THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 5, 2006 and OCTOBER 8, 2007

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XV

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

2011

Copyright A. D. 2011

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

For the benefit of the State of Nebraska

TABLE OF CONTENTS
For this Volume

COURT OF APPEALS JUDGES v

TABLE OF CASES REPORTED vii

LIST OF CASES DISPOSED OF BY MEMORANDUM OPINION AND JUDGMENT ON APPEAL xi

LIST OF CASES DISPOSED OF WITHOUT OPINION xxix

LIST OF CASES ON PETITION FOR FURTHER REVIEW xciii

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION cxiii

CASES DETERMINED IN THE NEBRASKA COURT OF APPEALS 1

HEADNOTES CONTAINED IN THIS VOLUME 995

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

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

TABLE OF CASES REPORTED

A/C Security Systems; ADT Security Servs. v. 666
ADT Security Servs. v. A/C Security Systems 666
ARL Credit Servs. v. Piper 811
Anonymous v. Vasconcellos 363
Ashland-Greenwood Public Schools v. Thorell 114
Atchison; State v. 422
Auto Auctions; R & S Investments v. 267

Bevard v. Kelly 960
Board of Regents; Kerr v. 907
Brown; Murphy v. 914

Casey's General Stores; Godsey v. 854
Cervantes; State v. 457
Chloe H. & Katrina H., In re Interest of 148
City of Lincoln; Poppe v. 164
City of Omaha; Jura v. 390
City of Omaha; Perez v. 502
City of Omaha; Reed v. 234
Clarke; Russell v. 221
Columbus Township Bd.; State ex rel. Newman v. 656
Conn v. Conn 77
Craig; State v. 836
Crete Carrier Corp.; Davis v. 241
Cup-O-Coa, Inc.; TierOne Bank v. 648

Damrow v. Murdoch 920
Davis v. Crete Carrier Corp. 241
Davis v. Fraternal Order of Police 470
Deztiny C., In re Interest of 179

Eagle Run Square II v. Lamar's Donuts Internat. 972
Emily C., In re Interest of 847
Estate of Malloy, In re 755
Estate of Straka, In re 796
Ethan M., In re Interest of 148

Forgey v. Nebraska Dept. of Motor Vehicles 191
Fraternal Order of Police; Davis v. 470

Garcia v. Platte Valley Constr. Co. 357
Godsey v. Casey's General Stores 854

Goosic; Sack Lumber Co. v. 529
Grange v. Grange 297

Hailey M., In re Interest of 323
Headliners–1299 Farnam; Qwest Bus. Resources v. 405
Helget Gas Products; Snowden v. 33
Hertzel v. Palmyra Sch. Dist. 538
Higginbotham v. Sukup 821
Hisey; State v. 100
Holmstedt v. York Cty. Jail Supervisor 893
Hormel Foods Corp.; Hubbart v. 129
Houston; State ex rel. Tyler v. 374
Hubbart v. Hormel Foods Corp. 129

In re Charles C. Wells Revocable Trust 624
In re Estate of Malloy 755
In re Estate of Straka 796
In re Interest of Chloe H. & Katrina H. 148
In re Interest of Deztiny C. 179
In re Interest of Emily C. 847
In re Interest of Ethan M. 148
In re Interest of Hailey M. 323
In re Interest of Jesse D. 534
In re Interest of Kevin K. 641
In re Interest of Maxwell T. 47
In re Interest of Teneko P. 463
In re Interest of Vincent P. 437

Jackson; State v. 523
Jesse D., In re Interest of 534
John Otte Oil & Propane; MBH, Inc. v. 341
Johnson v. Johnson 292
Jordan; Rosen Auto Leasing v. 1
Jura v. City of Omaha 390

Kay; State ex rel. Wagner v. 85
Kehm; State v. 199
Kelly; Bevard v. 960
Kerr v. Board of Regents 907
Kevin K., In re Interest of 641
Kramer v. Kramer 518
Kyler; Tyler v. 939

Lamar's Donuts Internat; Eagle Run Square II v. 972
Lessley v. Nebraska Dept. of Corr. Servs. 955
Lincoln, City of; Poppe v. 164
Lovette; State v. 590
Lower Platte South NRD; Weichman v. 946
Loynachan; Malin v. 706

MBH, Inc. v. John Otte Oil & Propane 341
Malin v. Loynachan 706

Malloy, In re Estate of 755
Mastne; State v. 280
Maxwell T., In re Interest of 47
McCrimon; State v. 452
McCulloch; State v. 616
McIntosh v. Nebraska State Patrol 867
McKay; State v. 169
Molina-Navarrete; State v. 966
Murdoch; Damrow v. 920
Murphy; State v. 398
Murphy v. Brown 914
Muse; State v. 13
Myers; State v. 308

Nebraska Dept. of Corr. Servs.; Lessley v. 955
Nebraska Dept. of Motor Vehicles; Forgey v. 191
Nebraska Dept. of Motor Vehicles; Yenney v. 446
Nebraska State Patrol; McIntosh v. 867
Neth; Robbins v. 67
Newman, State ex rel. v. Columbus Township Bd. 656

Omaha, City of; Jura v. 390
Omaha, City of; Perez v. 502
Omaha, City of; Reed v. 234
Omaha Cold Storage Terminals v. Patterson 548

Palmyra Sch. Dist.; Hertzel v. 538
Papio-Missouri River NRD v. Willie Arp Farms 984
Patterson; Omaha Cold Storage Terminals v. 548
Perez v. City of Omaha 502
Piper; ARL Credit Servs. v. 811
Platte Valley Constr. Co.; Garcia v. 357
Poppe v. City of Lincoln 164

Qwest Bus. Resources v. Headliners–1299 Farnam 405

R & S Investments v. Auto Auctions 267
Reed v. City of Omaha 234
Renter v. Siedenburg 884
Robbins v. Neth 67
Roberts; Trueblood v. 579
Rosen Auto Leasing v. Jordan 1
Russell v. Clarke 221

Sack Lumber Co. v. Goosic 529
Sanders; State v. 554
Schilke; Spicer Ranch v. 605
Siedenburg; Renter v. 884
Snowden v. Helget Gas Products 33
Spicer Ranch v. Schilke 605
State ex rel. Newman v. Columbus Township Bd. 656
State ex rel. Tyler v. Houston 374

State ex rel. Wagner v. Kay 85
State v. Atchison 422
State v. Cervantes 457
State v. Craig 836
State v. Hisey 100
State v. Jackson 523
State v. Kehm 199
State v. Lovette 590
State v. Mastne 280
State v. McCrimon 452
State v. McCulloch 616
State v. McKay 169
State v. Molina-Navarrete 966
State v. Murphy 398
State v. Muse 13
State v. Myers 308
State v. Sanders 554
State v. Thompson 764
State v. Volcek 416
State v. White 486
State v. Wiemer 260
State v. Wilson 212
Straka, In re Estate of 796
Sukup; Higginbotham v. 821

Tax Equal. & Rev. Comm.; Widtfeldt v. 410
Teneko P., In re Interest of 463
Thompson; State v. 764
Thorell; Ashland-Greenwood Public Schools v. 114
TierOne Bank v. Cup-O-Coa, Inc. 648
Trueblood v. Roberts 579
Trust, In re Charles C. Wells Revocable 624
Tyler, State ex rel. v. Houston 374
Tyler v. Kyler 939

Vasconcellos; Anonymous v. 363
Vincent P., In re Interest of 437
Volcek; State v. 416

Wagner, State ex rel. v. Kay 85
Weichman v. Lower Platte South NRD 946
Wells Revocable Trust, In re Charles C. 624
White; State v. 486
Widtfeldt v. Tax Equal. & Rev. Comm. 410
Wiemer; State v. 260
Wild v. Wild 717
Willie Arp Farms; Papio-Missouri River NRD v. 984
Wilson; State v. 212

Yenney v. Nebraska Dept. of Motor Vehicles 446
York Cty. Jail Supervisor; Holmstedt v. 893

LIST OF CASES DISPOSED OF BY MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Author judge listed first.)

No. A-04-715: **Otte v. Neth**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge. Inbody, Chief Judge, dissents.

No. A-04-1191: **Frazier v. Eberspacher**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-04-1258: **Pedersen v. Pedersen**. Affirmed as modified. Sievers, Irwin, and Carlson, Judges.

No. A-04-1373: **Cook v. Cook**. Affirmed as modified. Moore, Sievers, and Cassel, Judges.

No. A-04-1430: **Rickman v. Rickman**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-05-064: **State on behalf of Snyder-Brandt v. Bartels**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-05-065: **Watson v. Colchin**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-05-126: **State v. Fair**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-155: **Robison v. Robison**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-196: **Blair v. Delman**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-05-205: **Empkey v. Empkey**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-265: **Cosentino v. Harrison**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-05-291: **Tippett v. Nebraska State Patrol**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-05-297: **Starman v. Chas. Vrana & Son Constr. Co**. Affirmed. Sievers, Irwin, and Carlson, Judges.

Nos. A-05-315, A-05-453: **Knoll v. Knoll**. Affirmed. Cassel and Moore, Judges. Inbody, Chief Judge, participating on briefs.

No. A-05-337: **Scherich v. Scherich**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-05-369: **Hollibaugh v. Hollibaugh**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-400: **Weller v. Metro Area Transit**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-450: **Engel v. Engel**. Affirmed in part as modified, and in part vacated and remanded for further proceedings. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-461: **Pasko v. City of Omaha**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-469: **Bush v. Central Valley Ag Transport**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-492: **Jura v. Player's, Inc**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-05-504: **State v. Buggs**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-05-508: **In re Estate of Petereit**. Affirmed in part, and in part vacated and remanded with directions. Sievers and Irwin, Judges, and Hannon, Judge, Retired.

No. A-05-509: **Southall v. Southall**. Affirmed as modified. Sievers and Irwin, Judges, and Hannon, Judge, Retired.

No. A-05-562: **In re Estate of Sklenar**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-622: **Wiedel v. Wiedel**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-05-659: **Dinslage v. Westside Community Schools**. Affirmed. Per Curiam.

No. A-05-764: **Baker v. Juilfs**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-05-782: **Butts v. Liebaert**. Affirmed. Sievers and Cassel, Judges, and Hannon, Judge, Retired.

No. A-05-786: **State v. Hoover**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-05-792: **Hanger v. Hanger**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-861: **State v. Akins**. Affirmed. Hannon, Judge, Retired, and Sievers and Cassel, Judges.

No. A-05-895: **City of Ashland v. Remmen**. Affirmed in part, and in part remanded with directions. Sievers, Carlson, and Cassel, Judges.

No. A-05-905: **Cooper v. Cooper**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-05-936: **State v. Gonzales**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-937: **Mather v. Stevenson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-955: **Jackson v. Neth**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-05-958: **Havlat v. Havlat**. Affirmed as modified. Sievers, Irwin, and Cassel, Judges.

No. A-05-960: **Tyrrell v. Nebraska State Patrol**. Reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-963: **State v. Leonor**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-998: **S.D. Citibank v. Wilkins**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-05-1007: **Goeke v. Goeke**. Affirmed as modified. Irwin, Sievers, and Cassel, Judges.

No. A-05-1027: **Whitlow v. Casey-Witzenburg-Hall Funeral Chapel**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1075: **Lira v. Hy-Vee, Inc**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-05-1077: **Harris v. Spring Ctr. Mental Health Agency**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1082: **Sears v. Sears**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-1091: **White v. White**. Affirmed as modified, and in part remanded with directions. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

No. A-05-1092: **Praus v. Praus**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1099: **Ajlouny v. Commonwealth Land Title Ins. Co**. Appeal dismissed, and cause remanded with directions. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1120: **Siebert v. AGO, Inc**. Affirmed. Hannon, Judge, Retired, and Sievers and Cassel, Judges.

No. A-05-1125: **Hooks v. Johnson**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-05-1154: **Puentes v. Department of Motor Vehicles**. Reversed and remanded for further proceedings. Moore, Irwin, and Carlson, Judges.

No. A-05-1172: **State v. Frazier**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-05-1198: **Westerby v. City of Grand Island**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1208: **Santo v. Department of Motor Vehicles**. Reversed and remanded for further proceedings. Moore, Irwin, and Carlson, Judges.

No. A-05-1257: **Picard v. Allmerica Fin. Life Ins. & Annuity Co**. Reversed and remanded. Sievers, Carlson, and Cassel, Judges.

No. A-05-1265: **Wilson v. Wilson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1270: **Farris v. Mangiameli**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1274: **Stoeger v. Stoeger**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1291: **Dunn v. Wallace Sch. Dist**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1292: **Jacobson v. Shresta**. Reversed and remanded for further proceedings. Cassel, Irwin, and Sievers, Judges.

No. A-05-1304: **Rose Investments v. Lobo**. Affirmed. Per Curiam.

No. A-05-1305: **Law v. Terratrack, Inc**. Affirmed. Inbody, Chief Judge, and Moore, Judge. Carlson, Judge, participating on briefs.

No. A-05-1316: **Empire Park Partnership v. Vecchio**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1361: **State v. Lopez-Mariscal**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1369: **Young v. Young**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1372: **Overfield v. Edwards**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-05-1377: **Paulsen v. Paulsen**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-05-1393: **State v. Phipps**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-05-1395: **Meier v. Lemmer**. Affirmed in part, reversed in part, vacated and set aside in part. Sievers, Carlson, and Cassel, Judges

No. A-05-1399: **Petersen v. Lindsay Mfg. Co**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-1406: **In re Interest of Michael M**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1412: **Attaie v. Attaie**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-05-1421: **Garrett v. Garrett**. Affirmed as modified. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-1422: **United States Cold Storage v. Pinnacle Foods Corp**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-05-1443: **Hall v. Hall**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-05-1461: **Johnson v. Johnson**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1464: **Koziol v. Koziol**. Affirmed as modified. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-1466: **State v. Plambeck**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-1476: **Hannon v. Hannon**. Affirmed. Irwin, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-05-1500: **Braddock v. Ristow**. Reversed and remanded for further proceedings. Sievers, Irwin, and Cassel, Judges.

No. A-05-1506: **Noordam v. Vickers, Inc**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-05-1522: **State v. Sledge**. Affirmed. Moore and Carlson, Judges. Sievers, Judge, participating on briefs.

No. A-05-1523: **State v. Riggle**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-1532: **State v. Hummer**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-05-1543: **State v. Abboud**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-1553: **Anderson v. Anderson**. Appeal dismissed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1560: **Smith v. Smith**. Reversed. Cassel, Irwin, and Sievers, Judges.

No. A-05-1577: **State v. Curry**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-006: **Akins v. Shipflett**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-008: **State v. Zephier**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-011: **State on behalf of Douglas v. Douglas**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-029: **Sinsel v. Weinand**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-033: **Hoppes v. Neth**. Reversed and remanded with directions. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-034: **In re Interest of Todd A**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-036: **Citibank South Dakota v. Hansen**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-042: **State v. Hansen**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-064: **Carver v. Giles**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-068: **State v. Wiese**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-097: **Mid-States Acceptance Corp. v. Carrier's Servs**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-098: **Stock v. Stock**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-100: **State v. Lopez**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-111: **In re Interest of Bubba W**. Reversed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-117: **Wiles Bros. Fertilizer v. S & S Seeding**. Reversed and remanded for further proceedings. Cassel, Irwin, and Sievers, Judges.

No. A-06-121: **State v. Hernandez**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-125: **State v. McDaniels**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-06-126: **Schuman v. Roether**. Affirmed. Sievers, Judge, and Inbody, Chief Judge. Moore, Judge, participating on briefs.

No. A-06-146: **State v. Cattau**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-148: **Rodriguez v. Nebraska Dept. of Corr. Servs**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-158: **State on behalf of Michaelson v. Martin**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-06-198: **State v. Rodriguez-Servin**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-200: **Chereck v. Chereck**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-207: **State v. Munoz-Gonzales**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-212: **State v. Rutan**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-220: **Munoz v. Wagner**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-232: **In re Interest of Michael P**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-233: **In re Interest of Shayann D. & Jeremiah H**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Irwin, and Carlson, Judges.

No. A-06-235: **In re Interest of Fedalina G**. Affirmed. Irwin and Sievers, Judges, and Hannon, Judge, Retired.

No. A-06-236: **In re Estate of Rockhill**. Reversed and remanded for further proceedings. Sievers, Irwin, and Cassel, Judges.

No. A-06-247: **Wolever v. Wolever**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-255: **Powers v. Drivers Mgmt**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-259: **In re Interest of Connor S. & Marissa T**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-06-273: **In re Interest of Isaiah B**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-274: **In re Interest of Michael B**. Vacated and remanded. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-276: **State v. Becker**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-278: **Jensen v. Jensen**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-282: **State v. Hernandez**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-284: **State v. Baker**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-06-291: **State v. Tagwerker**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-293: **State v. Bartlett**. Appeal dismissed in part, and in part affirmed. Irwin, Carlson, and Cassel, Judges.

No. A-06-294: **State v. Nikolas**. Reversed and remanded with directions. Cassel, Irwin, and Moore, Judges.

No. A-06-303: **In re Interest of Diamond T**. Appeal dismissed. Carlson, Irwin, and Sievers, Judges.

No. A-06-304: **Furman v. Olsen**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-305: **Wood v. Wood**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-06-306: **Hrnchir v. Hrnchir**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-324: **State v. Kemper**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-326: **State v. White**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-06-341: **Porter v. Porter**. Affirmed in part as modified, vacated in part, and in part reversed and remanded. Inbody, Chief Judge, and Sievers and Moore, Judges.

Nos. A-06-359 through A-06-361: **Mohrmann v. Gdowski**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-371: **Kistner v. Cleary's Building Corp**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-377: **Motley v. Motley**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-382: **Brummels v. C & M Land Co**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-400: **State v. Benish**. Affirmed in part, and in part dismissed. Carlson and Moore, Judges. Cassel, Judge, participating on briefs.

No. A-06-407: **In re Interest of Bethany W**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-413: **In re Interest of Savannah S. et al**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-416: **State v. Farley**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-417: **In re Interest of Brandy W. & Bridget H**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-06-421: **State v. Price**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-430: **Nutter v. Nutter**. Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-435: **State v. Bartels**. Order vacated. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-436: **Treffer v. Treffer**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-06-438: **In re Interest of Lane Z**. Reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge. Moore, Judge, dissenting.

No. A-06-440: **In re Interest of Joshua A. et al**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-441: **Snodgrass v. Nebraska Machinery Co.** Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-06-446: **State v. Peeks**. Affirmed. Inbody, Chief Judge, and Sievers and Moore, Judges.

No. A-06-449: **State v. Nelson**. Affirmed. Carlson, Moore, and Cassel, Judges

No. A-06-450: **State v. Smith**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-06-453: **In re Interest of Shaylee A**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-458: **Ozuna v. Maruffo**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-468: **In re Interest of Vontavious H**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-472: **In re Interest of Amber Y**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-483: **Witmer v. Witmer**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-489: **In re Interest of Vinnie F. et al**. Affirmed in part, and in part reversed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-500: **Adams v. Stahly**. Reversed and remanded for further proceedings. Per Curiam.

No. A-06-501: **Hiddleston v. Douglas Cty. Bd. of Equal**. Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-509: **State v. Payne**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-06-511: **Jones v. Platteview Apartments**. Reversed and remanded for further proceedings. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-513: **In re Interest of Megan R**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-520: **In re Interest of Ciera M**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-544: **In re Interest of Aleisha L**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-545: **In re Interest of Ashlei L**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-550: **State v. Brown**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-551: **State v. Roundtree**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-581: **State v. Harr**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-588: **Meisinger v. Messer**. Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-590: **Henke v. Penske Truck Leasing**. Affirmed. Moore and Sievers, Judges. Irwin, Judge, participating on briefs.

No. A-06-599: **State v. Potter**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-613: **Clark v. Clark**. Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-617: **State on behalf of Deidel v. Deidel**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-618: **State v. Monje**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-06-619: **Gonzales v. Dun-Par**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-626: **State v. Watkins**. Affirmed. Cassel, Carlson, and Moore, Judges.

Nos. A-06-635 through A-06-639: **State v. Curry**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-647: **State v. Campbell**. Affirmed. Cassel and Sievers, Judges. Inbody, Chief Judge, participating on briefs.

No. A-06-650: **Gurley v. Baugh**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-656: **In re Interest of Jason B. & Michael B**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-657: **State v. Stewart**. Affirmed as modified. Cassel, Sievers, and Carlson, Judges.

No. A-06-659: **State v. Sorenson**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-667: **State v. Castellanos**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-06-674: **In re Interest of Austin M.** Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-704: **Lecuona v. Express Messenger Sys.** Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-708: **In re Interest of Travon G. & Amariyon G.** Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-06-717: **In re Interest of Savannah S. et al.** Affirmed. Per Curiam.

No. A-06-718: **In re Interest of Ciera C.** Reversed and remanded for further proceedings. Cassel, Sievers, and Carlson, Judges.

No. A-06-723: **In re Interest of Rachael G.** Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-726: **State v. Scheffert.** Affirmed in part, and in part sentence vacated and cause remanded for further proceedings. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-752: **State v. Buckman.** Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-755: **In re Interest of Lashawnta H.** Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-766: **In re Interest of Elizabeth G. & Tobin G.** Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-767: **In re Interest of Julio M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-768: **In re Interest of Lourdes M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-769: **In re Interest of Yesenia M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-770: **In re Interest of Israel M.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-780: **Cooper v. Slosburg Co.** Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-812: **In re Interest of Amber M. et al.** Affirmed. Carlson, Irwin, and Cassel, Judges.

No. A-06-827: **State v. Brown.** Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-837: **Maldonado v. Hansen.** Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-841: **In re Interest of Xavier H**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-06-846: **State v. Gray**. Affirmed. Cassel, Irwin, and Carlson, Judges.

No. A-06-854: **Paus v. Paus**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-862: **State v. Hill**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-863: **State v. Schneider**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-867: **State v. Jenkins**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-879: **Lickliter v. Farmers Coop. Elev. Co**. Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-882: **In re Interest of Amber K. et al**. Affirmed. Cassel, Carlson, and Moore, Judges.

No. A-06-900: **Williams v. Williams**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-06-916: **In re Interest of Brenda F**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-933: **Lonsdale v. Big Sky Energy Equip**. Affirmed. Cassel, Carlson, and Moore, Judges. Carlson, Judge, concurs.

No. A-06-947: **State v. Berg**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-958: **State v. Prien**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-978: **In re Interest of Elba L. & Angel L**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-994: **State v. Plasencio**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-1000: **State v. Henderson**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-1014: **Serie v. Serie**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1020: **In re Interest of Michael B**. Reversed and remanded with directions. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-1022: **Neujahr v. Western Hills Ltd. Partnership**. Affirmed. Cassel, Sievers, and Irwin, Judges.

No. A-06-1031: **State v. Busch**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-06-1046: **Buettgenback v. Kehn**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-06-1053: **Arias v. IBP, inc**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-1060: **In re Interest of Patrick W. et al**. Affirmed. Carlson, Moore, and Cassel, Judges.

No. A-06-1068: **Eugene S. v. Stephanie B**. Reversed and remanded with directions. Cassel, Irwin, and Sievers, Judges.

No. A-06-1073: **Wilson v. Mumm**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-06-1096: **In re Interest of Skylar B**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-1122: **Krantz v. Krantz**. Affirmed as modified and in part remanded with directions. Sievers, Irwin, and Cassel, Judges.

No. A-06-1140: **In re Interest of Terra K**. Reversed and remanded with directions. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-1144: **Hassan v. Kawasaki Motors Mfg. Corp**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-1145: **In re Conservatorship of Heuertz**. Affirmed. Moore, Carlson, and Cassel, Judges.

No. A-06-1154: **Collett v. Collett**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-1159: **Purcell v. Christiancy**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-06-1164: **State v. Heil**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-1169: **State v. Knotek**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-1196: **Knight v. Kubr Construction**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

No. A-06-1198: **State on behalf of Lee v. Lee**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-1201: **Trimm v. Trimm**. Affirmed. Sievers and Cassel, Judges. Carlson, Judge, participating on briefs.

No. A-06-1212: **Wood v. Nebraskaland Tire**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-06-1228: **State v. Dan**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-06-1232: **Ingswersen v. American Tool Cos**. Affirmed. Moore, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

No. A-06-1240: **In re Interest of Jimmy D**. Affirmed. Irwin, Sievers, and Cassel, Judges.

Nos. A-06-1242, A-06-1243: **In re Interest of Jake T**. Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

Nos. A-06-1244, A-06-1245: **In re Interest of Preston S**. Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

Nos. A-06-1246, A-06-1247: **In re Interest of Thomas S**. Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

Nos. A-06-1248, A-06-1249: **In re Interest of Franklin S**. Appeals dismissed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-06-1252: **State v. Pope**. Affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-06-1291: **In re Interest of Steven M**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

Nos. A-06-1313 through A-06-1317: **State v. Delao**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1357: **In re Guardianship of Charles H. & Natalya H**. Reversed. Sievers, Carlson, and Cassel, Judges.

No. A-06-1359: **Garcia v. Hillcrest Nursing Home**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-1369: **In re Interest of Sabastian Q**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-1370: **In re Interest of Mia Q**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

Nos. A-06-1378, A-07-147: **Beal v. Beal**. Appeal in No. A-06-1378 dismissed. Judgment in No. A-07-147 affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1380: **In re Interest of Destiny A. et al**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-06-1382: **State v. Zesatti**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-06-1388: **Byam v. Modern Equip. Co**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-06-1392: **State v. Larue**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

Nos. A-06-1415 through A-06-1420: **Howard Cty. Bd. of Equal. v. Bahensky**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-06-1421: **Lagemann v. Nebraska Methodist Hospital**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-06-1423: **State v. Schreck**. Affirmed. Inbody, Chief Judge, and Carlson and Moore, Judges.

No. A-07-015: **In re Interest of Joseph E**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-07-031: **Panhandle Cmty. Servs. v. Morrill Cty. Bd. of Equal**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-07-052: **In re Interest of Tierra M. et al**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-079: **State v. Sainz**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-082: **In re Interest of Kyle W. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-07-127: **State v. Al-Hakemi**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-07-158: **In re Interest of Bobbie W**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-07-183: **In re Interest of Garrett E**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-07-201: **In re Interest of Kolt S. & Ariel R**. Reversed. Sievers, Carlson, and Cassel, Judges.

No. A-07-214: **State v. Rott**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-07-220: **General Motors Acceptance Corp. v. Leth**. Reversed and remanded with directions. Carlson, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-257: **Davis v. Johnson**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-07-265: **FourThought Group v. Oligmueller**. Affirmed. Irwin, Sievers, and Cassel, Judges.

No. A-07-267: **State v. Jafferis**. Affirmed in part, and in part reversed and remanded for resentencing. Cassel, Irwin, and Sievers, Judges.

No. A-07-281: **In re Interest of Naif A. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-07-310: **In re Interest of Jeff D**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-311: **In re Interest of Mindy D**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-398: **In re Interest of KirstieAlley M. & Promise M**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-413: **In re Interest of Mason S**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-07-427: **In re Interest of Tyler L. & Alyssa L**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-07-636: **Jacob v. Department of Corr. Servs**. Reversed and remanded with directions. Carlson, Sievers, and Cassel, Judges. Cassel, Judge, concurring.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-05-166: **One Ninety-Two, L.L.C. v. Schaben**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-548: **Towne v. Towne**. Stipulation allowed; appeal dismissed.

No. A-05-665: **Maple Hill Dairy v. Dolezal-Soukup**. Stipulation allowed; appeal dismissed.

No. A-05-686: **Hughes-Hastings v. Hastings**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-709: **Shepard v. Department of Corrections**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-05-912: **Christensen v. Mulhall's Nursery**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-925: **Carlson v. Mackjust**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-934: **Progressive Ins. Co. v. Warfield**. Stipulation allowed; appeal dismissed with prejudice.

No. A-05-1047: **Edwards v. Edwards**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004). Purported order nunc pro tunc rendered October 4, 2006, is vacated. See, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Camp v. Camp*, 14 Neb. App. 473, 709 N.W.2d 696 (2006).

No. A-05-1149: **Hansen v. Vampola**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

Nos. A-05-1156, A-05-1165, A-05-1166: **In re Trust of Beyer**. Motions of appellant to dismiss appeal sustained; appeals dismissed with prejudice; each party to pay own costs.

No. A-05-1190: **State v. Brown**. Motion of appellee for summary affirmance sustained. See, *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995).

No. A-05-1224: **Eggerling v. Sandylot Cattle Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1242: **Reeder v. Reeder**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1256: **Fletcher v. State**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005).

No. A-05-1261: **In re Estate of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1262: **In re Estate of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1263: **In re Trust of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1264: **In re Trust of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-05-1297: **In re Guardianship & Conservatorship of Preston B**. Appeal dismissed as moot.

No. A-05-1301: **Benjamin v. Skyline Retirement Community**. Stipulation allowed; appeal dismissed with prejudice.

No. A-05-1332: **Rural Environ. Action Conser. Team v. Thayer Cty. Bd. Comrs**. Appeal dismissed. See, rule 7A(1); *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006); *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003). See, also, *State v. Belk*, 14 Neb. App. 53, 703 N.W.2d 652 (2005).

No. A-05-1333: **State v. Vera**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1396: **Mosley v. Hudson**. Appeal dismissed. See, rule 7A(2); *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

No. A-05-1408: **State v. Lohman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1475: **State ex rel. Arroyo v. Arroyo**. Affirmed. See, rule 7A(1); *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000); *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999).

No. A-05-1490: **Tyler v. Woodard**. Affirmed. See rule 7A(1).

No. A-05-1511: **Ross v. Panhandle Concrete Products**. Stipulation allowed; appeal dismissed.

No. A-05-1522: **State v. Sledge**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006); *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

No. A-05-1522: **State v. Sledge**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-05-1549: **Nemec v. Nemec**. Appeal dismissed. See, rule 7A(2); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

No. A-06-027: **Pusch v. Pelshaw**. Affirmed. See, rule 7A(1); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

No. A-06-035: **State v. Segura**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-037: **In re Guardianship of Charles H. & Natalya H**. Appeal dismissed. See rule 7A(2).

No. A-06-041: **State v. Perry**. Summarily affirmed. See, rule 7A(1); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

No. A-06-072: **Hansen v. County of Saline**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-091: **Hadrick v. Hadrick**. Motion of appellee for summary dismissal sustained. See Neb. Rev. Stat. §§ 42-352 (Reissue 2004) and 25-517.02 (Reissue 1995).

No. A-06-094: **Timmons v. Hirschman**. Appeal dismissed. See, rule 7A(2); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

No. A-06-095: **Russell v. Kriefels**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 25-1149 (Reissue 1995); *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

No. A-06-140: **Barden v. Neth**. Affirmed. See, rule 7A(1); *In re Petition of Navrkal*, 270 Neb. 391, 703 N.W.2d 247 (2005); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-06-142: **Langdon v. Langdon**. Motion of appellee for summary dismissal sustained; appeal dismissed. See rule 7B(1).

No. A-06-144: **Sommerfeld v. City of Gibbon**. Motion of appellee for summary dismissal for mootness sustained.

No. A-06-166: **Davis v. Neth**. Amended stipulation for summary reversal allowed; judgment of district court summarily reversed, and cause remanded with directions. See, rule 7C(1); *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006).

No. A-06-169: **State v. Stanclift**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-173: **State v. Colchin**. Motion of appellee for summary affirmance granted. See rule 7B(2).

No. A-06-190: **Lamar Co. v. Omaha Admin. Bd. of Appeals**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-192: **School Dist. No. 128 v. Randall**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-193: **Pautsch v. Blumanthal**. Affirmed. See, rule 7A(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-06-202: **Hernandez v. Irwin Industrial Tool Co**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-208: **State v. Aron**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-06-213, A-06-214: **State v. Reising**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-221: **Stanko v. Hlava**. Affirmed. See, rule 7A(1); *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002).

No. A-06-222: **Buggs v. Cruise**. Affirmed. See rule 7A(1).

No. A-06-227: **State v. Piso**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-237: **Tilman v. Stevens**. Appeal dismissed. See, rule 7A(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

No. A-06-241: **Clayton v. Warford**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-06-251, A-06-252: **State v. Enriques**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-253: **Murray v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-06-283: **State v. Kollars**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-285: **Huffman v. Adams County**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 28-716 (Supp. 2005).

No. A-06-307: **State v. Guajardo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-315: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-316: **State v. Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-317, A-06-318: **State v. Trump**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-322: **Rodriquez v. Rodriquez**. Order of district court entered March 6, 2006, summarily vacated and cause remanded for further proceedings. See, rules 5A(1) and 7C; *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002).

No. A-06-327: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-328: **Kulhanek v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-331: **State v. Goldsworthy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-336: **Yeutter v. Bartlett**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-06-338: **State v. Zanca**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-339: **State v. Minter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-342: **State v. Snoddy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

Nos. A-06-343, A-06-344: **State v. Cisar**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-345: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-346: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-347: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-348: **State v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-353: **Tarar v. Tarar**. Affirmed. See, rule 7A(1); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986); *Redfield v. Redfield*, 6 Neb. App. 274, 572 N.W.2d 422 (1997).

No. A-06-356: **Barnes v. Department of Corr. Servs.** Affirmed. See rule 7A(1).

No. A-06-364: **Shasteen v. LaPointe**. Affirmed. See, rule 7A(1); *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005).

No. A-06-365: **Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998); *State v. Billups*, 10 Neb. App. 424, 632 N.W.2d 375 (2001).

No. A-06-374: **State v. Beavers**. Affirmed. See rule 7A(1).

No. A-06-375: **State v. Hanway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-376: **Tyler v. Heineman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-379: **Lara v. Advance Services**. Affirmed. See, rule 7A(1); *Bronzynski v. Model Electronic*, 14 Neb. App. 355, 707 N.W.2d 46 (2005).

No. A-06-381: **State v. Loughry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-386: **State on behalf of Penn v. Hollingsworth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-388: **Long v. State Patrol**. Affirmed. See rule 7A(1).

No. A-06-389: **State v. Braymen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

No. A-06-391: **Cavalieri v. Gause**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-392: **Kerwin v. Wolff**. Stipulation allowed; appeal dismissed with prejudice.

No. A-06-395: **State v. Mosley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-398: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-399: **State v. Rees**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Blankenship*, 195 Neb. 329, 237 N.W.2d 868 (1976).

No. A-06-401: **State v. Lindsay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

No. A-06-410: **In re Guardianship of Mackinzi W**. Stipulation allowed; appeal dismissed.

No. A-06-411: **State on behalf of Wesson v. Harker**. Appeal dismissed. See, rule 7A(2). *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2002).

No. A-06-426: **Harvey v. Harvey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-434: **In re Trust of Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-437: **State v. Warnsing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-445: **State v. Sanchez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-451: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-460: **City of Grand Island v. Strohl**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-461: **In re Guardianship & Conservatorship of Chloe D**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-462: **State v. Lawver**. Summarily affirmed. See rule 7A(1).

No. A-06-463: **State v. Heston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-464: **State v. Quevedo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-469: **Theis v. Neth**. Affirmed. See, rule 7A(1); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-06-473: **State v. Tracy**. Motion of appellee for summary affirmance sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. §§ 25-1912(1) and 29-2306 (Cum. Supp. 2004); *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

No. A-06-474: **Eilers v. Star City/Federal, Inc**. Appeal dismissed. See rule 7A(2).

Nos. A-06-476, A-06-478: **State v. Cooper**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-477: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-479: **State v. Wenke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-484: **Devillier v. Devillier**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-485: **Kaelin v. Neth**. Affirmed. See, rule 7A(1); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-06-491: **State v. McKethan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-493: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-495: **State v. Hittle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-06-496, A-06-497: **State v. Porter**. Affirmed. See, rule 7A(1); *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

No. A-06-498: **State v. Bang**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-503: **Ramos v. Egan Trucking Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-504: **State v. Craig**. Motion of appellant for rehearing sustained. Appeal reinstated. See *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-06-505: **State v. Bogan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-506: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-507: **State v. Pham**. Affirmed. See rule 7A(1).

No. A-06-514: **State on behalf of Blackbonnet v. Pelter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-515: **State v. Pinkelman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998).

No. A-06-516: **State v. Humphrey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-518: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-519: **Schroeder v. Chapman**. Summarily affirmed. See, rule 7A(1); *Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002).

No. A-06-522: **Cash v. State**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-527: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-528: **Sherman v. Sherman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-529: **General Motors Acceptance Corp. v. Leth.** Reversed, vacated, and remanded with directions.

No. A-06-530: **In re Application of Brown v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-533: **Tyler v. City of Omaha**. Affirmed. See rule 7A(1).

No. A-06-534: **State v. Spangler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-535: **State v. Gutierrez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

No. A-06-537: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-539: **State v. Weekly**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-540: **State v. Wallace**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-542: **Misiunas v. Saitta-Misiunas**. Stipulation allowed; appeal dismissed.

No. A-06-552: **Berglund v. Berglund**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-555: **State v. Davlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

No. A-06-557: **Dughman v. Dughman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-558: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). See, also, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-559: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-573, A-06-574: **State v. Lock**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-578: **State v. Bivens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-587: **State v. McClain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-589: **Peery v. Sims**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-592: **State v. Patchin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-596: **Walker v. Malone**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-600: **State v. LoGrande**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-601: **Grantham v. Grantham**. Affirmed. See rule 7A(1).

No. A-06-602: **State ex rel. Tyler v. Department of Corrections**. Appeal dismissed. See, rule 7A(2); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

No. A-06-604: **Tyler v. Houston**. Appeal dismissed. See, rule 7A(2); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

No. A-06-610: **Serrano v. Serrano**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-611: **State v. McCabe**. Motion of appellee for summary affirmance of denial of postconviction relief sustained; judgment affirmed.

No. A-06-621: **Schlichenmaier v. Whitlock**. Appeal dismissed. See, rule 7A(2); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-06-623: **In re Interest of Desiree D**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-646: **State v. Red Bear**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). See, also, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-651: **State v. Perez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-653: **State v. Le**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-654: **State v. Brejcha**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-655: **State v. Chapman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-660: **State v. Calderon-Munoz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-668: **State v. DeLay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-669: **State v. DeLay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-673: **State v. Haman**. Appellee's suggestion of remand sustained. See rule 7C. Convicton reversed, sentence vacated, and cause remanded for a new trial. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

No. A-06-679: **Thompson v. Separate Juv. Ct. for Douglas Cty**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-685: **Moulton v. John Henry's Plumbing Co**. Appeal dismissed. See rule 7A(2).

No. A-06-685: **Moulton v. John Henry's Plumbing Co**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-06-685: **Moulton v. John Henry's Plumbing Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-687: **State v. Rhamy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-688: **State v. Lowery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-691: **State v. Cramer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-695: **Rohrbouck v. Rohrbouck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-697: **Tyler v. Sherwin Williams Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-698: **State v. Tyler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

No. A-06-700: **State v. Costello**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-701: **State v. Krieger**. Motion of appellee for summary affirmance under rule 7B(2) sustained; convictions and sentences affirmed.

No. A-06-707: **State v. Cossio-Astorga**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-06-711: **Barrett v. Fabian**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-712: **State v. Jimenez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-713: **State v. Bell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-714: **State v. Reyes-Barnett**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-715: **State v. Martin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-720: **McElhinny v. Camron, Inc**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

Nos. A-06-727, A-06-728: **State v. Gould**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

No. A-06-729: **CACV of Colorado v. Larson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-730: **Tyler v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-06-733, A-06-734: **State v. Cockson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-735: **State v. Cogley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-739: **State v. Boeck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997).

No. A-06-740: **State v. Jordan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-743, A-06-758: **State v. Anderson**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-06-748: **MBNA America Bank v. Hansen**. Affirmed. See rule 7A(1).

No. A-06-748: **MBNA America Bank v. Hansen**. Motion of appellant for rehearing sustained in part. Appeal reinstated.

No. A-06-749: **Stuart v. Lewis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005).

No. A-06-750: **Rader v. Lewis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), *affirmed* 269 Neb. 595, 694 N.W.2d 208 (2005).

No. A-06-751: **In re Interest of Marquez S**. Stipulation allowed; appeal dismissed.

No. A-06-754: **State v. Felder**. Affirmed. See, rule 7A(1); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

No. A-06-759: **State v. Klaus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

No. A-06-760: **Cash v. Cash**. Appeal dismissed. See, rule 7A(2); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-762: **Scholting v. Scholting**. Summarily affirmed. See, rule 7A(1); *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

No. A-06-763: **Barrett v. Fabian**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-06-772: **State ex rel. Tyler v. Stennis-Williams**. Appeal dismissed. See, rule 7A(2); *Tyler v. Stennis*, 10 Neb. App. 655, 635 N.W.2d 550 (2001).

No. A-06-773: **Pinson v. Jordon**. Appeal dismissed. See, rule 7A(2); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-06-775: **State v. Ashford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-777: **Colling v. Price**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

No. A-06-778: **Newman v. Newman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-784: **State v. Parnell**. Affirmed. See, rule 7A(1); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

No. A-06-785: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-787: **Evers v. American Nat. Bank**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-06-788: **Evers v. Bellevue City Office**. Affirmed. See, rule 7A(1); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005); *Dennes v. Dunning*, 14 Neb. App. 934, 719 N.W.2d 737 (2006).

No. A-06-789: **Gunhus v. Gunhus**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-790: **State v. Lemuz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-791: **State v. Kutschara**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

No. A-06-796: **Geer v. Neth**. Affirmed. See, rule 7A(1); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

No. A-06-797: **State v. Yager**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-801: **Hillig v. Hillig**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2004); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). See, also, Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004).

No. A-06-803: **Citibank South Dakota v. Schroeder**. Appeal dismissed for lack of jurisdiction, and judgment of district court on appeal vacated for lack of jurisdiction. See, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999).

No. A-06-805: **State v. Broussard**. Affirmed. See rule 7A(1).

No. A-06-806: **Carlson v. Mackjust**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-807: **State ex rel. Tyler v. Kenney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-808: **Ellis v. Ellis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-811: **State v. Fletcher**. Appeal dismissed. See rule 7A(2).

No. A-06-816: **State v. Jelinek**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

No. A-06-819: **State v. Oneal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-821: **State v. Anderson**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

Nos. A-06-828 through A-06-830: **State v. Wright**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-833: **Buggs v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-834: **Buggs v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-835: **State ex rel. Tyler v. Marcuzzo**. Appeal dismissed as filed out of time. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

No. A-06-836: **First National Equip. Financing v. Tabke**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2004).

No. A-06-839: **State v. Hernandez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-840: **State v. Hernandez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-842: **Pauley v. Pauley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-843: **In re Guardianship & Conservatorship of Rosemary D**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-847: **State v. Dan**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-848: **State v. Tilton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-849: **Darrington v. Ray Martin Co. of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-850: **State v. Risney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-855: **Simmons v. Baily**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-06-856: **Mengedoht v. Buckley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006); *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997).

No. A-06-857: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-859: **State on behalf of Saltzman v. Schildt**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-861: **State v. Hansen**. After review of appellee's suggestion of remand, dismissal of appeal entered by district court on July 7, 2006, is vacated and cause is remanded to district court with directions to set matter for hearing, with notice to parties.

No. A-06-864: **In re Interest of Micah C**. Appeal dismissed. See, Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-865: **In re Interest of William B**. Appeal dismissed. See, Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-868: **State v. Enriquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-869: **State v. Enriquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-871: **Santo v. Santo**. Appeal dismissed. See, rule 7A(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-06-880: **State v. Nye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-881: **In re Interest of Devon M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-883: **State v. Jenkins**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-884: **State v. Ford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-885: **State v. Ford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-886: **State v. Baldwin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-887: **Buck's, Inc. v. Delozier**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-888: **Walton v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-889: **Williams v. Baird**. Appeal dismissed. See, rule 7A(2); *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

No. A-06-890: **In re Interest of Kyah H**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

No. A-06-891: **Livingston v. Pacific Realty Commercial**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-892: **State v. Velazquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-893: **State v. Harlan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-894: **Bush v. County of Lancaster**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-895: **Schmalken v. Schmalken**. Appeal dismissed. See, rule 7A(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-897: **Paradigm Properties v. TSN Properties**. Stipulation allowed; appeal dismissed.

No. A-06-898: **Wilson v. Nebraska Dept. of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-899: **State v. Moses**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

No. A-06-901: **Onuachi v. Meylan Enters**. Appeal dismissed. See rule 7A(2).

No. A-06-902: **Schrader v. Titterington**. Appeal dismissed. See, rule 7A(2); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

No. A-06-903: **City of Blair v. Thompson**. Appeal dismissed. See, rule 7A(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-904: **State v. Gallegos**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-905: **Novak v. Community Redevelopment Auth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-906: **Jones v. Jones**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-06-907: **Guajardo v. Carlson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-912: **State v. Ricks**. Stipulation for summary reversal allowed; portions of sentences regarding restitution vacated, and cause remanded for resentencing on issue of restitution, including restitution hearing. See, rule 7C(1); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

No. A-06-913: **State v. Villarreal**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-915: **In re Interest of Alexis H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-917: **State v. King**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-922: **State v. Kelley**. Motion of appellee for summary affirmance sustained. See, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-923: **State v. Chollett**. Appellee's suggestion of remand sustained. Case remanded to the district court for a new sentencing hearing.

No. A-06-926: **Smallcomb v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-928: **Blair v. McArthur**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-06-929: **Yoder v. Work A While**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 48-185 (Reissue 2004) and 25-1912(1) (Cum. Supp. 2004).

No. A-06-931: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-932: **State v. Applegate**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-934: **State v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-935: **State v. Hymond**. Affirmed. See rule 7A(1).

No. A-06-936: **David Mgmt. & Constr. v. Pearson**. Affirmed. See rule 7A(1).

No. A-06-937: **Swedburg v. Nutt**. Stipulation allowed; appeal dismissed.

No. A-06-940: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-941: **Hearst-Argyle Properties v. Entrex Communication Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-942: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-943: **Warford v. Warford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-944: **Fox v. Fox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-946: **State v. Wamboldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-948: **In re Interest of Seth S. & Annalynn S**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-950: **Retherford v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-06-952: **Portsche v. Department of Motor Vehicles**. Appeal dismissed as moot.

No. A-06-953: **Klug v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-954: **City of LaVista v. Long**. Summarily dismissed. See rule 7A(2).

No. A-06-955: **Stricker v. Neth**. Affirmed. See rule 7A(1).

No. A-06-956: **State v. Stricker**. Motion for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

No. A-06-957: **State v. York**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

No. A-06-960: **Hardy v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-962: **State v. Lentz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-964: **Buggs v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-967: **State v. Williams**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-968: **Kline v. Minard**. Appeal dismissed. See, rule 7A(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-969: **State v. Schuneman**. Appellee's suggestion of remand granted. Case remanded to the district court to recalculate the number of days credited for time previously served.

No. A-06-970: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-971: **State v. Schumacher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-972: **State v. Watson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

No. A-06-973: **State v. Terry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-974: **State v. Castor**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-976: **Clark v. Modern Equip. Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-977: **Hammond v. Kelly Industries**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-979: **Witte v. Witte**. Affirmed. See, rule 7A(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-06-980: **Walz v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-981: **Mashek v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-982: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-984: **First Resolution Investment v. Llanes**. Appeal dismissed. See, rule 7A(2); *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

No. A-06-985: **Brock v. Smith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2004); *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

No. A-06-985: **Brock v. Smith**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-06-986: **Streeks v. Walgreen Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-987: **Amerisourcebergen Corp. v. Heidelk Pharmacy**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-988: **Foltz v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

No. A-06-989: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-990: **State v. Penix**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-991: **State v. Hatch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-992: **State on behalf of Graham v. Jensen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-993: **State v. Cruz**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 29-118 and 29-826 (Cum. Supp. 2004); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-06-996: **State on behalf of Diaz v. Weaver**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-997: **State ex rel. Bonner v. McSwine**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. §§ 25-2001(4) and 25-2008 (Cum. Supp. 2006); *State ex rel. Bonner v. McSwine*, 14 Neb. App. 486, 709 N.W.2d 691 (2006).

No. A-06-998: **State v. Matthies**. Affirmed. See, rule 7A(1); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006); *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003); *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963).

No. A-06-999: **State v. Wells**. Appeal dismissed pursuant to appellee's suggestion of mootness. See, rule 7D(1); *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993).

No. A-06-1002: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1003: **Kuhn v. Wells Fargo Bank**. Motion of appellee to dismiss appeal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-06-1005: **State v. Berg**. Motion of appellee for summary affirmance sustained. See, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1007: **Martin v. Department of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1009: **Steffens v. Steffens**. Stipulation allowed; appeal dismissed.

No. A-06-1011: **State v. Poessnecker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 28-932 (Cum. Supp. 2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1012: **Rivera v. DCS Sanitation**. Stipulation allowed; appeal dismissed.

No. A-06-1013: **State v. Scheil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1015: **State v. Raven**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1017: **Van Ert v. State Farm Mut. Auto. Ins. Co**. Appeal dismissed. See, rule 7A(2); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-06-1018: **Shepard v. Roach**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-1019: **County of Hitchcock v. Barger**. Appeal dismissed. See rule 7A(2).

No. A-06-1023: **State v. Krutilek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

Nos. A-06-1024, A-06-1025: **State v. Eagle Elk**. Motions for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1029: **Stade v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1033: **Zion Lutheran Church v. Mehner**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

No. A-06-1034: **Workman v. Workman**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-1040: **Lawler v. Lawler**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-1042: **State v. Cave**. Appeal dismissed. See, rule 7A(2); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

No. A-06-1043: **State v. Loyd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1048: **Phelps v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004). See, also, *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-06-1052: **In re Interest of Donita D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1057: **Bromwich v. Bromwich**. Appeal dismissed. See, rule 7A(2); *City of Beatrice v. Meints*, 12 Neb. App. 276, 671 N.W.2d 243 (2003).

No. A-06-1058: **State v. Fernen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1059: **George v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1061: **In re Guardianship of Jessica R**. Appeal dismissed. See rule 7A(2).

No. A-06-1062: **Addison Ins. Co. v. L&M Siding & Window**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1064: **Classe v. College of Saint Mary**. Appeal dismissed. See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). See, also, *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

No. A-06-1069: **Villarreal v. Anderson**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-1708 (Reissue 1995).

No. A-06-1070: **State v. Sledge**. Appellee's suggestion of remand granted. See *State v. Boye*, 1 Neb. App. 548, 499 N.W.2d 860 (1993). Case remanded to district court to review sufficiency of evidence to sustain conviction.

No. A-06-1074: **Campbell v. Wise**. Affirmed. See rule 7A(1).

No. A-06-1075: **Domeier v. Yaney**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1076: **State v. Buck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1077: **State v. Lindteigen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1078: **State v. Shelby**. Affirmed. See, rule 7A(1); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

No. A-06-1079: **Shellenberger v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-06-1080: **Engelbart v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1081: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1082: **State v. Lamont**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1083: **Modern Farm Equip. v. Stanko**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1084: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1086: **SFI Ltd. Partnership IV v. Marks**. Stipulation allowed; appeal dismissed.

No. A-06-1087: **Pollet v. Anschutz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1090: **Johnson v. City of Lincoln**. Appeal dismissed. See, rule 7A(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

No. A-06-1092: **State v. Schwisow**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-06-1094, A-06-1095: **State v. Sandlin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-1098: **In re Estate of Chrisp**. Appeal dismissed. See, rule 7A(2); *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-06-1100: **Feld Investment Co. v. Valley West Apartments**. Appeal dismissed. See, rule 7A(2); *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

No. A-06-1101: **State v. Pfitzer**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-2728 and 25-2729 (Cum. Supp. 2004).

No. A-06-1102: **Cubas v. Alcazar**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-1104: **Alfredson v. Alfredson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1105: **Prokop v. Jarecke**. Affirmed. See, rule 7A(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-06-1108: **State ex rel. Freeman v. Freeman**. Affirmed. See, rule 7A(1); *State on behalf of Kayla T. v. Risinger*, 273 Neb. 694, 731 N.W.2d 892 (2007); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Dartmann v. Dartmann*, 14 Neb. App. 864, 717 N.W.2d 519 (2006).

No. A-06-1109: **State v. Strasburg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1110: **State v. Jones**. Motion for summary affirmance sustained; judgment affirmed as modified. See rule 7B(2).

No. A-06-1111: **State v. Gray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1112: **Wade v. Ferguson**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-06-1114: **State v. Urwin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1115: **State v. Ashburn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987).

No. A-06-1118: **Strelko v. Larson**. Motion of appellant to dismiss appeal sustained; appeal dismissed. See, rule 7B(1); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-1119: **Dumas v. Daro**. Affirmed. See, rule 7A(1); *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005).

No. A-06-1120: **Dumas v. Daro**. Affirmed. See, rule 7A(1); *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005).

No. A-06-1121: **State v. Andres**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1125: **Cook v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1127: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

No. A-06-1129: **State v. Barns**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1130: **Juhlin v. Personal Rep. of Estate of Brown**. Affirmed. See rule 7A(1). See, also, Neb. Ct. R. of Cty. Cts. 52(I)(G); Neb. Rev. Stat. § 30-2404 (Reissue 1995); *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001).

No. A-06-1132: **County of Douglas v. Petrmichl**. Affirmed. See rule 7A(1).

No. A-06-1134: **McCook Pub. Power Dist. v. City of McCook**. Stipulation allowed; appeal dismissed.

No. A-06-1135: **State v. Kite**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1136: **State v. Lacy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1137: **Settje v. Settje**. Affirmed. See, rule 7A(1); *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

No. A-06-1142: **State v. Newson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1143: **State v. Brockman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1147: **Marcovitz v. Rogers-Farkas**. Appeal dismissed. See, rule 7A(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-06-1149: **State v. Schulte**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1150: **State v. Paez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1151: **State v. Hollenback**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1152: **State v. Lowe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1153: **Steffens v. Steffens**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1914 (Cum. Supp. 2004).

No. A-06-1155: **Berry v. Colorado Investment Corp**. Affirmed. See, rule 7A(1); *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990).

No. A-06-1156: **State v. Montin**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-06-1157: **Cobb v. Froehlich**. Stipulation to dismiss appeal sustained.

No. A-06-1158: **In re Name Change of Rosales**. Affirmed. See rule 7A(1).

No. A-06-1165: **State v. Schulte**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1167: **State v. Koester**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-06-1168, A-06-1253: **State v. Cisneros**. Stipulations allowed; appeals dismissed.

No. A-06-1172: **State v. Tolan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1173: **State v. Valasek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1174: **State v. Gallagher**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. §§ 25-1329 and 29-2926(2)(f) (Cum. Supp. 2006); *Cumming v. Red Willow Sch. Dist. No. 179*, 273 Neb. 483, 730 N.W.2d 794 (2007).

No. A-06-1177: **Spotanski v. Willyard**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-1179: **State v. McKinnie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-06-1182, A-06-1183: **State v. McSwine**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000).

No. A-06-1185: **McMichael v. McMichael**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1187: **Mead v. Mead**. Affirmed. See rule 7A(1).

No. A-06-1189: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1190: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1191: **Villarreal on behalf of Villarreal v. Tran**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1192: **Villarreal on behalf of Villarreal v. Anderson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

No. A-06-1194: **Wiech v. Wiech**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-06-1200: **Partain v. Sheffield**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1203: **State v. Erickson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-06-1204: **Brooks v. Farringer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007); *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

No. A-06-1209: **State v. Rosales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1210: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Narcisse*, 264 Neb. 160, 646 N.W.2d 583 (2002); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

No. A-06-1211: **Kreifels v. Pamida, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-1214: **Davis v. Davis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-1215: **In re Interest of Haley M**. Appeal dismissed. See, rule 7A(2); *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004).

No. A-06-1219: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1222: **In re Interest of Ethan M**. Appeal dismissed as moot. See *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006).

No. A-06-1225: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1226: **State v. Lorenzana-Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1227: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1229: **Goeser v. Allen**. Stipulation allowed; appeal dismissed.

No. A-06-1231: **Buckman v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 83-4,123 (Reissue 1999); *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1234: **In re Guardianship & Conservatorship of Rosemary D**. Appeal dismissed and matter remanded to the county court for further proceedings. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

No. A-06-1235: **State v. Bartholomew**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1236: **Smith v. Breeden**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1237: **Villarreal v. Villarreal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

No. A-06-1238: **State v. Brazzell**. Affirmed. See rule 7A(1).

No. A-06-1239: **State v. Fitzgerald**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1241: **In re Interest of Alicia P. et al**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1257: **Hernandez v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

No. A-06-1259: **Tyler v. Union Pacific RR. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1260: **Miller v. Neth**. Appeal dismissed. See *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

No. A-06-1261: **Davis v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1262: **Davis v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1263: **Davis v. Board of Parole**. Appeal dismissed. See, rule 7A(2); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-06-1264: **State v. Payne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1265: **State v. Huffman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-06-1269: **Hilt v. Hilt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1272: **In re Interest of Anthony L. et al**. Response to order to show cause considered; judgment affirmed. See rules 1B(1)(b) and 7A(1).

No. A-06-1273: **State v. Channel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1274: **Grayek v. Platte Valley Auto Mart**. Stipulation allowed; appeal dismissed with prejudice.

No. A-06-1279: **State on behalf of Conkling v. Matlock**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1286: **State v. Charbonneau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1290: **In re Interest of Lauren B**. Appeal dismissed. See, rule 7A(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-06-1291: **In re Interest of Steven M**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-06-1291: **In re Interest of Steven M**. Motion of appellant for rehearing sustained. Order of December 22, 2006, vacated, and appeal reinstated.

No. A-06-1292: **Santo v. Santo**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1293: **Santo v. Santo**. Affirmed. See, rule 7A(1); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

No. A-06-1294: **State v. Lange**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1295: **In re Guardianship & Conservatorship of Dorothy M**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1298: **Nemec v. Nemec**. Appeal dismissed. See, rule 7A(2); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-1299: **EPCO Carbon Dioxide Products v. Abengoa Bioenergy Corp**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

No. A-06-1300: **State v. Jermark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1301: **State v. Salinas**. Order denying postconviction relief affirmed. See, rule 7A(1); *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999); *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988).

No. A-06-1302: **Obermeyer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-06-1303: **Bitner v. Department of Motor Vehicles**. Appeal dismissed.

No. A-06-1304: **State v. Finch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1306: **Aguirre-Waters v. Alegent Health Fontenelle**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-1308: **State v. Parrott**. Affirmed. See, rule 7A(1); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gonzales*, 14 Neb. App. 493, 709 N.W.2d 707 (2006).

No. A-06-1309: **State v. Hassan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1312: **Purnell v. Purnell**. Affirmed. See, rule 7A(1); *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

No. A-06-1319: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-06-1320: **State v. Trostheim**. Affirmed. See rule 7A(1).

No. A-06-1321: **State v. Good Plume**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1322: **State v. Anderson**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-1323: **State v. Wills**. Appeal dismissed. See, rule 7A(2); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000).

Nos. A-06-1324, A-06-1325: **State v. Hall**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-1328: **Welsh v. Department of Motor Vehicles**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-1333: **State v. Concannon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1335: **Arterburn v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1336: **Tjaden v. Department of Motor Vehicles**. Parties' stipulation for summary reversal sustained. See, rule 7C(1); *Moore v. Peterson*, 218 Neb. 615, 358 N.W.2d 193 (1984). Order of district court is reversed and cause is remanded with instructions to reinstate order of revocation.

No. A-06-1337: **Costanzo v. City of Omaha**. Affirmed. See, rule 7A(1); *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

No. A-06-1339: **Hoffman v. Repass**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1340: **Wieck v. Galvan**. Motion of appellee for summary dismissal sustained; appeal dismissed. See rule 7B(1).

No. A-06-1341: **State v. Frerichs**. Conviction and sentence affirmed as modified. See *State v. Mann*, 196 Neb. 824, 246 N.W.2d 604 (1976).

No. A-06-1342: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1343: **Benes v. Scurto**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1345: **In re Estate of Jensen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-06-1346: **State v. Wills**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-1347: **DeWall Enters. v. Boyle**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-1348: **State v. Schill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1352: **State v. Jarosz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1353: **State v. Enevoldsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1358: **Hall v. Mogensen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1360: **Nelson v. Nelson**. Affirmed. See, rule 7A(1); *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990).

No. A-06-1365: **Zwink v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1366: **Hinspeter v. Hinspeter**. Appeal dismissed. See, rule 7A(2); *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

No. A-06-1368: **State v. Tuttle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1372: **State v. Caldwell**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-1375: **Davis v. Vincentini**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-1376: **State ex rel. Tyler v. Board of Parole**. Affirmed. See, rule 7A(1); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

No. A-06-1377: **State v. Ozuna**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1381: **State v. Enamorado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1384: **Rognirhar v. Kinlund**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1387: **State v. Palmateer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1389: **In re Interest of Lauren B**. Appeal dismissed as moot. See, rule 7A(2); *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006).

No. A-06-1390: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1391: **State v. Villarreal**. Appeal dismissed. See rule 7A(2).

Nos. A-06-1394, A-06-1434: **State v. Schneider**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-06-1397: **ABC Native American Consulting v. Hatch**. Appeal dismissed. See, rule 7A(2); *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005).

No. A-06-1398: **Moulton v. Seng**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1399: **Store Kraft Mfg. Co. v. Chaney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-1401: **In re Guardianship & Conservatorship of Ann B**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1404: **McCaslin v. Neth**. Appeal dismissed. See, rule 7A(2); *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006); *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993).

No. A-06-1405: **Wicker v. Abboud**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1406: **State v. Moten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1407: **State v. Blair**. Appeal dismissed as moot. See rule 7D.

No. A-06-1409: **State v. Damme**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1410: **State on behalf of Phillips v. Motton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1411: **State on behalf of Clark v. Motton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-06-1412: **State on behalf of Motton v. Motton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1413: **State on behalf of Ziegenbein v. Motton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-1422: **Martin v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-06-1424: **State v. Miller**. Motion of appellant to dismiss appeal considered; appeal dismissed at cost of appellant.

No. A-06-1425: **State v. Starr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1426: **State v. Schaff**. Motion of appellee for summary affirmance sustained. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-1427: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1428: **Werner v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1429: **State v. Gonzalez-Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-06-1430: **State v. Ebers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1432: **State v. Trussel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1433: **Goss v. Goss**. Affirmed. See, rule 7A(1); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

No. A-06-1435: **Barrett v. Fabian**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-06-1438: **Powers v. Mangiameli**. Appeal dismissed. See rule 7A(2).

No. A-06-1446: **Sullivan v. Superior Street Family Physicians**. Motion of appellees Noble and Lincoln Orthopedic Center for summary affirmance sustained; judgment affirmed. See rule 7B(2). As to remaining appellees, judgment affirmed. See rule 7A(1). See, also, *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004).

No. A-06-1447: **McElroy v. Paden**. Motions of appellees for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1448: **State v. Parks**. Affirmed. See, rule 7A(1); *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006); *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

No. A-06-1451: **Patterson v. Nebraska Legislature**. Motion considered; appeal dismissed.

No. A-06-1453: **Koziol v. Koziol**. Appeal dismissed. See, rule 7A(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-1454: **Classe v. College of Saint Mary**. District court orders of September 22 and December 8, 2006, affirmed. See, rule 7A(1); *Young v. First United Bank of Bellevue*, 246 Neb. 43, 516 N.W.2d 256 (1994); *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004). See, also, Neb. Ct. R. of Pldg. in Civ. Actions 15(a) (rev. 2003); *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991).

No. A-06-1455: **State v. Stevens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995).

No. A-06-1456: **State v. Bowie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1457: **State v. Roundtree**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1458: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-1459: **State v. DeLa Cruz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-1460: **State v. Sainz**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-1462: **In re Trust of Short**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-1464: **Ramirez v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-06-1467: **Tyler v. Sherwin Williams Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

Nos. A-06-1469, A-06-1470: **State v. Poole**. Motions of appellee for summary affirmance sustained; judgments affirmed.

No. A-07-001: **State v. Ford**. Stipulation considered; appeal dismissed.

No. A-07-004: **Parks v. Neth**. Reversed pursuant to joint stipulation of parties for summary reversal. See *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

No. A-07-005: **TierOne Bank v. Cup-O-Coa, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-007: **HGR Acquisitions v. DeWall**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-009: **Mortgage Express v. Tudor Ins. Co**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

No. A-07-011: **State v. Oknewski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-012: **State v. Barfield**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-017: **Ballinger v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-019: **Warner v. Warner**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-025: **State ex rel. Linder v. Remmen**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-07-026: **Widtfeldt v. Tax Equal. & Rev. Comm**. Appeal dismissed as filed out of time. See, rule 7A(2); Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2006).

No. A-07-027: **State v. Swartz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-029: **State v. Gonzales**. Affirmed. See, rule 7A(1); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

No. A-07-030: **Womack v. Crawford**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-032: **Robinson v. Hormel Foods**. Affirmed. See, rule 7A(1); *Hubbart v. Hormel Foods Corp.*, 15 Neb. App. 129, 723 N.W.2d 350 (2006); *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

No. A-07-033: **Chader v. Langford**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-035: **State on behalf of Savick v. Savick**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-036: **In re Interest of Eva J. & Shakeela J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-038: **State v. Ayer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-039: **State v. Jones**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-040: **State v. Sedoris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

No. A-07-041: **Tiny's Boat & Motor v. Ellis**. Appeal dismissed. See, rule 7A(2); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-042: **Crotty v. Crotty**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-07-045: **Tift v. Tift**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-046: **State ex rel. Kafele v. Lacey**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-048: **State ex rel. Tyler v. Warren**. Affirmed. See rule 7A(1).

No. A-07-050: **St. Monica's v. Lancaster Cty. Bd. of Equal**. Stipulation for summary reversal sustained. The order of the Tax Equalization and Review Commission is reversed, and the cause is remanded to the commission for hearing on the merits. See, rule 7C(1); Neb. Rev. Stat. § 77-202.04(1) (Cum. Supp. 2006); *Nye v. Fire Group Partnership*, 263 Neb. 735, 642 N.W.2d 149 (2002).

No. A-07-051: **State v. Kolar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-055: **State v. Ramirez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

No. A-07-059: **Nielsen v. Nielsen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1219(3) (Cum. Supp. 2006); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-07-060: **Duda v. American Fam. Ins. Group**. Appeal dismissed. See, rule 7A(2); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-07-062: **State v. Hobbs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-063: **Ware v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-064: **Hobbs v. Hobbs**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-066: **State ex rel. Tyler v. Kenney**. Appeal dismissed. See, rule 7A(2); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

No. A-07-067: **Tyler v. Lang**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-071: **In re Interest of Montreon R**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-072: **Yelli v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

Nos. A-07-077, A-07-078: **State v. Clark**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-081: **Storm v. Lancaster Cty. Civil & Small Claims Ct**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-083: **In re Interest of Travis H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-086: **Wells v. Wells**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-088: **In re Interest of Precious W**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-091: **In re Interest of Jaymir P**. Appeal dismissed as moot.

No. A-07-095: **State v. Perry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-097: **State v. Blakeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-107: **Finnell v. Jacobsen**. Appeal dismissed. See, rule 7A(2); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006); *Lopez v. IBP, inc.*, 264 Neb. 273, 646 N.W.2d 628 (2002).

No. A-07-108: **Breinig v. Breinig**. Appeal dismissed. See, rule 7A(2); *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-110: **State v. Hibberd**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-111: **State v. Oliver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004); *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986).

No. A-07-113: **Bykerk v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-114: **Gunter v. Gunter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-115: **Bare v. Hiner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-116: **Partch v. Partch**. Appeal dismissed. See, rule 7A(2); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-07-120: **Jacob v. Hill**. Appeal dismissed. See rule 7A(2).

No. A-07-123: **Martin v. Lanphier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-125: **State on behalf of Lahrs v. Perez**. Summarily affirmed. See, rule 7A(1); *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985); *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 544 (2003).

No. A-07-126: **In re Estate of Hue**. Appeal dismissed. See, rule 7A(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-07-128: **State v. Petersen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-129: **State v. Holloway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-07-130: **State v. Clayton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-132: **State v. Sever**. State's suggestion of remand and request that we affirm conviction of third offense is considered and sustained. Conviction affirmed, and cause remanded to district court for remand to county court, with directions to conduct new enhancement hearing. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

No. A-07-134: **Timmerman v. Timmerman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-136: **State v. Fowler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-143: **Hendrix v. Sivick**. Appeal dismissed. See, Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-07-145: **Bull v. City of Omaha**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-07-148: **State v. Wills**. Appeal dismissed. See, rule 7A(2); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000); *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007).

No. A-07-149: **Myers v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-150: **Myers v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-152: **State v. Robinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-153: **Westwood v. Hemminger**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-156: **State v. Russell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-157: **In re Guardianship & Conservatorship of Rosemary D**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-159: **State v. Brooks**. Motion of appellee for summary dismissal sustained for lack of jurisdiction. See, rule 7B(1) and (2); Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993).

No. A-07-160: **In re Interest of Brianna N**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-161: **In re Interest of Brianna N**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-162: **State v. Stover**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-07-163: **City of Omaha v. Tract 1**. Summarily dismissed. See rule 7A(2).

No. A-07-164: **City of Omaha v. Tract No. 3**. Summarily dismissed. See rule 7A(2).

No. A-07-166: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-168: **State v. Fudge**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-825 (Cum. Supp. 2006); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-07-169: **State v. Singletary**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-825 (Cum. Supp. 2006); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-07-170: **State v. Copeland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-172: **State v. Rademaker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-173: **State v. Green**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-176: **State v. Jarman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-07-177, A-07-178: **State v. Albrecht**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-180: **Jacob v. Schlichtman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-07-180: **Jacob v. Schlichtman**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-07-185: **State v. Moore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-194: **K.V. Joint Venture v. Maxamillion, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-195: **Bragg v. Bragg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-196: **State v. Hansen**. Affirmed. See rule 7A(1).

No. A-07-197: **Vanderzee v. Vanderzee**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-199: **Watkins v. Regan**. Appeal dismissed. See, rule 7A(2); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-07-200: **Sherrod v. State**. Appeal dismissed. See, rule 7A(2); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-07-202: **Felder v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-203: **State v. English**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-205: **City of Omaha v. Tract No. 3**. Summarily dismissed. See rule 7A(2).

No. A-07-207: **Tyler v. Rocafort**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-208: **Velehradsky v. Velehradsky**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-07-210: **Hall v. Swartz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-211: **In re Guardianship & Conservatorship of Jack P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-07-212: **State v. Tillemans**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-213: **State v. Myers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-217: **Taylor v. Dahlsten Truck Line**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-218: **Guardian Real Estate v. Hunt**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-219: **Tyler v. Murray**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-222: **Livingston v. Pacific Realty Commercial**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-224: **State v. Reising**. Appeal dismissed. See rule 7A(2).

No. A-07-225: **State v. Reising**. Appeal dismissed. See rule 7A(2).

No. A-07-226: **State v. Manuel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-227: **Davis v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-07-229, A-07-230: **Sunbeam Properties v. Department of Nat. Resources**. Stipulations allowed; appeals dismissed.

No. A-07-233: **State v. Detter**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-234: **In re Estate of Carlson**. Summarily dismissed. See Neb. Rev. Stat. § 30-1601(3) (Cum. Supp. 2006).

No. A-07-235: **State v. Troyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

No. A-07-236: **State v. Stafford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-237: **In re Interest of Joseph W**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-241: **State v. Standley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-242: **State v. Osborn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-244: **Jones v. Gibilisco**. Appeal dismissed. See, rule 7A(2); *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999); *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996).

No. A-07-248: **In re Interest of Steven K**. Stipulation allowed; appeal dismissed.

No. A-07-249: **State v. Marker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

No. A-07-254: **Hudson v. Physician Mut. Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-258: **Tripp v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-260: **In re Interest of Madason G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-262: **Cann v. Barnett**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2006). See, also, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-07-266: **State v. Piseno**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-270: **In re Interest of Daniel V. et al**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1902 (Reissue 1995), 25-1912(1) (Cum. Supp. 2006), and 43-2,106.01 (Reissue 2004).

No. A-07-270: **In re Interest of Daniel V. et al**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-07-271: **State v. Crane**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-272: **State v. Kelly**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-274: **Carter v. Knott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-276: **Mesa v. Douglas Cty. Bd. of Equal**. Motion of petitioner-appellant to dismiss appeal considered; appeal dismissed.

No. A-07-277: **State v. Latzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-278: **State v. Honstein**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-279: **Pavel v. Douglas Cty. Bd. of Equal**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-282: **In re Interest of Stephanie G**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-285: **Brummels v. Brummels**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-287: **Humlicek v. Ferguson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-292: **State v. Harbour**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-293: **Hudson v. Hartigan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-294: **State v. Gifford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-295: **State v. Newman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-296: **State v. Hellbusch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-301: **Caton v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-305: **State v. Ashley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-306: **Walker v. Walker**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-07-309: **In re Interest of James M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-314: **In re Interest of Dustina H**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-315: **Hibler v. Albrecht**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-317: **Bacon v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-319: **State v. Chapman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *State v. Hernandez*, 1 Neb. App. 830, 511 N.W.2d 535 (1993).

Nos. A-07-322, A-07-323: **State v. Lunsford**. Affirmed in part, sentence of restitution vacated, and cause remanded with directions to hold a restitution hearing. See, rule 7A(1); Neb. Rev. Stat. § 29-2281 (Reissue 1995); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

No. A-07-327: **Womack v. Perkins**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).

No. A-07-330: **State v. Dollen**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-07-331, A-07-332: **State v. Harding**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-333: **State v. Spencer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-334: **State v. Templeton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-335: **State v. Abboud**. Appeal dismissed as moot. See, rule 7D(1); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993).

No. A-07-341: **State v. Mathis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-342: **State v. Long**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-344: **State v. Devitt**. Affirmed. See, rule 7A(1); *Jackson v. Brotherhood's Relief & Comp. Fund*, 273 Neb. 1013, 734 N.W.2d 739 (2007); *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984).

No. A-07-347: **Hughes v. Hughes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-348: **State v. Shannon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-349: **State v. Gray**. Appeal dismissed. See, rule 7A(2); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

No. A-07-352: **Henry v. Neth**. Reversed pursuant to joint stipulation of parties for summary reversal. See *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

No. A-07-353: **Sackett v. Sackett**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-354: **Geilenkirchen v. Baisden**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-355: **State v. Hellbusch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-357: **In re Guardianship of James G**. Appeal dismissed as notice of appeal prematurely filed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-07-360: **Pfingston v. Greenfield**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-368: **State v. Stier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Hernandez*, 273 Neb. 456, 730 N.W.2d 96 (2007); *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005).

No. A-07-371: **Agarwal v. Gopalakrishnan**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-07-377: **Davis v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995); *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988).

No. A-07-378: **State v. Helmstadter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-07-382: **Velehradsky v. Velehradsky**. Appeal dismissed. See, rule 7A(2); *Harvey v. Harvey*, 14 Neb. App. 380, 707 N.W.2d 444 (2005).

No. A-07-394: **State v. Long**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-396: **State v. Thompson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-400: **State v. Barber**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-401: **Davis v. Shaw**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-402: **Cummings v. Seward**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-403: **State v. Barritt**. Appeal dismissed. See rule 7A(2).

No. A-07-406: **Blair v. McArthur**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-07-407: **Melgar v. Divercon Constr**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-408: **Spotanski v. Willyard**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-410: **State v. Hamilton**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-411: **Thacker v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-418: **In re Trust of Shaneyfelt**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-07-420: **Hoskins v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-421: **In re Interest of Ginger C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-422: **In re Guardianship of Charles J**. Appeal dismissed as moot; each party to pay own costs.

No. A-07-435: **State v. Merwin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-438: **State v. Hjorth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-441: **Gibson v. Gibson**. Appeal dismissed. See rule 7A(2).

No. A-07-442: **State v. Lecher**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-445: **State v. Bickford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-446: **State v. Gray**. Appeal dismissed. See, rule 7A(2); *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

No. A-07-451: **Feld Invest. Co. v. Valley West Apartments**. Appeal dismissed. See rule 7A(2).

No. A-07-456: **In re Interest of Jeremy H**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-459: **State v. Elliott**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2306 (Cum. Supp. 2006).

No. A-07-460: **State v. Zitterkopf**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-461: **State v. Guerrero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-07-468: **Drudik v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-470: **State v. Land**. Appeal remanded with directions to remand to county court with directions to dismiss and vacate judgment and conviction. See *State v. Campbell*, 187 Neb. 719, 193 N.W.2d 571 (1972).

No. A-07-471: **State v. Hernandez**. Stipulation allowed; appeal dismissed.

No. A-07-473: **Waite v. Carpenter**. Motions of appellees for summary dismissal sustained. See, rule 7B(1) and (4); *Waite v. Carpenter*, 3 Neb. App. 879, 533 N.W.2d 917 (1995).

No. A-07-483: **In re Estate of Hue**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2006).

No. A-07-496: **State v. Beadle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-499: **State v. Narcisse**. Appeal dismissed. See, rule 7A(2); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995).

No. A-07-500: **State v. Orozco**. Appeal dismissed. See, rule 7A(2); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

No. A-07-504: **State v. Nesiba**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-507: **Finova Capital Corp. v. Carl S. Baum Druggists**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-508: **In re Guardianship & Conservatorship of Edna B**. Stipulation allowed; appeal dismissed.

No. A-07-510: **Beverly Enterprises-Nebraska v. Bockstadter**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-07-513: **In re Interest of Justice S. et al**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-2,106.01 (Reissue 2004) and 25-1912(1) (Cum. Supp. 2006).

No. A-07-518: **Delgado-Canas v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-522: **Jones v. Gibilisco**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-523: **Bellino v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

Nos. A-07-525, A-07-532: **State v. Cave**. Appeals dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-07-527: **Omaha Truck Center v. Oak Hills, Inc**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2006); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004); *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001).

No. A-07-528: **Seastedt v. Thompson**. Appeal dismissed. See rule 7A(2).

No. A-07-537: **State v. Hagan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006).

No. A-07-555: **State v. Clifford**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-557: **State v. Randolph**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-558: **State v. Whitelaw**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

No. A-07-563: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-564: **State v. Dugan**. Appeal dismissed. See, rule 7A(2); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

Nos. A-07-570, A-07-571: **State v. Voss**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-07-584: **State v. Dugan**. Appeal dismissed. See, rule 7A(2); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

No. A-07-585: **State v. Roberts**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-591: **In re Estate of Weibel**. Appeal dismissed. See, rule 7A(2); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-07-598: **State v. Young**. Appeal dismissed. See rule 7A(2).

No. A-07-600: **Ernesti v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-07-602: **Stevens v. Dolan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2006).

No. A-07-607: **State v. Rideout**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-608: **State v. Haley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-614: **Blair v. McArthur**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-616: **Cavanaugh v. Cavanaugh**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-625: **State v. Alameen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-629: **Coffey v. Coffey**. Appeal dismissed. See, rule 7A(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005). See, also, rule 5B(5); *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989).

No. A-07-631: **In re Interest of Clayden M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-632: **First National Bank v. Sheets**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-633: **McMurry v. Sanders-McMurry Enters**. By order of the court, appeal dismissed for failure to file briefs.

No. A-07-648: **Timmerman v. Neth**. Appeal dismissed. See rule 7A(2).

No. A-07-648: **Timmerman v. Neth**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-07-651: **Clayton v. Warford**. Appeal dismissed. See rule 7A(2).

No. A-07-656: **Norby v. Farnam Bank**. Appeal dismissed. See, rule 7A(2); *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

No. A-07-660: **McKinnis v. Strobel**. Stipulation considered; appeal dismissed at cost of appellant.

No. A-07-664: **Van Ert v. State Farm Mut. Auto. Ins. Co**. Order of district court summarily vacated, and cause remanded for evidentiary hearing on record. See, rule 5A(1); *KEB, Inc. v. Farris Constr. Co.*, 12 Neb. App. 38, 665 N.W.2d 667 (2003). See, also, *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002); *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001); *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

No. A-07-674: **State v. Dvarro**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-07-688: **State v. Dubray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-696: **State v. Drewes**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

No. A-07-700: **In re Interest of Allen E. et al**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-707: **Pittman v. Stickney**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-708: **Clarke v. Dodge Cty. Bd. of Equal**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-510.02 (Reissue 1995); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-07-714: **Glasson v. Penrose**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-735: **Sarik v. Ryan**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-07-736: **Village of Wilsonville v. Stoltz**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-07-737: **State v. McCarthy**. Appeal dismissed. See, rule 7A(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-07-741: **In re Estate of Grooms**. Appeal dismissed. See rule 7A(2).

No. A-07-744: **State on behalf of McCowin v. Wells**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-748: **Davis v. Davis**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-07-751: **Heimes Corp. v. Paradigm Properties**. Motion of appellee for summary dismissal sustained.

No. A-07-756: **Harden v. Harden**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-759: **State v. Heath**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

No. A-07-764: **State v. Vance**. Appeal dismissed. See rule 7A(2).

No. A-07-768: **In re Interest of Courtney J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-769: **In re Interest of Michaela J**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-778: **State v. Moshier**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-779: **Bihuniak v. Robert Corrigan Farm**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-07-789: **Renneke v. Health & Human Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999). See, also, *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993).

No. A-07-795: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-798: **State v. Jensen**. Appeal dismissed. See, rule 7A(2); *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992); *State v. Pawling*, 9 Neb. App. 824, 621 N.W.2d 821 (2000).

No. A-07-823: **State v. Alvarado**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-826: **Hawks v. Williamson**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

No. A-07-835: **Lewis v. Health & Human Servs**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-851: **State v. Dockery**. Affirmed. See rule 7A(1).

No. A-07-864: **State v. Batten**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-07-879: **State v. Miller**. Appeal dismissed. See rule 7A(2).

No. A-07-901: **State v. Johnson**. Appeal dismissed. See rule 7A(2).

No. A-07-902: **Brooks v. Brooks**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

No. A-07-967: **Davis v. ConAgra Foods**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 48-179 (Cum. Supp. 2006); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-07-982: **Miller v. Miller**. Appeal dismissed. See, rule 7A(2); *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987). See, also, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

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

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

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

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

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

No. A-04-1098: **R & S Investments v. Auto Auctions**, 15 Neb. App. 267 (2006). Petition of appellant for further review overruled on February 22, 2007.

No. A-04-1189: **Davis v. Fraternal Order of Police**, 15 Neb. App. 470 (2007). Petition of appellant for further review overruled on May 25, 2007, as untimely filed.

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

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

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

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

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

No. A-04-1373: **Cook v. Cook**. Petition of appellant for further review overruled on April 11, 2007.

No. A-04-1473: **Keup v. Department of Corr. Servs**. Petition of appellant for further review overruled on June 6, 2007.

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

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

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

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

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

No. A-05-196: **Blair v. Delman**. Petition of appellant for further review overruled on July 18, 2007.

No. A-05-200: **Weigert-Stathes v. American Fam. Mut. Ins. Co**. Petition of appellee for further review overruled on June 20, 2007.

No. A-05-206: **Reed v. City of Omaha**, 15 Neb. App. 234 (2006). Petition of appellant for further review overruled on February 22, 2007.

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

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

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

No. A-05-379: **ADT Security Servs. v. A/C Security Systems**, 15 Neb. App. 666 (2007). Petition of appellant for further review overruled on September 20, 2007.

No. A-05-379: **ADT Security Servs. v. A/C Security Systems**, 15 Neb. App. 666 (2007). Petition of appellee for further review overruled on September 20, 2007.

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

No. A-05-461: **Pasko v. City of Omaha**. Petition of appellant for further review overruled on August 29, 2007.

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

No. A-05-467: **City of Ashland v. Strode**. Petition of appellant for further review overruled on July 11, 2007.

No. A-05-492: **Jura v. Player's, Inc**. Petition of appellant for further review overruled on March 26, 2007, for lack of jurisdiction.

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

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

No. A-05-508: **In re Estate of Petereit**. Petition of appellant for further review overruled on May 17, 2007.

No. A-05-518: **Henningsen v. Pacesetter Homes**. Petition of appellant for further review overruled on March 21, 2007.

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

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

No. A-05-541: **Bosiljevac v. Board of Trustees of City of Omaha**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-622: **Wiedel v. Wiedel**. Petition of appellant for further review overruled on April 11, 2007.

No. A-05-652: **Barger v. Abboud**. Petition of appellee for further review overruled on July 11, 2007.

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

No. A-05-693: **State Law Enforcement Barg. Council v. State**. Petition of appellee for further review overruled on July 18, 2007.

No. A-05-695: **Yenney v. Nebraska Dept. of Motor Vehicles**, 15 Neb. App. 446 (2007). Petition of appellee for further review overruled on May 17, 2007.

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

No. A-05-713: **Omaha Cold Storage Terminals v. Patterson**, 15 Neb. App. 548 (2007). Petition of appellee for further review overruled on July 11, 2007.

No. A-05-786: **State v. Hoover**. Petition of appellant for further review overruled on March 28, 2007.

No. A-05-817: **Schrier v. Schrier**. Petition of appellee for further review overruled on March 14, 2007.

No. A-05-849: **In re Charles C. Wells Revocable Trust**, 15 Neb. App. 624 (2007). Petition of appellant for further review overruled on August 29, 2007.

No. A-05-861: **State v. Akins**. Petition of appellant for further review overruled on June 13, 2007.

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

No. A-05-898: **Applied Underwriters v. Employer Outsource Serv**. Petition of appellant for further review overruled on July 18, 2007.

Nos. A-05-920 through A-05-922: **State v. Ajamu**. Petitions of appellant for further review overruled on April 25, 2007.

No. A-05-936: **State v. Gonzales**. Petition of appellant for further review overruled on September 20, 2007.

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

No. A-05-956: **Wright v. County of Douglas**. Petition of appellant for further review overruled on July 11, 2007.

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

No. A-05-963: **State v. Leonor**. Petition of appellant for further review overruled on May 9, 2007.

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

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

No. A-05-1051: **In re Estate of Corbin**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-1067: **Knittel v. State**. Petition of appellant for further review overruled on June 20, 2007.

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

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

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

No. A-05-1120: **Siebert v. AGO, Inc**. Petition of appellant for further review overruled on June 20, 2007.

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

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

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

No. A-05-1160: **Omaha Police Union Local 101 v. City of Omaha**. Petition of appellee for further review overruled on June 27, 2007.

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

No. A-05-1189: **Brandt v. Heil**. Petition of appellant for further review overruled on June 13, 2007.

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

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

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

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

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

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

No. A-05-1291: **Dunn v. Wallace Sch. Dist**. Petition of appellants for further review overruled on August 29, 2007.

No. A-05-1292: **Jacobson v. Shresta**. Petition of appellee for further review overruled on August 29, 2007.

No. A-05-1304: **Rose Investments v. Lobo**. Petition of appellant for further review overruled on August 29, 2007.

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

No. S-05-1328: **Davis v. Crete Carrier Corp.**, 15 Neb. App. 241 (2006). Petition of appellee for further review sustained on April 11, 2007.

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

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

No. A-05-1361: **State v. Lopez-Mariscal**. Petition of appellant for further review overruled on June 27, 2007.

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

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

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

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

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

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

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

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

No. A-05-1443: **Hall v. Hall**. Petition of appellant for further review overruled on September 20, 2007.

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

No. A-05-1465: **Canterbury v. Istas**. Petition of appellee for further review overruled on February 28, 2007.

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

No. A-05-1490: **Tyler v. Woodard**. Petition of appellant for further review overruled on March 28, 2007.

No. A-05-1522: **State v. Sledge**. Petition of appellant for further review overruled on April 18, 2007.

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

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

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

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

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

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

No. A-06-010: **State ex rel. Tyler v. Houston**, 15 Neb. App. 374 (2007). Petition of appellant for further review overruled on April 11, 2007, as moot.

No. A-06-027: **Pusch v. Pelshaw**. Petition of appellant for further review overruled on February 14, 2007.

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

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

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

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

No. A-06-070: **State v. Claussen**. Petition of appellant for further review overruled on March 14, 2007.

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

No. A-06-079: **State v. Hale**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-090: **ARL Credit Servs. v. Piper**, 15 Neb. App. 811 (2007). Petition of appellee for further review overruled on September 20, 2007.

No. A-06-100: **State v. Lopez**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-114: **State v. Myers**, 15 Neb. App. 308 (2006). Petition of appellant for further review overruled on May 17, 2007.

No. A-06-126: **Schuman v. Roether**. Petition of appellant for further review overruled on July 11, 2007.

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

No. A-06-144: **Sommerfeld v. City of Gibbon**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-153: **State v. Owen**. Petition of appellant for further review overruled on April 18, 2007.

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

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

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

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

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

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

No. A-06-209: **State v. Aron**. Petition of appellant for further review overruled on July 30, 2007, as untimely filed.

No. A-06-235: **In re Interest of Fedalina G**. Petition of appellant for further review overruled on March 28, 2007.

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

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

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

No. S-06-275: **State v. McCulloch**, 15 Neb. App. 616 (2007). Petition of appellee for further review sustained on July 11, 2007.

No. A-06-281: **State v. Lovette**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-282: **State v. Hernandez**. Petition of appellant for further review overruled on January 31, 2007.

No. A-06-282: **State v. Hernandez**. Petition of appellant pro se for further review overruled on January 31, 2007.

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

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

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

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

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

No. A-06-337: **Johnson v. Johnson**, 15 Neb. App. 292 (2006). Petition of appellant for further review overruled on January 31, 2007.

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

Nos. A-06-359 through A-06-361: **Mohrmann v. Gdowski**. Petitions of appellants for further review overruled on September 20, 2007.

No. A-06-364: **Shasteen v. LaPointe**. Petition of appellant for further review overruled on September 26, 2007.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on February 14, 2007.

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

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

No. A-06-390: **State v. Fisher**. Petition of appellant for further review overruled on June 13, 2007.

No. A-06-400: **State v. Benish**. Petition of appellant for further review overruled on May 14, 2007, as filed out of time.

No. A-06-400: **State v. Benish**. Petition of appellant pro se for further review overruled on May 14, 2007, as filed out of time.

Nos. A-06-404, A-06-405: **State v. McCray**. Petitions of appellant for further review overruled on May 9, 2007.

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

No. A-06-421: **State v. Price**. Petition of appellant for further review overruled on April 11, 2007.

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

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

No. A-06-446: **State v. Peeks**. Petition of appellant for further review overruled on February 12, 2007, as filed out of time. See rule 2F(1).

No. S-06-447: **In re Interest of Kevin K.**, 15 Neb. App. 641 (2007). Petition of appellee for further review sustained on July 18, 2007.

No. S-06-449: **State v. Nelson**. Petition of appellant for further review sustained on March 28, 2007.

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

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

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

No. A-06-462: **State v. Lawver**. Petition of appellant for further review overruled on February 22, 2007.

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

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

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

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

No. A-06-509: **State v. Payne**. Petition of appellant for further review overruled on January 31, 2007.

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

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

No. A-06-544: **In re Interest of Aleisha L.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-545: **In re Interest of Ashlei L.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-550: **State v. Brown**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-555: **State v. Davlin**. Petition of appellant for further review overruled on February 14, 2007.

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

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

No. A-06-581: **State v. Harr**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-599: **State v. Potter**. Petition of appellant for further review overruled on July 18, 2007.

No. A-06-606: **Rue v. Douglas County Corrections**. Petition of appellee for further review overruled on September 20, 2007.

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

No. A-06-612: **State v. Thompson**, 15 Neb. App. 764 (2007). Petition of appellant for further review overruled on August 29, 2007.

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

No. A-06-619: **Gonzales v. Dun-Par**. Petition of appellant for further review overruled on March 28, 2007.

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

No. A-06-624: **Higginbotham v. Sukup**, 15 Neb. App. 821 (2007). Petition of appellee for further review overruled on August 29, 2007.

No. A-06-625: **State v. Rudnick**. Petition of appellant for further review overruled on August 29, 2007.

Nos. A-06-635 through A-06-639: **State v. Curry**. Petitions of appellant for further review overruled on June 13, 2007.

No. A-06-647: **State v. Campbell**. Petition of appellant for further review overruled on May 17, 2007.

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

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

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

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

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

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

No. A-06-674: **In re Interest of Austin M**. Petition of appellant for further review overruled on February 22, 2007.

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

No. A-06-692: **In re Interest of Hailey M.**, 15 Neb. App. 323 (2007). Petition of appellee for further review overruled on March 14, 2007.

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

No. A-06-703: **State v. Atchison**, 15 Neb. App. 422 (2007). Petition of appellant for further review overruled on April 11, 2007.

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

No. A-06-717: **In re Interest of Savannah S. et al**. Petition of appellant for further review overruled on April 11, 2007.

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

No. A-06-756: **In re Interest of Tabbitha H. & Joshua K**. Petition of appellant for further review overruled on February 28, 2007.

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

No. A-06-784: **State v. Parnell**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-790: **State v. Lemuz**. Petition of appellant for further review overruled on May 18, 2007. See rule 2F(1).

No. A-06-794: **State v. White**, 15 Neb. App. 486 (2007). Petition of appellant for further review overruled on June 6, 2007.

No. A-06-804: **State v. Sears**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-812: **In re Interest of Amber M. et al**. Petition of appellant for further review overruled on April 18, 2007.

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

No. S-06-831: **State v. Scheffert**. Petition of appellant for further review sustained on May 23, 2007.

No. S-06-831: **State v. Scheffert**. Petition of appellant for further review dismissed on August 31, 2007, and judgment of the Court of Appeals of March 20, 2007, affirming judgment of the district court, is final.

No. S-06-841: **In re Interest of Xavier H**. Petition of appellant for further review sustained on April 25, 2007.

No. A-06-843: **In re Guardianship & Conservatorship of Rosemary D**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-878: **State v. Cervantes**, 15 Neb. App. 457 (2007). Petition of appellant for further review overruled on April 11, 2007.

No. A-06-879: **Lickliter v. Farmers Coop. Elev. Co**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-882: **In re Interest of Amber K. et al**. Petition of appellant for further review overruled on May 9, 2007.

No. A-06-882: **In re Interest of Amber K. et al**. Petition of appellee Richard K. for further review overruled on May 9, 2007.

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

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

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

No. A-06-932: **State v. Applegate**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-933: **Lonsdale v. Big Sky Energy Equip**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-935: **State v. Hymond**. Petition of appellant for further review overruled on February 28, 2007.

No. A-06-939: **State v. Valverde**. Petition of appellee for further review overruled on June 29, 2007, as untimely filed.

No. A-06-955: **Stricker v. Neth**. Petition of appellant for further review overruled on June 8, 2007, as untimely filed.

No. S-06-957: **State v. York**. Petition of appellant for further review sustained on February 22, 2007.

No. A-06-958: **State v. Prien**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-959: **State v. Jones**. Petition of appellant for further review overruled on September 20, 2007.

No. A-06-970: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-971: **State v. Schumacher**. Petition of appellant for further review overruled on March 21, 2007.

No. A-06-973: **State v. Terry**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-979: **Witte v. Witte**. Petition of appellant for further review overruled on September 20, 2007.

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

No. A-06-991: **State v. Hatch**. Petition of appellant for further review overruled on May 9, 2007.

No. A-06-997: **State ex rel. Bonner v. McSwine**. Petition of appellant for further review overruled on June 13, 2007.

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

No. A-06-999: **State v. Wells**. Petition of appellant for further review overruled on March 14, 2007.

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

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

No. A-06-1013: **State v. Scheil**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-1023: **State v. Krutilek**. Petition of appellant for further review overruled on May 17, 2007.

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

No. A-06-1040: **Lawler v. Lawler**. Petition of appellant for further review overruled on June 13, 2007.

Nos. A-06-1050, A-06-1051: **In re Interest of Markus K. & Justin K**. Petitions of appellant for further review overruled on June 13, 2007.

No. A-06-1059: **George v. Department of Corr. Servs**. Petition of appellant for further review dismissed on February 22, 2007, for lack of jurisdiction. See rule 7A(2).

No. A-06-1069: **Villarreal v. Anderson**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-1077: **State v. Lindteigen**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1078: **State v. Shelby**. Petition of appellant for further review overruled on February 26, 2007, as untimely filed.

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

No. A-06-1135: **State v. Kite**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1145: **In re Conservatorship of Heuertz**. Petition of appellant for further review overruled on June 6, 2007.

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

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

No. A-06-1174: **State v. Gallagher**. Petition of appellant for further review overruled on July 11, 2007.

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

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

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

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

No. A-06-1210: **State v. Washington**. Petition of appellant for further review overruled on April 11, 2007.

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

No. A-06-1225: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1226: **State v. Lorenzana-Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1227: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1228: **State v. Dan**. Petition of appellant for further review overruled on June 20, 2007.

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

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

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

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

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

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

No. A-06-1290: **In re Interest of Lauren B**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1294: **State v. Lange**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review overruled on June 6, 2007.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review overruled on July 13, 2007.

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

No. A-06-1322: **State v. Anderson**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1340: **Wieck v. Galvan**. Petition of appellant for further review overruled on June 6, 2007.

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

No. A-06-1381: **State v. Enamorado**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1425: **State v. Starr**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1432: **State v. Trussel**. Petition of appellant for further review overruled on July 11, 2007.

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

No. A-06-1438: **Powers v. Mangiameli**. Petition of appellant for further review overruled on March 14, 2007.

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

No. A-06-1447: **McElroy v. Paden**. Petition of appellant for further review overruled on July 11, 2007.

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

No. A-07-011: **State v. Oknewski**. Petition of appellant for further review overruled on July 11, 2007.

No. A-07-026: **Widtfeldt v. Tax Equal. & Rev. Comm**. Petition of petitioner-appellant for further review overruled on April 18, 2007.

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

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

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

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

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

No. A-07-107: **Finnell v. Jacobsen**. Petition of appellant for further review overruled on March 28, 2007.

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

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

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

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

No. A-07-199: **Watkins v. Regan**. Petition of appellant for further review overruled on May 9, 2007.

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

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

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

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

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

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

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

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

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

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

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

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-03-1137: **State v. Blair**. 06 NCA No. 38. Reversed and remanded. Sievers, Judge.

No. A-04-1428: **Jessen v. Uhler**. 06 NCA No. 36. Affirmed. Sievers, Judge. Cassel, Judge, concurring.

No. A-04-1473: **Keup v. Department of Corr. Servs**. 07 NCA No. 15. Affirmed. Irwin, Judge.

No. A-05-003: **Heine v. Heine**. 06 NCA No. 39. Affirmed as modified. Cassel, Judge.

No. A-05-004: **Hayden v. Neville**. 07 NCA No. 17. Affirmed in part, and in part reversed. Cassel, Judge.

No. A-05-035: **Underwood v. Underwood**. 06 NCA No. 38. Affirmed. Moore, Judge.

No. A-05-121: **Stephens v. Pillen**. 06 NCA No. 40. Affirmed. Cassel, Judge.

No. A-05-195: **SID No. 177 v. Employers Mut. Cas. Co**. 06 NCA No. 50. Affirmed. Carlson, Judge.

No. A-05-198: **Herres v. Ridgeway**. 06 NCA No. 52. Affirmed. Irwin, Judge.

No. A-05-200: **Wiegert-Stathes v. American Fam. Mut. Ins. Co**. 07 NCA No. 18. Reversed and remanded for further proceedings. Moore, Judge.

No. A-05-233: **State v. Thompson**. 07 NCA No. 19. Affirmed. Cassel, Judge.

No. A-05-281: **Rinne v. Pawnee Cty. Bd**. 07 NCA No. 14. Affirmed. Moore, Judge.

No. A-05-301: **Wagoner v. Tracy**. 06 NCA No. 49. Affirmed. Inbody, Chief Judge.

No. A-05-316: **Khan v. Midwest Cardiology**. 07 NCA No. 15. Affirmed. Moore, Judge.

No. A-05-336: **Perry v. Allied Prop. & Cas. Ins. Co**. 07 NCA No. 18. Affirmed. Moore, Judge.

No. A-05-422: **Naidenovich v. Naidenovich**. 07 NCA No. 18. Affirmed as modified. Cassel, Judge.

No. A-05-452: **Hutchinson v. DeMuth**. 07 NCA No. 5. Affirmed as modified. Inbody, Chief Judge.

No. A-05-467: **City of Ashland v. Strode**. 07 NCA No. 18. Affirmed. Moore, Judge.

No. A-05-500: **Bank v. Neth**. 07 NCA No. 17. Reversed and remanded with directions. Irwin, Judge.

No. A-05-518: **Henningsen v. Pacesetter Homes**. 07 NCA No. 3. Affirmed. Irwin, Judge. Cassel, Judge, concurring. Sievers, Judge, dissenting.

No. A-05-541: **Bosiljevac v. Board of Trustees of City of Omaha**. 07 NCA No. 20. Reversed and remanded with directions. Moore, Judge.

No. A-05-613: **Montazer v. Folda**. 07 NCA No. 18. Affirmed. Cassel, Judge.

No. A-05-651: **Green v. Ameritrade**. 07 NCA No. 23. Affirmed. Carlson, Judge.

No. A-05-652: **Barger v. Abboud**. 07 NCA No. 20. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-05-654: **Neiman v. Neiman**. 07 NCA No. 39. Affirmed. Carlson, Judge.

No. A-05-693: **State Law Enforcement Barg. Council v. State**. 07 NCA No. 21. Reversed. Sievers, Judge.

No. A-05-707: **State v. Rose**. 06 NCA No. 40. Affirmed. Cassel, Judge.

No. A-05-720: **BCD Farms v. Sandhills Cattle Feeding**. 07 NCA No. 34. Reversed and remanded with directions. Carlson, Judge.

No. A-05-724: **Downey Land Ltd. v. John M. Probandt Co**. 07 NCA No. 26. Affirmed. Moore, Judge.

No. A-05-732: **Heeren v. City of Hastings**. 07 NCA No. 5. Affirmed. Irwin, Judge.

No. A-05-771: **Aramark Uniform Servs. v. Meylan Enters**. 07 NCA No. 22. Affirmed. Irwin, Judge.

No. A-05-817: **Schrier v. Schrier**. 06 NCA No. 49. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Chief Judge. Carlson, Judge, concurs.

No. A-05-852: **Lind v. Clay Cty. Mut. Ins. Co**. 07 NCA No. 6. Affirmed. Irwin, Judge.

No. A-05-880: **Yoachim v. Department of Motor Vehicles**. 07 NCA No. 20. Reversed and remanded with directions. Moore, Judge.

No. A-05-898: **Applied Underwriters v. Employer Outsource Serv**. 07 NCA No. 21. Affirmed. Carlson, Judge.

Nos. A-05-920 through A-05-922: **State v. Ajamu**. 07 NCA No. 7. Affirmed. Carlson, Judge.

No. A-05-929: **Doyle v. Watts Trucking**. 07 NCA No. 28. Affirmed. Moore, Judge.

No. A-05-930: **Tanner v. Nebraska Health System**. 07 NCA No. 27. Affirmed. Irwin, Judge.

No. A-05-948: **State v. Bryant**. 07 NCA No. 38. Affirmed. Moore, Judge.

No. A-05-956: **Wright v. County of Douglas**. 07 NCA No. 22. Affirmed. Irwin, Judge.

No. A-05-967: **Keating v. Ironwood Golf & Country Club**. 07 NCA No. 35. Affirmed. Sievers, Judge.

No. A-05-982: **State v. Schmader**. 06 NCA No. 36. Sentence vacated, and cause remanded with directions. Irwin, Judge.

No. A-05-1020: **Rambo v. Sullivan R.E. Group**. 07 NCA No. 30. Affirmed in part, and in part reversed. Moore, Judge.

No. A-05-1051: **In re Estate of Corbin**. 07 NCA No. 20. Reversed and remanded with directions. Moore, Judge,

No. A-05-1052: **State v. Stankoski**. 06 NCA No. 41. Affirmed. Irwin, Judge.

No. A-05-1067: **Knittel v. State**. 07 NCA No. 19. Affirmed. Cassel, Judge.

No. A-05-1132: **State v. Moss**. 07 NCA No. 3. Affirmed. Cassel, Judge.

No. A-05-1160: **Omaha Police Union Local 101 v. City of Omaha**. 07 NCA No. 20. Reversed and remanded with directions. Carlson, Judge.

No. A-05-1189: **Brandt v. Heil**. 07 NCA No. 17. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge.

No. A-05-1215: **State on behalf of F.J. v. McSwine**. 07 NCA No. 34. Affirmed. Sievers, Judge.

No. A-05-1249: **Plater v. Douglas Cty. Treasurer's Office**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-05-1253: **State v. Stevens**. 06 NCA No. 46. Affirmed. Moore, Judge.

No. A-05-1269: **State v. Dupre**. 06 NCA No. 42. Affirmed. Inbody, Chief Judge.

No. A-05-1394: **Classe v. Fitzgerald, Schorr**. 07 NCA No. 27. Affirmed. Irwin, Judge.

No. A-05-1417: **State v. Brown**. 06 NCA No. 38. Sentence modified. Inbody, Chief Judge.

No. A-05-1448: **Robertson v. Burnette**. 06 NCA No. 52. Reversed and remanded with directions. Carlson, Judge.

No. A-05-1465: **Canterbury v. Istas**. 07 NCA No. 3. Reversed. Carlson, Judge.

No. A-05-1487: **Baseggio v. Baseggio**. 07 NCA No. 34. Affirmed. Carlson, Judge.

No. A-06-066: **State v. Holladay**. 07 NCA No. 6. Affirmed. Irwin, Judge.

No. A-06-070: **State v. Claussen**. 07 NCA No. 3. Affirmed. Carlson, Judge. Sievers, Judge, concurring in part and dissenting in part.

No. A-06-079: **State v. Hale**. 07 NCA No. 16. Conviction affirmed, and sentence modified in part. Sievers, Judge.

No. A-06-153: **State v. Owen**. 07 NCA No. 10. Affirmed. Cassel, Judge.

No. A-06-171: **Steskal v. Iams Co**. 06 NCA No. 49. Affirmed. Carlson, Judge.

No. A-06-172: **State v. Russo**. 06 NCA No. 37. Affirmed. Carlson, Judge.

No. A-06-201: **Glodowski v. Glodowski**. 07 NCA No. 10. Affirmed. Irwin, Judge.

No. A-06-209: **State v. Aron**. 07 NCA No. 26. Affirmed. Irwin, Judge.

No. A-06-229: **State v. Stoltz**. 06 NCA No. 46. Affirmed. Irwin, Judge.

No. A-06-230: **DeWester v. Dundy County**. 07 NCA No. 34. Affirmed. Moore, Judge.

No. A-06-250: **State v. Hauck**. 06 NCA No. 49. Affirmed. Inbody, Chief Judge.

No. A-06-254: **State v. Blair**. 07 NCA No. 3. Affirmed. Sievers, Judge.

No. A-06-263: **State v. Monroy**. 06 NCA No. 52. Affirmed. Irwin, Judge.

No. A-06-279: **Noss v. Noss**. 07 NCA No. 11. Affirmed in part, and in part remanded for further proceedings. Irwin, Judge.

No. A-06-301: **State v. Tuttle**. 07 NCA No. 7. Affirmed. Moore, Judge.

No. A-06-302: **Bribiesca v. Rotella's Italian Bakery**. 06 NCA No. 51. Affirmed as modified. Irwin, Judge.

No. A-06-332: **State v. Short**. 07 NCA No. 5. Affirmed. Carlson, Judge.

No. A-06-385: **State on behalf of Schlautman-Sudik v. Schlautman**. 07 NCA No. 11. Affirmed. Irwin, Judge.

No. A-06-390: **State v. Fisher**. 07 NCA No. 9. Affirmed. Moore, Judge.

Nos. A-06-404, A-06-405: **State v. McCray**. 07 NCA No. 15. Affirmed. Moore, Judge.

No. A-06-418: **In re Interest of Taylor P**. 07 NCA No. 6. Affirmed. Cassel, Judge.

No. A-06-431: **In re Guardianship of Grabher**. 07 NCA No. 31. Affirmed. Moore, Judge.

No. A-06-465: **State v. Reddish**. 07 NCA No. 29. Affirmed. Irwin, Judge.

No. A-06-475: **State v. Poppe**. 06 NCA No. 50. Order vacated in part, and in part affirmed. Sievers, Judge.

No. A-06-524: **State v. Malcom**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-06-541: **MBNA America Bank v. Runyan**. 07 NCA No. 11. Affirmed. Carlson, Judge.

No. A-06-546: **In re Interest of Courtney S. et al**. 06 NCA No. 46. Appeal dismissed. Irwin, Judge.

No. A-06-554: **State v. Colpitts**. 07 NCA No. 5. Affirmed in part, and in part vacated and remanded with directions for resentencing. Cassel, Judge.

No. A-06-567: **State v. Lukowski**. 07 NCA No. 24. Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge.

No. A-06-583: **Bice v. Abbott Enters**. 07 NCA No. 9. Affirmed. Cassel, Judge.

No. A-06-606: **Rue v. Douglas County Corrections**. 07 NCA No. 18. Reversed and remanded with directions. Irwin, Judge.

No. A-06-616: **In re Interest of Amanda W**. 06 NCA No. 46. Affirmed. Inbody, Chief Judge.

No. A-06-620: **State v. Barritt**. 07 NCA No. 11. Affirmed. Irwin, Judge.

No. A-06-625: **State v. Rudnick**. 07 NCA No. 28. Affirmed. Sievers, Judge.

No. A-06-658: **State v. Hobbs**. 07 NCA No. 40. Affirmed. Irwin, Judge.

No. A-06-661: **In re Interest of Jasmine B**. 07 NCA No. 3. Reversed. Sievers, Judge.

No. A-06-675: **State v. Stewart**. 07 NCA No. 26. Affirmed. Carlson, Judge.

No. A-06-676: **State v. Smith**. 07 NCA No. 17. Affirmed. Irwin, Judge.

No. A-06-702: **State v. Deras**. 07 NCA No. 14. Affirmed. Sievers, Judge.

No. A-06-709: **Hand v. Flexcon Company**. 07 NCA No. 11. Affirmed. Carlson, Judge.

No. A-06-753: **Krumwiede v. Metropolitan Util. Dist**. 07 NCA No. 16. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

No. A-06-756: **In re Interest of Tabbitha H. & Joshua K**. 07 NCA No. 5. Affirmed. Carlson, Judge.

No. A-06-771: **In re Interest of Amoria M. et al**. 07 NCA No. 9. Affirmed. Irwin, Judge.

No. A-06-776: **Tyler v. Physicians Mut. Ins. Co**. 06 NCA No. 42. Affirmed. Cassel, Judge.

No. A-06-804: **State v. Sears**. 07 NCA No. 20. Affirmed. Moore, Judge.

No. A-06-809: **Roman v. Werner Enters**. 07 NCA No. 14. Affirmed. Cassel, Judge.

No. A-06-824: **State v. Jacobitz**. 07 NCA No. 9. Affirmed. Cassel, Judge.

No. A-06-831: **State v. Scheffert**. 07 NCA No. 12. Affirmed. Inbody, Chief Judge.

No. A-06-914: **State v. Bearden**. 07 NCA No. 28. Sentences modified. Carlson, Judge.

No. A-06-938: **State v. Coldanghise**. 07 NCA No. 30. Order vacated, and cause remanded with directions. Sievers, Judge.

No. A-06-939: **State v. Valverde**. 07 NCA No. 20. Exception sustained, and cause remanded with directions. Moore, Judge.

No. A-06-959: **State v. Jones**. 07 NCA No. 26. Affirmed. Irwin, Judge.

No. A-06-1010: **Neyens v. Neyens**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-06-1035: **In re Interest of D.C**. 07 NCA No. 34. Affirmed. Sievers, Judge.

No. A-06-1036: **State v. Dargeloh**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-06-1045: **In re Interest of R.P**. 07 NCA No. 22. Affirmed. Sievers, Judge.

Nos. A-06-1050, A-06-1051: **In re Interest of Markus K. & Justin K**. 07 NCA No. 16. Affirmed. Carlson, Judge.

No. A-06-1166: **State v. Palu**. 07 NCA No. 39. Affirmed. Carlson, Judge.

No. A-06-1178: **Mays v. Drivers Mgmt., Inc**. 07 NCA No. 28. Affirmed. Carlson, Judge.

No. A-06-1195: **State v. Bennett**. 07 NCA No. 34. Appeal dismissed. Irwin, Judge.

No. A-06-1197: **In re Interest of Mitchell H. et al**. 07 NCA No. 27. Affirmed. Irwin, Judge.

No. A-06-1233: **Romine v. Buckridge Inc**. 07 NCA No. 30. Affirmed. Irwin, Judge.

No. A-06-1270: **Doughty v. Cabela's, Inc**. 07 NCA No. 36. Affirmed. Moore, Judge.

No. A-06-1334: **State v. Dober**. 07 NCA No. 37. Affirmed. Carlson, Judge.

No. A-06-1354: **In re Interest of Ajal B. & Akur B**. 07 NCA No. 30. Reversed and remanded for further proceedings. Cassel, Judge.

No. A-06-1371: **In re Interest of Connor S. & Marissa T**. 07 NCA No. 32. Affirmed. Irwin, Judge.

No. A-07-092: **State v. Garcia**. 07 NCA No. 26. Affirmed. Inbody, Chief Judge.

No. A-07-104: **State v. Davis**. 07 NCA No. 32. Reversed and remanded. Irwin, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

ROSEN AUTO LEASING, INC., A NEBRASKA CORPORATION, APPELLANT, V. MICHAEL A. JORDAN, APPELLEE.

720 N.W.2d 911

Filed September 5, 2006. No. A-05-477.

1. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004) sets forth two ministerial requirements for a final judgment: the rendition of a judgment and the entry thereof; both are prerequisites to appellate court jurisdiction.
4. **Judgments: Records: Words and Phrases.** Rendition of a judgment is defined as the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
5. ____: ____: ____. Entry of a judgment is defined as the act of the clerk of the court in placing the file stamp and date upon the judgment.
6. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** For a final judgment to exist to allow an appellate court to acquire jurisdiction, there must be an order that is both signed by the court as well as file stamped and dated by the clerk of the court.
7. **Jurisdiction: Final Orders: Appeal and Error.** It is an appellate court's duty to dismiss appeals for lack of jurisdiction and to direct the trial court to expunge from its records actions or orders which are not valid.
8. **Courts: Judgments: Final Orders.** Trial courts must understand that any action purporting to be a judgment, decree, or final order must be rendered and entered to be valid, as provided in Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004).
9. **Judgments: Records: Notice: Fees: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2004), a notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.
10. **Judgments: Jurisdiction: Records: Notice: Appeal and Error.** The effect of Neb. Rev. Stat. §§ 25-1912(2) and 25-2729(5) (Cum. Supp. 2004) when the judgment is defective is that the appellate court potentially has jurisdiction because the lower

court's judgment can be made final by rendition by the judge or entry by the clerk of the court, whichever is lacking, long after the notice of appeal is filed.

11. ____: ____: ____: ____: ____. A premature notice of appeal is treated as filed after the proper rendition and entry of the judgment and becomes effective when the defect is cured; thus, the appellate court's "potential" jurisdiction over the appeal "springs" into full jurisdiction.
12. **Courts: Jurisdiction: Appeal and Error.** When the district court acts as an intermediate appellate court and the jurisdictional defect is caused at the county court level, the appeal in the Nebraska Court of Appeals cannot be saved by Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2004).
13. **Jurisdiction: Final Orders: Appeal and Error.** When a court lacks jurisdiction and nonetheless enters an order, such order is void.

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, EDNA R. ATKINS, Judge. Appeal dismissed.

John T. Rogers for appellant.

No appearance for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Rosen Auto Leasing, Inc. (Rosen), has attempted to prosecute this appeal from an order of the county court for Douglas County, Nebraska, denying Rosen's request of the county court to issue a capias for the arrest of Michael A. Jordan. Rosen appealed to the district court, which affirmed the county court's denial of Rosen's request. Since the docketing of the case in this court, the case has been under jurisdictional review because the original order of the county court was not properly entered by the clerk of the county court—there was no file stamp placed upon the order. Despite Rosen's attempts to remedy the jurisdictional default, we now conclude that we are without jurisdiction, and we dismiss this appeal.

Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005), this case was ordered submitted without oral argument. We write a published opinion in this case to discuss the jurisdictional problems contained herein and to discuss this case's variation of the concept of "springing" jurisdiction previously discussed in *State v. Brown*, 12 Neb. App. 940, 687

N.W.2d 203 (2004). Additionally, we feel compelled to once again emphasize the vital importance of lower courts, clerks of court, counsel, and litigants taking the most basic steps to ensure compliance with Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2004). As we iterated in *State v. Brown*, 12 Neb. App. at 940, 687 N.W.2d at 205, "[o]ur hope is that our opinion will provide guidance for the bench and bar, eliminate unnecessary procedural delays for litigants, and make the work of the appellate courts somewhat simpler."

II. BACKGROUND

On November 27, 2001, Rosen filed a petition in the county court. In the petition, Rosen sought a judgment against Jordan for default under the terms of a lease agreement.

On May 15, 2002, Rosen filed a motion seeking a default judgment because Jordan "failed to timely answer, appear or otherwise plead." On May 16, the county court entered a default judgment in favor of Rosen in the amount of $3,360.11 plus interest and costs. On November 13, Rosen filed a praecipe for execution of the default judgment, but the sheriff was "unable to locate [Jordan] in Douglas County" and Jordan had "no goods, chattels, lands and tenements on which to levy."

On August 26, 2003, Rosen filed a motion seeking an order in aid of execution of the default judgment. Rosen asked the county court to issue an order "requiring [Jordan] to appear and answer questions concerning property of [Jordan]." On August 27, the county court signed an order demanding that Jordan appear and warning that Jordan's failure to so appear could result in a warrant being issued for his arrest. A civil process server was unable to serve the order, however, because Jordan could not be located "after diligent search and inquiry."

On January 20, 2004, Rosen filed another motion seeking an order in aid of execution of the default judgment and asking the county court to issue an order "requiring [Jordan] to appear and answer questions concerning property of [Jordan]." On January 21, the county court signed an order demanding that Jordan appear and again warning that Jordan's failure to so appear could result in a warrant being issued for his arrest. A process server was again unable to serve the order because Jordan could not be located.

On May 6, 2004, Rosen filed another motion seeking an order in aid of execution of the default judgment and asking the county court to issue an order for Jordan's appearance. On May 7, the county court signed an order demanding that Jordan appear and again warning that Jordan's failure to so appear could result in a warrant being issued for his arrest. On May 7, the county court also signed an order authorizing service "by leaving the process at [Jordan's] usual place of residence and mailing a copy by first class mail to [Jordan's] last known address." A process server left the process at Jordan's "usual place of residence," and Rosen served a copy by first-class mail.

A June 29, 2004, county court journal entry indicates the following:

> Plaintiff appeared
> Defendant failed to appear. No Personal Service.
> ~~Order Signed Pl granted leave to issue Capias. Bond set at $5,000 10%.~~
>
> ERA

This journal entry does not bear any file stamp. It appears that the county court initially intended to journal that Rosen be granted leave to issue an arrest warrant for Jordan's arrest and to set a bond amount for the arrest warrant but then decided not to issue such an order because Jordan had not been personally served with the May 7 order in aid of execution. Nonetheless, because the journal entry does not bear a file stamp, it did not constitute a properly entered order pursuant to § 25-1301.

On July 28, 2004, Rosen filed a notice of appeal in the county court indicating Rosen's intention to appeal "from the order entered . . . on June 29, 2004 wherein the [county c]ourt denied [Rosen's] request for Capias to [i]ssue against [Jordan]." On September 13, Rosen filed a "Statement of Errors" in the district court challenging the county court's failure to issue an arrest warrant without personally serving Jordan. On March 9, 2005, the district court entered an order affirming the county court's "decision."

On April 7, 2005, Rosen filed a notice of appeal in the district court indicating Rosen's intention to appeal the district court's affirmance of "the decision of the Douglas County Court denying [Rosen's] request for Capias to [i]ssue against [Jordan]." On

July 7, this court issued an order to show cause. In the order, this court noted the lack of a "valid signed and file-stamped judgment denying a motion for capias" by the county court. Rosen requested an extension of time and leave of court to cure the jurisdictional defect, in which motion Rosen requested leave of court to obtain a valid judgment in the county court, a modified order in the district court, and a supplemental transcript in this court.

On August 17, 2005, the county court issued an order specifically denying Rosen's request for capias. The county court specifically found that the request was denied "solely on the fact that [Jordan] was not personally served with notice" of the county court's order in aid of execution. This order of the county court was properly signed by the county court judge and was file stamped by the clerk of the county court.

On August 24, 2005, Rosen filed a motion in the district court seeking to modify the district court's March 9 order of affirmance. Rosen requested the district court "to acknowledge the Court's acquisition of full jurisdiction in this appeal and for such other and further relief as is just and equitable." On September 1, the district court entered an order modifying the March 9 order of affirmance. The district court recognized that it had "full and complete jurisdiction" and again affirmed the county court's denial of Rosen's request for issuance of capias.

On December 6, 2005, this court issued an order, sua sponte, directing the parties to file briefs addressing the following issue:

> Assuming that jurisdiction "sprung" to the district court upon the entry of judgment in the county court on August 17, 2005, see *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004); Neb. Rev. Stat. § 25-2729(5) (Cum.Supp. 2004), does the district court's September 1 Order of affirmance confer jurisdiction upon the Court of Appeals, despite the fact that no new notice of appeal from the district court to the Court of Appeals was filed at any time after the jurisdiction of the district court was perfected on August 17?

Rosen filed its brief on appeal and specifically addressed the above issue. Jordan failed to file any brief on appeal.

III. ASSIGNMENTS OF ERROR

Because we conclude that we are without jurisdiction to hear Rosen's appeal, we need not specifically address Rosen's assignments of error concerning the merits of this case.

IV. ANALYSIS

1. § 25-1301

[1-3] We begin, as we did in *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), with the general proposition that for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Further, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). Section 25-1301 sets forth two ministerial requirements for a final judgment: the rendition of a judgment and the entry thereof; both are prerequisites to appellate court jurisdiction.

[4-6] The first ministerial requirement, found at § 25-1301(2), is rendition of a judgment, defined as the act of the court, or a judge thereof, "in making and signing a written notation of the relief granted or denied in an action." The second ministerial requirement, found at § 25-1301(3), is the entry of a judgment, defined as the act of the clerk of the court in placing the file stamp and date upon the judgment. In short, for a final judgment to exist to allow an appellate court to acquire jurisdiction, there must be an order that is both signed by the court as well as file stamped and dated by the clerk of the court. See, § 25-1301; *State v. Brown, supra.*

Since § 25-1301 became effective in August 1999, the appellate courts of this state have been required to deal with many appeals containing nonfinal judgments because the lower court's orders were missing the signature of the court or the file stamp and date of the clerk of the court, or both. *State v. Brown, supra.* See, e.g., *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002) (order missing file stamp); *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001) (orders neither signed by judge nor file stamped by clerk); *State v. Wilcox*, 9 Neb. App. 933, 623 N.W.2d 329 (2001)

(order missing file stamp and date); *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000) (order not signed by judge). In addition, numerous cases have been disposed of by the appellate courts of this state by way of summary dismissal because of similar failings.

[7,8] This court has previously indicated that "[i]t is our duty to dismiss appeals for lack of jurisdiction and to direct the trial court to expunge from its records actions or orders which are not valid." *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. at 318, 633 N.W.2d at 916. "Trial courts must understand that any action purporting to be a judgment, decree, or final order must be rendered and entered to be valid, as provided in § 25-1301." 10 Neb. App. at 318, 633 N.W.2d at 916.

More than 6 years ago, the Nebraska Supreme Court cautioned the lower courts and the practicing bar of the importance of the legislative enactments which created the current version of § 25-1301, and the Supreme Court "urge[d] both the trial courts and the practicing bar to familiarize themselves with this new legislation as it w[ould] have a substantial impact on future appeals." *Hornig v. Martel Lift Systems*, 258 Neb. 764, 769, 606 N.W.2d 764, 769 (2000). Nonetheless, this court has noted that trial courts were slow to adopt procedures to ensure compliance with § 25-1301, and this court has encouraged lower courts to utilize meaningful file stamps to comply with § 25-1301 and specifically noted that former methods and procedures of rendering judgments are no longer effective without compliance with § 25-1301. See, *State v. Wilcox, supra*; *Mumin v. Hart, supra.*

Unfortunately, although the current version of § 25-1301 has now been in effect for nearly 7 years, too often trial courts and clerks of court continue to disregard the requirements of § 25-1301. Additionally, counsel and litigants continue to prosecute appeals without ensuring that the two simple ministerial steps of rendition of the judgment and entry thereof have been accomplished. We take this opportunity to once again remind trial courts, counsel, and litigants to ensure that a final judgment has been rendered by the court's signing of the order and has been entered by the court clerk's placing a date and file stamp on the order before an appeal is attempted. The failure to do so will continue to cause the appellate courts to "unnecessarily

wrestle with jurisdictional issues created by less than full compliance by court clerks and trial judges with the clear statutory requirements" and will result in continued dismissals for lack of jurisdiction. *State v. Wilcox*, 9 Neb. App. at 936, 623 N.W.2d at 331-32.

2. "Springing" Jurisdiction

[9] In *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), this court discussed the interaction between § 25-1301 and either Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2004) (when trial court is district court) or Neb. Rev. Stat. § 25-2729(5) (Cum. Supp. 2004) (when trial court is county court) and the concepts of "potential" jurisdiction and "springing" jurisdiction. In *State v. Brown*, we noted that § 25-1912(2) provides:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

Accord § 25-2729(5). We also noted that "announcement" can come, inter alia, orally from the bench, from trial docket notes, from file-stamped but unsigned journal entries, or from signed but not file-stamped journal entries. *State v. Brown, supra.*

[10,11] As we recognized in *State v. Brown*, § 25-1912(2) and § 25-2729(5) create what we called "potential" jurisdiction and "springing" jurisdiction. These jurisdictional situations occur when the trial court's order which is intended to finally dispose of the matter is announced but not rendered or not entered, but nonetheless a party files a notice of appeal. The effect of §§ 25-1912(2) and 25-2729(5) when the judgment is defective is that the appellate court "potentially" has jurisdiction because the lower court's judgment can be made final by rendition by the judge or entry by the clerk of the court, whichever is lacking, long after the notice of appeal is filed. In such a situation, the premature notice of appeal is treated as filed after the proper rendition and entry of the judgment and becomes effective when the defect is cured. Thus, the appellate court's "potential" jurisdiction over the appeal "springs" into full jurisdiction. This is true whether the appellate court is the district court sitting as an

intermediate appellate court, the Nebraska Court of Appeals, or the Nebraska Supreme Court.

[12] In *State v. Brown*, we also recognized the unique problems that can occur when the district court acts as an intermediate appellate court. Specifically, we recognized that when the district court acts as an intermediate appellate court and the jurisdictional defect is caused at the county court level, the appeal in this court "cannot be saved by § 25-1912(2)." 12 Neb. App. at 942, 687 N.W.2d at 206.

The procedural background of *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), was in many ways substantially comparable to the procedural background of the case at bar. In *State v. Brown*, the county court sentenced the defendant, Scott A. Brown, on February 12, 2004, to a term of imprisonment. The court's sentencing order was rendered by being signed by the sentencing judge, but was not entered due to not being file stamped by the clerk of the court. Brown filed a notice of appeal to the district court, which affirmed the sentence in an order that was both rendered and entered in July. Brown then filed a notice of appeal to this court. This court entered a show cause order on August 11, and Brown responded by filing a supplemental transcript showing that the clerk of the county court had file stamped the county court's February sentencing order on August 17, after this court's show cause order.

This court concluded that when the district court reviewed the county court's action and rendered its order of affirmance, the district court was acting without jurisdiction, because the county court's sentencing order was not final under § 25-1301 until August 17, 2004, when the previously rendered order was entered by the clerk of the court. *State v. Brown, supra*. We concluded that when the district court entered its July order of affirmance, it had only potential jurisdiction which did not "spring" into existence until August 17—meaning that its July order was entered without jurisdiction. We ordered the district court to vacate its July order of affirmance. Because the district court lacked jurisdiction when it entered its July order of affirmance, that order was void and this court acquired no jurisdiction through the notice of appeal filed in the district court. Rather, the case was remanded for the district court to enter a

new order—the implication being that a new notice of appeal from a properly rendered and entered district court order would be required for this court to acquire jurisdiction.

3. Application to Case at Bar

The case at bar, although in many ways comparable procedurally to *State v. Brown, supra*, differs from that case because of Rosen's attempts to cure the jurisdictional defect. As such, we discuss the springing jurisdiction problem in this case as it relates to the jurisdiction of the district court and as Rosen's cure of the jurisdictional defect relates to this court's jurisdiction.

(a) District Court's Jurisdiction

When Rosen filed its notice of appeal in the county court on July 28, 2004, the district court did not acquire full jurisdiction. Because the county court's order had not been entered by the court clerk's placing a date and file stamp on the order, there was a jurisdictional defect and the district court acquired only potential jurisdiction, subject to § 25-1912. That jurisdiction did not "spring" into full jurisdiction until the defect was cured, which did not occur until the county court rendered and entered its order on August 17, 2005. Thus, when the district court entered its order of affirmance on March 9, 2005, the district court was acting without jurisdiction.

[13] When a court lacks jurisdiction and nonetheless enters an order, such order is void. See, *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001) (where district court lacked jurisdiction over action, further orders were null and void); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001) (district court order void where court lacked jurisdiction); *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005) (order entered by court lacking subject matter jurisdiction was void). As such, the March 9, 2005, order of the district court affirming the county court's decision was void, and we vacate that order. See *State v. Bracey, supra*, and *Wells v. Goodyear Tire & Rubber Co., supra* (appellate court has power and duty to vacate void order). The district court was without jurisdiction to act until its potential jurisdiction "sprang" into full jurisdiction on August 17.

(b) Court of Appeals' Jurisdiction

As we recognized in *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004), when the district court acts as an intermediate appellate court and the jurisdictional defect occurs in the county court, simply curing the jurisdictional defect in the county court will not save the appeal in this court. Doing so only remedies the springing jurisdiction problem in the district court, but leaves this court without jurisdiction until the district court has rendered and entered a valid order and an appeal is taken from that order.

In the case at bar, Rosen cured the jurisdictional defect in the county court, allowing the district court's potential jurisdiction to spring into full jurisdiction. Unlike the defendant in *State v. Brown*, however, Rosen further attempted to save this appeal by moving for the district court to enter a new order recognizing its full jurisdiction. The district court rendered and entered an order on September 1, 2005. However, no notice of appeal was filed from that order.

We conclude that we lack jurisdiction to consider the merits of Rosen's appeal, because no notice of appeal was filed from the only valid order rendered and entered by the district court—the September 1, 2005, order of affirmance. The jurisdictional problem with Rosen's appeal to this court from the district court was not, and is not, a problem of springing jurisdiction remedied by Rosen's curing of the county court's defective order.

The jurisdictional problem with Rosen's appeal to the district court from the county court was a problem occasioned by Rosen's filing a notice of appeal before the county court's order had been both rendered and entered. Under § 25-1912 and our decision in *State v. Brown, supra*, Rosen created a potential and springing jurisdiction problem in the district court which could be, and was, remedied by curing the defect with the county court's order.

The jurisdictional problem with Rosen's appeal to this court from the district court, however, was a problem occasioned by Rosen's filing a notice of appeal from a void order. The problem with Rosen's appeal to this court was not that the notice of appeal was filed after the district court had announced a valid decision but before that decision was properly rendered or entered, but,

rather, the problem was that the district court's order was rendered and entered without jurisdiction and was thus void. As a result, Rosen's curing the jurisdictional defect with the county court's order, although providing the district court with jurisdiction to act, in no way made Rosen's notice of appeal to this court valid or effective, because it remained a notice of appeal from a void order.

When Rosen cured the defect with the county court's order by having the county court properly render a judgment and enter an order on August 17, 2005, Rosen's notice of appeal to the district court became effective and the district court acquired jurisdiction to act. No actions by the district court prior to August 17 could be valid, and any prior orders by the district court, including the March 9 order of affirmance, were void. Although the district court's September 1 order of affirmance is a validly rendered and entered order, no notice of appeal was filed from that order. As such, we conclude that we lack jurisdiction, because the only notice of appeal to this court was from a void order.

V. CONCLUSION

It is well established that an appellate court has the power and the duty to determine whether it has jurisdiction. See *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). It is also well established that the appellate courts in Nebraska engage in a practice of early examination of cases for jurisdictional defects. See *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004). The appellate courts of Nebraska, as discussed earlier herein, have repeatedly attempted to emphasize the importance of proper rendition of judgments by trial judges and proper entry thereof by court clerks, as well as ensuring such by counsel and litigants. As we have repeatedly established, the straightforward requirements of § 25-1301 mandate that the trial court properly render a judgment by signing an order and that the clerk of the court properly enter a judgment by placing a date and file stamp on the order. As we noted in *State v. Brown*, 12 Neb. App. at 944, 687 N.W.2d at 207, "[t]he requirements for rendition and entry of judgments under § 25-1301 have been with us since August 28, 1999, and adherence to the requirements found therein should now be a matter of routine." Had these basic requirements

been complied with in the present case, the complicated jurisdictional morass that we have had to unravel would have been entirely avoided and the merits of Rosen's appeal would have been reviewable. Unfortunately, that was not done.

Despite Rosen's efforts to cure the defect in the county court's order and to cause the district court's potential jurisdiction to spring into full jurisdiction, Rosen failed to properly secure jurisdiction in this court. Because Rosen failed to file a notice of appeal from a properly rendered and entered order of the district court, we are without jurisdiction and are compelled to dismiss the appeal. The district court's March 9, 2005, order of affirmance, being a void order, is vacated.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
GARY S. MUSE, APPELLANT.

721 N.W.2d 661

Filed September 12, 2006. No. A-05-947.

1. **Public Officers and Employees: Records.** It is the duty of the clerk of each of the courts to file together and carefully preserve in his or her office all papers delivered to him or her for that purpose in every action or special proceeding.
2. ____: ____. The clerk of the court shall endorse upon every paper filed with him or her the day of filing it.
3. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.
4. **Criminal Law: Motions to Suppress: Appeal and Error.** In criminal cases, a trial court's ruling on a motion to suppress is reviewed for an abuse of discretion.
5. **Trial: Evidence.** The trial court is permitted to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice; the fact that evidence is prejudicial is not enough to merit exclusion, and relevant evidence should be excluded only if it has a tendency to suggest a decision on an improper basis that is unfairly prejudicial.
6. **Trial: Witnesses.** In a jury trial, the credibility of witnesses is an issue to be resolved by the jury, not by the trial court.
7. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence.

8. ____: ____: ____. On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
9. **Habitual Criminals.** Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than 1 year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal.

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

Stefanie A. Martinez and James Walter Crampton for appellant.

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

IRWIN, MOORE, and CASSEL, Judges.

PER CURIAM.

I. INTRODUCTION

Gary S. Muse appeals his convictions and sentences on a number of criminal charges. Muse asserts on appeal that the record does not indicate the second amended information, upon which trial proceeded, was ever properly filed and that the trial court erred in granting a motion in limine, in admitting certain evidence, in accepting the verdict, and in finding Muse to be a habitual criminal. We find no merit to these assertions, and we affirm.

II. BACKGROUND

On May 16, 2005, Muse was arraigned on an amended information. Although the amended information does not appear in the transcript, the arraignment indicates that the amended information charged, and Muse was arraigned on, one count of first degree sexual assault, two counts of robbery, and a charge of being a habitual criminal. Muse was also arraigned on three counts of use of a deadly weapon in the commission of a felony, although, as noted below, the three use counts were apparently not actually included in the amended information. Muse pled not guilty to all charges.

On May 23, 2005, the parties appeared before the district court for trial. The State requested leave to file a second amended information to add three counts of use of a deadly weapon in the

commission of a felony. According to counsel for the State, "[t]he original information had the [use counts] on it." "For some reason," he explained, "they didn't get [included] on [the amended information] and for some ungodly reason I didn't catch it until this weekend when I was going over the information because this is obviously a use case." Muse objected to the request for leave to file a second amended information, indicated that he was ready to proceed with jury selection, and asked the court to deny the request.

At that point, the court asked Muse's counsel if she was "aware the allegation in this case is use of a knife," to which query Muse's counsel responded, "Yes." The court expressed its displeasure with the State's amending "at the last minute" but found, "I do believe there's no notice of [sic] surprise and the knife was involved and the state is entitled to amend and [Muse] is entitled to 24 hours' notice."

The record does not indicate that Muse was served with a copy of the second amended information at this time, and the second amended information was not read aloud in court. The court, however, immediately arraigned Muse on the three counts of use of a deadly weapon in the commission of a felony. The court asked Muse if he "wish[ed] to enter a plea [that day] with respect to those three charges," and Muse responded, "Yes, not guilty."

The court asked counsel for the State, "Do you have a copy of the [second] amended information?" Counsel for the State responded, "This was the original I was going to file." The court then indicated to counsel for the State, "Probably ought to be just left with me and I'll put a note on it to file it." The case proceeded to trial on May 24 through 26, 2005, and the jury returned a verdict on May 26 finding Muse guilty.

On appeal, the transcript to this court, which transcript is duly certified by a deputy clerk of the district court at its conclusion, begins with a recital of the district court's assigned judge, judicial district, county, location, and term, followed by the further recital:

> BE IT REMEMBERED, that in a certain cause lately pending in the District Court of Douglas County, State of Nebraska entitled: State of Nebraska against Gary S. Muse, appearing on Criminal Docket 165 Number 259 there was

> filed in the office of the Clerk of said Court on the 23rd day of May, 2005, a certain Information, which said Information is in the words and following, to-wit:
>
> SECOND AMENDED INFORMATION

The transcript then continues with photocopies of the filings in the district court, including a copy of the second amended information.

The notation of filing on the face of the second amended information does not appear in the frequently observed form of a file stamp. The first page of the second amended information represents a summary or title page and, except as we note below, appears to have been typed by the State. The upper two-thirds of the page includes the case number, the case caption, the title of the document, a summary of the charges, and a list of witnesses. That information is separated from the bottom one-third of the page by a short line, and beneath that line is an area for filing information. In the lower area appear the words "FILED: May 23, 2005," and immediately below those words appears a signature block stating the proper name and abbreviated title of the district court clerk followed below by the word "By:" and a signature line. Under the signature line appears the word "Deputy." Beneath the signature block, the document provides spaces for designating the "Journal" and "Page" at which the second amended information was recorded. The signature line bears a signature from a deputy clerk of the district court; however, the journal and page designations remain blank. Immediately to the right of the deputy clerk's signature, there appears an inexplicable stamp that indicates, "MADE MAY 26 2005."

The last page of the second amended information includes three certificates. The first is a certificate indicating that the contents of the second amended information "are true to the best of my knowledge and belief" and is signed by counsel for the State. That certificate is notarized by a deputy clerk of the court and indicates that the second amended information was sworn to before the deputy clerk on May 23, 2005. The second is a certificate indicating that the second amended information "is a full and true copy of the information in [this] case" and includes blanks to be filled in to designate the case caption, the date, and the signature of a deputy clerk of the court. None of the blanks

in this certificate are filled in. The third is a certificate added to the page by way of a stamp, indicating that "[a] certified copy of the information was delivered or mailed to [Muse] or counsel of record . . . ." This certificate indicates that a certified copy of the second amended information was not served on Muse until May 26, and it includes a signature of a deputy clerk of the court.

On July 6, 2005, Muse appeared for sentencing. At that time, Muse's counsel asked the court to note that he had filed a "motion to arrest judgment"; he argued that the district court lacked jurisdiction because the second amended information was not properly filed with the clerk of the court prior to the verdict's being rendered. The State argued that "[t]he fact that the clerk's office didn't put [its] stamp on [the second amended information]" on May 23, when it was allegedly filed, "does not render anything that [the] Court did ineffective or not valid."

On July 7, 2005, the court filed an order sentencing Muse. The court sentenced Muse to 20 to 30 years' imprisonment for first degree sexual assault, 10 to 20 years' imprisonment for each of the two robbery convictions, and 10 to 20 years' imprisonment for each of the three convictions of use of a deadly weapon in the commission of a felony. This appeal followed.

III. ASSIGNMENTS OF ERROR

Muse has assigned eight errors on appeal, which we consolidate for discussion to five. First, Muse asserts that the trial court erred in proceeding to trial and convicting him upon a second amended information that the record does not establish was ever properly filed. Second, Muse asserts that the court erred in granting a motion in limine. Third, Muse asserts that the court erred in admitting certain evidence. Fourth, Muse asserts that the court erred in accepting the jury's verdict. Fifth, Muse asserts that the court erred in finding Muse to be a habitual criminal.

IV. ANALYSIS

1. Jurisdiction of District Court

The initial issue presented in this appeal is whether Muse's convictions and sentences can be sustained based on the record

presented. Muse argues that the second amended information, upon which trial proceeded, was never properly filed. The State argues that the second amended information was properly filed. We conclude that the record presented fails to establish the second amended information was not properly filed and that accordingly, the district court had jurisdiction to proceed with trial, conviction, and sentencing of Muse.

We begin by observing that in the introduction to the transcript, the lower court certifies that the second amended information was filed on May 23, 2005. The record presented on appeal also provides a copy of the second amended information to further prove its content and filing. The document shows that it was subscribed and sworn to before a deputy clerk of the district court on May 23. The face of the document shows a notation that the document was "FILED," followed by the purported date of filing, also May 23, 2005, and the signature of a deputy clerk acting in the name of the district court clerk, memorializing that the document was thus filed, albeit without using a file stamp.

When the parties appeared in court, the State was seeking leave to file the second amended information, indicating that such had not yet been done at that time. At the conclusion of the day's proceedings, the court indicated that it would take the second amended information from counsel for the State and "put a note on it to file it." On the second amended information's face, the deputy clerk's notation of filing states that such action occurred on May 23, 2005.

[1,2] Neb. Rev. Stat. § 25-2205 (Reissue 1995) states that "[i]t is the duty of the clerk of each of the courts to file together and carefully preserve in his [or her] office all papers delivered to him [or her] for that purpose in every action or special proceeding." Neb. Rev. Stat. § 25-2206 (Reissue 1995) requires, in relevant part, that "[t]he clerk of the court shall endorse upon every paper filed with him [or her] the day of filing it . . . ."

The duty imposed by § 25-2206 upon the clerk requires that officer to "endorse" the day of filing upon each document. However, except with regard to a final judgment, the parties have not cited, nor have we found, any statute that requires the "endorse[ment]" to be accomplished using a stamp. See *id.* We

recognize that Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2004) requires the clerk to affix a file stamp upon a judgment, decree, or final order as part of the "entry" of such judgment, decree, or final order. While use of a file stamp is an efficient and desirable means to making the endorsement required by § 25-2206, no statute requires use of a file stamp to make the required endorsement upon an information filed in a criminal case. Thus, by the deputy clerk's endorsement, the second amended information itself attests to its filing on May 23, 2005. It makes no difference in our analysis that some other person initially places the date of filing upon the document, so long as it appears that the filing officer has adopted that date.

[3] It has long been held that in the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed. See, *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *Ludwig v. Board of County Commissioners*, 170 Neb. 600, 103 N.W.2d 838 (1960). See, also, e.g., *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993). Such presumptions are applied to the official acts of the clerks of the district courts. *State v. Hess, supra*. See, e.g., *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927). Because the clerk of the district court is required by law to file and endorse the date of filing of all documents filed in the court, the timely filing of such documents is an official act to which the presumption of regularity attaches. *State v. Hess, supra*.

In this case, Muse argues that the record does not indicate that the second amended information, upon which trial proceeded, was ever filed. In this regard, Muse relies primarily upon the absence of a file stamp on the second amended information. While the blanks were not filled in concerning the journal or page at which the second amended information was recorded, we observe that no statute requires the journal and page of recording to be endorsed on the document. Neb. Rev. Stat. § 29-1604 (Reissue 1995) generally applies the laws concerning prosecution upon indictments to prosecutions and proceedings upon informations. Neb. Rev. Stat. § 29-1418(1) (Reissue 1995) requires the court clerk to "endorse" upon an indictment

the "day of [its] filing" and requires the clerk to "enter each case upon the appearance docket, and also upon the trial docket of the term." These specific requirements are wholly consistent with the general requirement of § 25-2206. No statute requires that the location in the appearance docket where that notation is made be endorsed upon the filed document. In other words, while the clerk must record the filing of the information in the appearance docket, the clerk is not required to endorse the information with the journal and page of the appearance docket. Similarly, the typed certificate indicating that the second amended information is a true and accurate copy of the filed document was not completed, but no statute requires any such certificate. While it is apparent, from the discussion at the time the State sought leave to file a second amended information, that the second amended information was being left with the court to "put a note on it to file it," the second amended information bears the signature of a deputy clerk of the district court immediately below a typed indication that the information was filed on "May 23, 2005."

The deputy clerk's signature on the second amended information and the typed date of May 23, 2005, are presumed to be correct until the contrary is shown. See *State v. Hess, supra.* Thus, we must presume, in the absence of affirmative evidence to the contrary, that the deputy clerk performed her duty and endorsed the second amended information with the date it was in fact presented to her for filing—presumably by adopting the date already typed on the instrument. See *id.*

Our approach is also consistent with the decision of the Nebraska Supreme Court in *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). In that case, the record indicated that on April 30, 1999, before the clerk of the district court, the county attorney subscribed and swore to an information charging the defendant. The information, however, was not file stamped until October 5. The defendant had pled not guilty on October 4. On January 20, 2000, the defendant filed a motion to discharge on speedy trial grounds which was denied by the district court. The district court found that the speedy trial period begins to run when an information is filed and found that the information at issue was not filed until it was file stamped on October 5, 1999.

On appeal, this court affirmed the district court's denial of the motion to discharge. *Id.* See, also, *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication). This court concluded that the speedy trial period did not begin to run until the information was file stamped on October 5, 1999. *Id.* The Nebraska Supreme Court dismissed a petition for further review as having been improvidently granted and, in a later appeal, held that this court's holding concerning the filing of the information had become the law of the case. *Id.*

The critical determination in our opinion in that case was our refusal to allow, for purposes of the speedy trial statute, the date of subscribing and swearing to the information to contradict the clerk's endorsement of the date of filing, which endorsement was accomplished by use of a file stamp. Neb. Rev. Stat. § 29-1207(2) (Reissue 1995) prescribes that the 6-month speedy trial period commences to run "from the date the indictment is returned or the information [is] filed." The statute does not refer to or require the use of a file stamp. In *Baker*, the date of filing was proven by the clerk's endorsement in the form of a file stamp bearing the date of October 5, 1999. In the case before us, the date of filing is proven by the deputy clerk's endorsement of a typed date by her signature. Thus, consistently with *Baker*, we view the endorsement date, rather than the date of subscribing and swearing, as controlling. In the instant case, unlike in *Baker*, those dates are the same. We recognize that the instant case presents no speedy trial issue; rather, we simply point out that our reliance upon the deputy clerk's endorsement of the filing date in the case before us does not conflict with the analysis in *Baker*. We find Muse's assertions of error concerning the filing of the second amended information to be without merit.

2. Motion in Limine

Muse asserts that the district court erred in sustaining the State's motion in limine to preclude testimony concerning a pending felony drug charge against one of the victims and a police search of the victims' residence conducted approximately 2 weeks prior to the incidents in the present case. Muse argues that he was prevented from presenting his "theory of the

defense"—"a drug deal gone bad." Brief for appellant at 9. We find no merit to Muse's assertions.

Although the court prevented Muse from presenting evidence on the matter, the record indicates that the two victims were the subject of an Omaha Police Department drug raid "a couple weeks prior" to the incident in this case, in which raid "$9,000 in cash and drugs were seized." At the time of trial in the present case, the male victim was apparently facing a pending felony drug charge as a result of the raid.

Prior to trial in the present case, the State made an oral motion in limine seeking to prevent Muse from inquiring about the male victim's pending felony charge and the prior drug raid on the victims' home. The State argued that the pending felony charge and the prior drug raid "somewhat [relate] to this case" and noted to the court, "When [Muse and his codefendants in the present] case came to the house, they demanded money, valuables, kept asking where's it at, where's it at. And we could assume that [the drugs and money were] what they're talking about." The State argued that Muse should be prevented from inquiring about the pending felony charge and the prior raid

> because [they] ha[ve] absolutely nothing to do with the facts of this particular case, in that if that was the motive for them coming over there, Your Honor, that has nothing to do with any of the elements. It has nothing to do with proving this case beyond a reasonable doubt. And it's prejudicial.

The court granted the motion in limine concerning the pending felony charge. We find no error in the ruling on this portion of the State's motion in limine.

Concerning the prior drug raid, Muse's counsel argued that the evidence was relevant "to the motive and intent" and that it "certainly could be impeachment material." The State argued that the evidence could not be impeachment material because "[i]mpeachment is when you're impeaching somebody's testimony, prior testimony, memory, knowledge of the event." The court reserved ruling concerning evidence of the prior drug raid and indicated that it would "make a decision at the time" and "[w]ait and see . . . whether [it] deem[ed] it relevant at the time." In effect, the court overruled that part of the State's motion

in limine, and because this part of the ruling was favorable to Muse, it cannot now be asserted as error. We therefore turn to Muse's arguments regarding exclusion of testimony.

During the trial, the male victim testified as a witness for the State. He described in detail what happened in the present case and identified Muse. During cross-examination, Muse's counsel questioned the male victim as follows:

> Q. Okay. And you relate to the [police] officers that the suspects were asking where are the drugs, where the money was; correct?
>
> A. Yes.
>
> Q. And you told the officers then that you did not know what [the suspects] were talking about; is that correct?
>
> A. Yes.
>
> Q. And that wasn't entirely truthful; was it?

At that point, the State objected and, at sidebar, argued, "Now we're getting into the area of the motion in limine when the police were there before talking about drugs and money. There's no relevancy to this line of questioning and I'd ask that we have a ruling on our motion in limine to keep that material out." Muse's counsel argued that if the court continued to allow this line of questioning, the male victim was "going to admit that he lied to the officers about being truthful with them about drugs and money and everything at the house" and that "it goes directly to his credibility." The court then inquired, "How does it go to his credibility? Where is it that you're saying he's been lying?" Muse's counsel responded that if the court continued to allow the questioning, it was "going to come out that [when] the officers asked [the male victim] if he knew any reason that people would be looking for drugs or money there, he said no." Counsel continued:

> And then eventually when pressed with information regarding the fact that his house had been raided a couple weeks prior and that $9,000 in cash and drugs were seized, he then came clean. He admitted lying to [the officers] at first. And that's directly related to his credibility. He's lying to [police] officers.

The State argued, "That has nothing, absolutely nothing to do with what we're doing here . . . it's not relevant and [is]

collateral." Muse's counsel responded, "I think anything involving his proclivity to lie to [police] officers affects his credibility." The court sustained the objection and indicated, "If it was directly in line with respect to some matter pertaining to this case, I'd let you go ahead. But it's highly prejudicial and it's something that occurred before."

Muse's counsel's next question of the male victim was "Sir, you're currently facing criminal charges that have been brought by [the county attorney's] office?" The State immediately objected. The State, in sidebar, argued, "[D]efense counsel intentionally violated [the court's] ruling on the motion in limine regarding pending charges and the state is contemplating moving for a mistrial. That was totally improper and inflammatory in front of the jury." Muse's counsel argued that the question "was a very general question" and explained:

> I was trying to get at the fact that [the male victim] might have motivation, just like any other state's witness that has charges pending, to explore whether or not they're going to be questioning some kind of deal. I kept it general for a very specific reason not to violate the order.

The court overruled the motion for mistrial, instructed the jury to disregard the question, and indicated, "[The question] is in violation of the motion in limine, so I'm going to ask [Muse's counsel] not to [ask] it again."

[4-6] In criminal cases, a trial court's ruling on a motion to suppress is reviewed for an abuse of discretion. See *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). Additionally, the trial court is permitted to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice; the fact that evidence is prejudicial is not enough to merit exclusion, and relevant evidence should be excluded only if it has a tendency to suggest a decision on an improper basis that is unfairly prejudicial. See, *id.*; Neb. Rev. Stat. § 27-403 (Reissue 1995). In a jury trial, the credibility of witnesses is an issue to be resolved by the jury, not by the trial court. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

Muse's arguments at trial were substantially in conformity with his arguments on appeal. Muse asserts the following on appeal:

> [T]he preclusion of the evidence left the jury with a completely distorted impression of the incident and the motives of the victims and [Muse] and the impression of the condition of the residence which was in total disarray from the [previous police search] but photographic evidence was admitted which tended to show that [Muse] had caused the disarray. [Muse] argued that his defense of a drug deal gone bad was prevented by the order in limine. Muse asserts that the trial court denied him his right to a fair trial and violated his constitutional rights in preventing him from presenting his theory of the defense.

Brief for appellant at 9.

We find no abuse of discretion by the district court in excluding this testimony. Muse has not presented any authority, nor are we aware of any, which would indicate that Muse's motive for committing these crimes—a "drug deal gone bad"—would provide any kind of defense to any of the charges. Muse did not assert that this was a case of mistaken identity, but, rather, indicated in arguments to the trial court and this court that his theory of defense was that the entire incident was part of a drug deal. The district court did not abuse its discretion in precluding the testimony.

Although credibility of witnesses is always an issue, and although this evidence was relevant to the male victim's credibility, we also do not find the district court's exclusion of the evidence to be reversible error in this regard. The record in this case contained substantial evidence implicating Muse in these crimes. Not only the male victim's testimony, set forth above and objected to, but also the female victim's testimony, expert DNA evidence, and the testimony of a codefendant who had driven the "getaway" car, all demonstrated Muse's guilt. As such, any error in excluding this evidence was harmless beyond a reasonable doubt. See *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992) (improper admission of evidence is harmless error where evidence overwhelmingly supports conviction). This assignment of error is without merit.

3. Admission of Evidence

Muse next assigns as error that the district court "abused its discretion in receiving irrelevant and inflammatory photographic

evidence of knives which were not used in a crime." Muse argues that one photograph received by the district court was "prejudicial" and therefore should not have been received. Brief for appellant at 26. We find no merit to this argument.

The photograph at issue depicts a table in the victims' residence on which rest four knives. It is not clear from the testimony at trial whether any of the four knives are alleged to be the knives used by Muse and the other suspect in perpetrating the crimes. Muse's objections to the photograph at trial were that the photograph was "cumulative" and "prejudicial."

[7,8] On appeal, Muse argues that "[n]o testimony related the knives to any element of the crimes alleged." *Id.* at 25. Additionally, Muse urges this court to construe his "prejudice" objection as a "relevance and materiality" objection. *Id.* at 26. The Nebraska Supreme Court has held that to preserve a claimed error in admission of evidence, a litigant must make a timely objection, which specifies the ground of the objection to the offered evidence. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Further, on appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *State v. Bray*, 243 Neb. 886, 503 N.W.2d 221 (1993).

In this case, Muse did not make any objection at trial concerning the foundation, relevance, or materiality of the photograph. Rather, Muse asserted that the photograph was cumulative, an objection he appears to have abandoned on appeal, and that the photograph was prejudicial. We conclude that Muse failed to preserve any issue concerning foundation or relevance of the photograph, and we find no merit to this assignment of error.

4. Acceptance of Verdict

Muse next asserts that the district court "erred when it accepted the verdict of eleven jurors polled and discharged the jury." We find this assignment of error to be meritless.

The record indicates that Muse asked the court to poll the jury when it returned the guilty verdicts. The court proceeded to poll the individual jurors, but for some reason, only 11 of them were initially polled. The court then accepted the verdict and found Muse guilty. Shortly thereafter, it was brought to the

attention of the court that one juror had not been polled. The court brought the 12th juror into the courtroom, polled the juror, and discharged him.

Neb. Rev. Stat. § 29-2024 (Reissue 1995) authorizes the polling of the jury "[b]efore the verdict is accepted" if requested by either party. Although Muse is correct in asserting that "[t]here is no provision that permits the court to separately poll a juror" after the verdict is accepted, brief for appellant at 25, neither is there any authority which suggests that doing so results in reversible error. In this case, the record indicates that all 12 jurors were polled and that all 12 jurors confirmed that their verdicts were "guilty" on each count, and Muse has not demonstrated any prejudice resulting from the separate polling of the 12th juror. This assignment of error is without merit.

5. Habitual Criminal

Muse next asserts that the district court "erred in receiving a partially authenticated exhibit and in finding [Muse] to be an habitual criminal." We find no merit to Muse's assertions.

At the sentence enhancement hearing, the State presented, without objection, evidence of a 2002 conviction for the crime of delivery of a controlled substance, for which Muse was sentenced to 18 to 24 months' imprisonment; evidence of a 1994 conviction for the crime of possession of a firearm by a felon, for which Muse was sentenced to 15 months' to 3 years' imprisonment; and evidence of a 1984 conviction for the crimes of false imprisonment and use of a deadly weapon in the commission of a felony, for which Muse was sentenced to consecutive terms of 18 months' to 3 years' imprisonment. In addition, the State offered a " 'pen packet' " from the Department of Correctional Services which compiled all three prior convictions, photographs of Muse, and fingerprint records.

The packet contains a cover page, which summarizes what is contained in the packet, and a concluding page, which is a certification from the records manager of the Secretary of State's office. The concluding page certifies that "the (1) photograph(s), (2) fingerprint card(s), (3) commitment, and (4) discharge order attached hereto are copies of the original records of" Muse. Muse objected that the packet should not be received because

the certification refers to only one "commitment" and one "discharge order" and therefore should not be construed as covering all three commitments and all three discharge orders contained within the packet. We find the packet to be sufficiently authenticated to be admissible and find no error by the district court in receiving the exhibit. Additionally, Muse failed to object to the other three exhibits proving his prior convictions and sentences.

In addition, Muse argued to the district court, and argues in his brief to this court, that with respect to one of the prior convictions, he was sentenced to 18 to 24 months' imprisonment with credit for 147 days for time served, but the evidence does not show he was committed to prison for more than 1 year, and as a result, the conviction was not properly used for enhancement. The Nebraska Supreme Court has specifically held that actual time served is not a consideration in determining whether the terms of the enhancement statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), have been satisfied. See, *State v. Wyatt*, 234 Neb. 349, 451 N.W.2d 84 (1990); *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), *overruled on other grounds, State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). Rather, it is the term of a defendant's prior sentences which controls the applicability of the habitual criminal penalty. See *id.*

[9] Section 29-2221(1) provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . .

The State presented evidence of three prior convictions, each of which resulted in a sentence of not less than 1 year in prison, which evidence was not objected to. Additionally, we find that the packet, which further compiled all three prior convictions, was properly authenticated. Muse's final assignment of error is without merit.

V. CONCLUSION

We find that the record fails to establish the second amended information was not properly filed and that, accordingly, the district court had jurisdiction to proceed with trial, conviction, and

sentencing of Muse. We find no merit to any of Muse's assertions of error concerning his trial or enhancement hearing. The judgment of the district court is affirmed.

AFFIRMED.

IRWIN, Judge, dissenting.

The record presented on appeal fails to demonstrate that the operative information was ever properly filed before Muse's trial was held, and such failure creates a jurisdictional defect which makes the trial court's convictions and sentences void. Additionally, the majority's holding creates potential speedy trial problems. For those reasons, I respectfully dissent and conclude that this court should reverse.

As the majority notes, the issue presented in this appeal is whether Muse's convictions and sentences can be sustained based on the record presented. Muse argues that the second amended information, upon which trial proceeded, was never properly filed. The State argues that the second amended information was properly filed, notwithstanding the absence of any file stamp. The record presented fails to establish that the second amended information was properly filed, and accordingly, the district court was without jurisdiction to proceed with trial, conviction, and sentencing of Muse.

Neb. Rev. Stat. § 29-1602 (Cum. Supp. 2004) provides in part:

> All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. The prosecuting attorney shall subscribe his or her name thereto and endorse thereon the names of the witnesses known to him or her at the time of filing.

As long ago as 1925, the Nebraska Supreme Court held that failure to comply with the mandatory statutory language in the first sentence of the statute quoted above constitutes a jurisdictional defect. *Langford v. State*, 114 Neb. 207, 206 N.W. 756 (1925). In that case, the trial court ruled that the county attorney was not disqualified to file an information, but no information was actually filed in the district court. The defendant was convicted after a trial. On appeal, the Supreme Court held that the county attorney's failure to file the information pursuant to statutory language identical to that quoted above constituted a

jurisdictional defect and the court reversed the conviction and remanded the case.

In this case, Muse argues that the record does not indicate that the second amended information, upon which trial proceeded, was ever filed. As indicated above in the background section of the majority opinion, there is no file stamp on the second amended information, the blanks were not filled in concerning the journal or page at which the second amended information was allegedly filed, and the certificate indicating that the second amended information is a true and accurate copy of the document allegedly filed was never completed. It is apparent from the discussion in the trial court at the time the State sought leave to file a second amended information that the second amended information was being left with the court to "put a note on it to file it." However, it is not clear from the record presented that the second amended information was, in fact, filed. It is this absence in the record which prompts me to disagree with the majority's analysis.

The State argues that we can discern that the second amended information was properly filed because a "transcript certificate" completed by a deputy clerk of the district court states that the second amended information was filed on May 23, 2005, because the first page of the second amended information contains a typed indication that it was filed on May 23, and because the deputy clerk of the court attested to counsel for the State's subscribing and swearing to the second amended information on May 23. Brief for appellee at 27. The majority concludes that the "presumption of regularity" suggests that the information was properly filed.

The question presented to this court is whether we can determine from the record presented that the second amended information was properly filed and, if so, when. In this regard, the lack of any proper file stamp, as well as the other "blanks" left on the second amended information and not filled in by the clerk or a deputy clerk of the district court, demonstrates that the record does not indicate that the second amended information was ever properly filed.

The case *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), is instructive. In that case, the record indicated that on

April 30, 1999, before the clerk of the district court, the county attorney subscribed and swore to an information charging the defendant. The information, however, was not file stamped until October 5. The defendant had pled not guilty on October 4. On January 20, 2000, the defendant filed a motion to discharge on speedy trial grounds which was denied by the district court. The district court found that the speedy trial period begins to run when an information is filed and found that the information at issue was not filed until it was file stamped on October 5, 1999.

On appeal, this court affirmed the district court's denial of the motion to discharge. *Id.* See, also, *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication). This court concluded that the speedy trial period did not begin to run until the information was file stamped on October 5, 1999. *Id.* The Nebraska Supreme Court dismissed a petition for further review as having been improvidently granted and, in a later appeal, held that this court's holding concerning the filing of the information had become the law of the case. *Id.*

Although there was a subsequent file stamp in *State v. Baker*, there are meaningful similarities between *State v. Baker* and the present case. In both cases, the record indicates a specific date on which the relevant information was subscribed and sworn to by the county attorney or a deputy county attorney. In both cases, the record indicates that the relevant information was not file stamped on that date. In *State v. Baker*, this court had held that the relevant information should not be considered properly filed for purposes of speedy trial calculations until it was file stamped, despite the detrimental effect such a finding had on the defendant's motion to discharge. According to the record in the present case, the second amended information has yet to be file stamped. As such, this court should conclude that the record presented on appeal does not indicate that the second amended information has yet been properly filed.

The record presented on appeal indicates that the second amended information, although subscribed and sworn to before a deputy clerk of the district court on May 23, 2005, was not file stamped on that date. When the parties appeared in court, the State was seeking leave to file the second amended information,

indicating that such had obviously not been done yet at that time. At the conclusion of the proceedings, the court indicated that it would take the second amended information from counsel for the State and "put a note on it to file it." Unfortunately, there is nothing to indicate that such was ever done. The majority's "presumption of regularity" analysis presupposes that the information was actually presented to the deputy clerk of the court for filing on May 23, such that the deputy clerk's signature can be said to constitute an endorsement on that date and such that the presumption that the deputy clerk properly filed the document on that date can attach.

The majority's analysis potentially creates significant problems for future cases involving such matters as motions to discharge on speedy trial grounds. As the case *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), indicates, the presence of a file stamp to indicate definitively when an information was filed is necessary for courts to properly calculate the running of the speedy trial clock. Neb. Rev. Stat. § 25-2206 (Reissue 1995), relied upon by the majority in concluding that the deputy clerk of the district court's signature on the front of the information indicates compliance with statutory mandates, requires "[t]he clerk of the court [to] endorse upon every paper filed with him, *the day of filing it*; and upon every order for a provisional remedy, and upon every undertaking given under the same, *the day of its return to his office*." (Emphasis supplied.) The plain language of this statute requires the clerk of the court to take some action to indicate the date of filing, such as by file stamping the filed document. Contrary to the majority's conclusion, the signature of the deputy clerk of the district court on the front of the second amended information fails to satisfy this statutory requirement precisely *because* of the lack of a file stamp; the clerk failed to endorse *any* day because the clerk failed to provide a file stamp indicating the date of filing. The only reference to May 23, 2005, is the typing of the county attorney's office, not provided by the clerk of the court, and the only additional date stamped on the information after it left the deputy county attorney's possession in court is a stamp indicating, "MADE MAY 26 2005."

To conclude that the "presumption of regularity" is enough to indicate that the second amended information in this case was

filed on May 23, 2005, despite the lack of any file stamp or other affirmative evidence to indicate that the document has ever been properly filed, leads to the absurd result of allowing convictions on the basis of an information which, as far as we can affirmatively determine, may never have been filed and was apparently not served on Muse until the final day of a 3-day trial. We should not suggest that the important jurisdictional requirement of proper filing of the information can be satisfied on the basis of a presumption which presupposes a fact not demonstrated in our record—that the trial judge actually delivered the second amended information to the clerk on the date pretyped on the information by the county attorney's office.

The only stamps appearing on the second amended information indicate that it was "MADE MAY 26 2005" (a stamp that counsel at oral argument was unable to explain) and that a copy of the second amended information was served on Muse on May 26, 2005, which was actually the final day of a 3-day trial. There is nothing to affirmatively indicate that the information was actually presented to the clerk by the court or actually filed on May 23, prior to the commencement of trial. Because the filing of the operative information is a jurisdictional matter, see *Langford v. State*, 114 Neb. 207, 206 N.W. 756 (1925), the record presented to us fails to establish that the district court had jurisdiction to proceed with the trial or convict and sentence Muse on the charges. As such, we should reverse on the basis of the trial court's lack of jurisdiction to proceed with trial, conviction, and sentencing.

PAMELA SNOWDEN, WIDOW OF DECEASED EMPLOYEE JEFFREY SNOWDEN, APPELLANT, AND GENEVIEVE SNOWDEN, DEPENDENT OF DECEASED EMPLOYEE, APPELLEE, V. HELGET GAS PRODUCTS, INC., APPELLEE.

721 N.W.2d 362

Filed September 12, 2006. No. A-05-1478.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or

award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act.
5. **Workers' Compensation: Notice.** The Nebraska Workers' Compensation Act provides that want of written notice shall not be a bar to proceedings under the act, if it be shown that the employer had notice or knowledge of the injury.
6. ____: ____. The purposes of the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004) are to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury and to facilitate the earliest possible investigation of the facts surrounding the injury.
7. ____: ____. Neb. Rev. Stat. § 48-133 (Reissue 2004) contemplates a situation where an employer has notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable and that therefore, the employer should investigate the matter further.
8. ____: ____. Knowledge of an employee's injury gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004).
9. ____: ____. In workers' compensation cases, notice to the insured-employer is binding on the insurer.
10. ____: ____. For notice or knowledge purposes under Neb. Rev. Stat. § 48-133 (Reissue 2004), the employer equates to the insurer, and vice versa.
11. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
12. **Workers' Compensation: Liability.** Voluntary payments of workers' compensation benefits do not constitute an admission of liability by an employer.
13. **Workers' Compensation: Notice.** Actual payment of workers' compensation benefits or provision of medical care is usually held to dispense with the necessity of notice of injury.
14. **Workers' Compensation: Final Orders.** An order in a workers' compensation action must satisfy the requirements of Workers' Comp. Ct. R. of Proc. 11 (2006).

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

W. Craig Howell, of Howell, Wilson & Derr, P.C., L.L.O., and Jerold V. Fennell for appellant.

Matthew J. Buckley and William D. Gilner, of Nolan, Olson, Hansen, Lautenbaugh & Buckley, L.L.P., for appellee Helget Gas Products.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Pamela Snowden and Genevieve Snowden, the widow and dependent child of Jeffrey Snowden, respectively, brought a workers' compensation action claiming that Jeffrey was injured while working at Helget Gas Products, Inc. (Helget), on February 18, 2002, while lifting gas cylinders. Pamela and Genevieve alleged that as a consequence of the injury, Jeffrey committed suicide on March 13, 2004. Pamela and Genevieve sought temporary disability benefits, payment of medical and funeral expenses, and widow's and dependent's benefits. The trial judge of the Workers' Compensation Court entered an order of dismissal, finding that Jeffrey failed to report his injury to his employer as soon as practicable. Pamela appealed to the review panel of the Workers' Compensation Court, which affirmed the trial judge's decision. Pamela appeals, and we reverse, because after review of the undisputed facts, we find that a reasonable employer had notice or knowledge Jeffrey's injury was potentially compensable and that as a result, the employer should have investigated the matter which satisfies the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004). Additionally, because of the trial judge's failure to render a reasoned decision under Worker's Comp. Ct. R. of Proc. 11 (2006), we vacate the judge's finding that Jeffrey's death by suicide was willful negligence.

FACTUAL BACKGROUND

Prior to 2002, Jeffrey suffered from various medical difficulties resulting from a car accident occurring in the late 1970's. Jeffrey began working at Helget in 2001. During the interview process, Jeffrey informed Helget that he had previously injured his back but that his doctors had released him to work. While working at Helget, Jeffrey was responsible for loading cylinders filled with gas onto the delivery truck and delivering them to the customers. According to Dale Weidner, Jeffrey's supervisor at Helget, the typical filled gas cylinder stands about 5½ feet tall

and weighs between 145 and 160 pounds, but there are smaller 3-foot cylinders that weigh about 8½ pounds (we assume the reference is to an empty cylinder). Typically, Helget uses a two-wheeler to move the larger cylinders and a four-wheeled cart to move the smaller cylinders. Helget's policy is that its employees are to use the two-wheelers and four-wheeled carts to lift and move the gas cylinders.

During the morning on February 18, 2002, Jeffrey and Weidner loaded Jeffrey's delivery truck with gas cylinders and then Weidner's assistant inventoried Jeffrey's load. As Jeffrey pulled away from the loading dock, some of the cylinders fell over in the truck. According to Weidner's testimony, Jeffrey and Weidner's assistant picked up the cylinders and restrapped them to the truck's wall. Weidner further testified that in the afternoon of the same day, Jeffrey hit a parked car with his truck in a parking lot, and that Weidner came to the scene of the accident. Weidner testified that Jeffrey told him he was "all right." Weidner had Jeffrey take a drug test per company policy and sent him home. The drug test was negative, although we note that the record does not reveal which drugs were screened.

The next day, Jeffrey resumed his regular work schedule. Between February 19 and March 8, 2002, Jeffrey called in sick once. Also between February 19 and March 8, Weidner approached Jeffrey about his job performance, and Weidner testified that Jeffrey explained that he had had a rough couple of weeks with the "accident and everything."

However, Jeffrey had visited his physician, Dr. Kurt V. Gold, on February 21, 2002, and according to Dr. Gold's records, Jeffrey said that he did significant lifting of gas cylinders earlier in the week—which activity required bending, twisting, and lifting—and that he was in a minor car accident. Dr. Gold evaluated Jeffrey and concluded that Jeffrey's then-current back problem was a work-related aggravation of his preexisting low-back condition. Dr. Gold prescribed a fentanyl lozenge and a fentanyl patch for Jeffrey's aggravated back injury.

On February 25, 2002, Weidner observed Jeffrey wearing a back brace at work. According to Weidner's testimony, Jeffrey informed him that his back was a "little tight" and that the back brace had nothing to do with Helget.

Then on March 8, 2002, Weidner met with Jeffrey, but the only account of that meeting is found in Weidner's testimony, which we summarize. Jeffrey decided to resign his position effective March 8. During this meeting, Jeffrey started talking about the events of the previous month and informed Weidner that he had been wearing his back brace under his uniform and that he had been using "morphine suckers" for the pain, which medication other evidence shows to have been fentanyl lozenges. Jeffrey inquired about the possibility of something work-related coming up after his resignation that resulted from his time at Helget, and Weidner stated that "if there was a problem because of his employment here, [Helget] would do what was required." Jeffrey signed a form from Helget which said that he was leaving his employment by mutual agreement because of health concerns as well as productivity issues. Helget offered Jeffrey 2 weeks of severance pay, and the final check was to be issued on April 1.

Later on the same day that Jeffrey resigned, Dr. Gold evaluated him and wrote in his notes that it was unfortunate Jeffrey's employment with Helget had ended and that Dr. Gold would appeal to Jeffrey's employer to "reconsider under these circumstances and to contact [Dr. Gold] personally if [Helget] has any questions or concerns regarding [Jeffrey's] condition." Dr. Gold also wrote that he wanted to see Jeffrey again for a progress review in 4 weeks, which would have been in April 2002.

After resigning, Jeffrey contacted Weidner about job references and the possibility of returning to work at Helget. Approximately 7 days after resigning, Jeffrey met with the owner of Helget in his office. Jeffrey inquired about getting his job back, and the owner said that he asked Jeffrey about his back, to which Jeffrey responded that he could do the job as required.

On April 4, 2002, Dr. Gold evaluated Jeffrey. Dr. Gold noted that Jeffrey had increased pain in his back and that Jeffrey had "attempted to go off" the fentanyl patch, but without success. On April 19, Helget's workers' compensation insurance carrier issued a payment for temporary total disability benefits in the amount of $1,840.02 for 6 weeks (March 22 through May 2, 2002). The temporary total disability payments continued until December 4, 2003. On December 24, Jeffrey filed his petition for temporary and permanent total disability benefits, payment

of medical care expenses, and vocational rehabilitation benefits. Jeffrey continued to see various physicians regarding his back pain who prescribed various pain medicines including OxyContin and Lortab. Jeffrey was also evaluated by a psychiatrist, Dr. Mark J. Diercks, who wrote in his notes that Jeffrey had been treated with antidepressants by his primary care physicians for the past 5 years and was on antidepressants as of February 20, 2003, when Dr. Diercks evaluated Jeffrey. According to Dr. Diercks' notes, Jeffrey experienced seizures because of his antidepressant medication. Dr. Diercks concluded that Jeffrey was depressed. Jeffrey died on March 13, 2004. Jeffrey's surviving wife, Pamela, revived Jeffrey's action. The parties stipulated at trial that Jeffrey died on March 13 as a result of drug toxicity.

PROCEDURAL BACKGROUND

After the trial on November 29, 2004, the compensation court trial judge found that Jeffrey had suffered an injury on February 18, 2002, arising out of and in the course of his employment but that he failed to give to his employer notice of his injury as soon as practicable and that therefore, his claim was barred under § 48-133. Pamela filed an application for review, and on November 18, 2005, the compensation court three-judge review panel affirmed the trial judge's order of dismissal.

Pamela appealed the decision of the review panel, and at the time that Pamela filed her brief, she failed to file a notice of a constitutional question with respect to § 48-133. On April 17, 2006, she filed a motion for enlargement of time to file the notice of constitutional question. The Supreme Court denied such motion, and accordingly, no issue of the constitutionality of a statute is involved in the appeal. Thus, the case remains on our docket.

ASSIGNMENTS OF ERROR

Pamela asserts, reordered and restated, that the trial court erred by (1) finding that the deceased failed to report his injury as soon as practicable after the accident, (2) allocating to Pamela the burden of proving that the deceased's fatal ingestion of narcotic drugs was not willful negligence, (3) finding that the deceased's fatal ingestion of narcotics constituted willful negligence, and (4) assuming that as a matter of law, the

intentional ingestion of narcotic drugs by the deceased was willful negligence.

STANDARD OF REVIEW

[1-3] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

Notice and Knowledge of Injury.

[4-10] We first deal with the question of notice under § 48-133. The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). Section 48-133 provides:

> No proceedings for compensation for an injury under the Nebraska Workers' Compensation Act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; *Provided*, that all disputed claims for compensation or benefits shall be first submitted to the Nebraska Workers' Compensation Court. The notice shall be in writing and shall state in ordinary language the time, place, and cause of the injury. . . . *Want of such written notice shall not be a bar to proceedings under the Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury.*

(Emphasis supplied.) "The purposes of the notice requirement are '[f]irst, to enable the employer to provide immediate medical

diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible investigation of the facts surrounding the injury.' " *Williamson v. Werner Enters.*, 12 Neb. App. 642, 648, 682 N.W.2d 723, 728 (2004), quoting 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.01 (2003). Section 48-133 provides an exception to the written notice rule if it can be shown that the employer had notice or knowledge of the injury. The nature and extent of such notice or knowledge has been articulated by the Nebraska Supreme Court as follows: "Section 48-133 contemplates a situation where an employer has *notice or knowledge sufficient to lead a reasonable person to conclude that an employee's injury is potentially compensable* and that, therefore, the employer should investigate the matter further." (Emphasis supplied.) *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 65, 541 N.W.2d 49, 53 (1995), citing *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985). Knowledge of an employee's injury gained by the employee's foreman, supervisor, or superintendent in a representative capacity for an employer is knowledge imputed to the employer and notice to an employer sufficient for the notice requirement of § 48-133. *Thompson, supra.* Moreover, notice to the insured-employer is binding on the insurer. See, Neb. Rev. Stat. § 48-146 (Supp. 2005); *Miller v. Commercial Contractors Equip.*, 14 Neb. App. 606, 711 N.W.2d 893 (2006). But here, the reverse situation is present, because the evidence shows that the insurer paid temporary total disability benefits within 2 months of the alleged accident, and thus, the insurer obviously had notice and knowledge of a claim within 2 months—and likely less than 2 months, given the need for some amount of "processing time" between notice of a claim and issuance of a first payment of benefits. In any event, we hold that for notice or knowledge purposes under § 48-133, the employer equates to the insurer, and vice versa.

[11] The compensation court found that based upon the testimony of Dr. Gold and the office visit he had with Jeffrey on February 21, 2002, Jeffrey suffered an "injury bending and lifting containers of various gases on February 18, 2002, arising out of and in the course of his employment." Helget does not cross-appeal this finding, and thus it is now the "law of the case." See

State v. White, 257 Neb. 943, 601 N.W.2d 731 (1999) (law-of-the-case doctrine operates to preclude reconsideration of substantially similar, if not identical, issues at successive stages of same suit).

We examine the information that Helget had between February 18 and April 19, 2002, regarding the incident on February 18 and Jeffrey's accompanying back injury. We use the date of April 19, because on such date, Jeffrey was paid temporary total disability benefits via a check from Helget's insurance carrier. Thus, indisputably, Helget and its insurer had notice of Jeffrey's claim absolutely no later than April 19, and likely sooner, in order to generate the referenced payment. Unfortunately, the evidence does not shed any light on what would be helpful information about how the insurer came to issue the April 19 payment, as well as the crucial dates involved in the issuance of the check.

However, returning to what is in the record, we know from Weidner's testimony that Helget knew that Jeffrey lifted gas cylinders in the morning and was in a car accident in the afternoon on February 18, 2002. Helget also knew that Jeffrey wore a back brace to work on February 25. Less than 3 weeks after the incidents on February 18, the employer understood that Jeffrey was resigning and that health concerns were a reason for such resignation. Helget further knew that during the resignation meeting, Jeffrey talked about the events of the previous month and informed Weidner that Jeffrey had been wearing his back brace under his uniform and had been using "morphine suckers." Additionally, Helget knew that Jeffrey had concerns about the possibility of something work-related coming up after his resignation that resulted from his time at Helget, and in response to Jeffrey's voicing his concerns, Weidner told him that "if there was a problem because of his employment [at Helget], [Helget] would do what was required." Helget also knew that Jeffrey would receive his last paycheck on April 1.

The compensation court found that Jeffrey failed to report to Helget his February 18, 2002, injury as soon as practicable, thus barring the claim under § 48-133. However, neither the trial judge nor the review panel analyzed the notice issue using the rubric, as articulated by the Supreme Court in *Scott v. Pepsi*

Cola Co., 249 Neb. 60, 541 N.W.2d 49 (1995), for determining whether the employer's notice or knowledge was sufficient. Instead, the trial judge and the review panel relied solely on a decision of this court, *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004), a case which is distinguishable in a number of respects, as we shall later discuss. Under *Scott*, the crucial question in the instant case is whether Helget had knowledge sufficient to lead a reasonable person to conclude that Jeffrey's back condition was potentially compensable and that an investigation was required. In *Scott*, the Supreme Court held that when the facts concerning reporting and notice are not disputed, whether such facts constitute sufficient notice to the employer under § 48-133 is a question of law. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Scott, supra.*

The following facts are undisputed: Helget had immediate knowledge of the two incidents on February 18, 2002, plus knowledge within a week thereafter that Jeffrey had begun using a back brace. Furthermore, after the two incidents, Helget knew that Jeffrey worked less than 3 weeks before his resignation, which was in part due to his health concerns, and that he was concerned about what work-related issues might arise after his resignation. Helget's workers' compensation insurance carrier issued a check on April 19 paying Jeffrey temporary total disability benefits for the time period of March 22 through May 2, 2002. This payment must be viewed as if Helget itself issued the check, and of course, knowledge of the claim sufficient to trigger the issuance of the check obviously occurred sometime prior to the date of the check—although the record before us is deficient because it does not disclose how and when the insurer was notified of Jeffrey's claim so as to trigger the issuance of the April 19 check. These core facts are undisputed, but it is noteworthy that because Jeffrey is deceased, we have only the testimony of Helget's employees about what Jeffrey said. Nonetheless, the central fact remains that the workers' compensation insurer for Helget made payment of benefits within 2 months of the claimed accident date.

[12,13] We are aware that voluntary payments of workers' compensation benefits do not constitute an admission of liability

by an employer. *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Nonetheless, the fact of such a payment clearly tends to prove that the employer or insurer had knowledge and notice of the claimed compensable injury, a different question than whether the employee sustained a compensable injury. In Professor Larson's treatise, he explains that "actual payment of compensation or provision of medical care is usually held to dispense with the necessity of notice of injury" and that "[t]his result follows naturally from the rule on actual knowledge, since the employer could hardly claim ignorance of the injury toward which it is contributing such payments." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.03[4] (2006). See, also, *Gilbert v. Metropolitan Utilities Dist.*, 156 Neb. 750, 57 N.W.2d 770 (1953), citing *Royal Co. v. Industrial Com.*, 88 Colo. 113, 293 P. 342 (1930). Therefore, we consider the April 19, 2002, benefits payment for that limited purpose, noting that no objection was made to such evidence by Helget.

After our independent review of the foregoing undisputed facts, we conclude as a matter of law that a reasonable employer, with the knowledge Helget possessed, would conclude both that a potential workers' compensation claim existed and that it should investigate the matter. It is important to point out that under *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995), the question is not whether Helget had notice or knowledge that Jeffrey's claim was valid or compensable, or even whether Jeffrey thought he had a compensable claim. Instead, the question is whether Helget knew enough that a reasonable employer would conclude, "This employee potentially has a workers' compensation claim and we had better investigate." Given the issuance of the April 19, 2002, check, Jeffrey obviously gave notice and made a claim before that date—although how long before, we cannot know from this record.

Next, we contrast this case with the only reported Nebraska case finding that any claim for benefits was barred for not giving notice "as soon as practicable" under § 48-133. See *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004). In *Williamson*, the compensation court found that the injured employee waited approximately 5 months to give his employer

notice, and our colleagues deferred to the compensation court's factual findings while saying that such delay exceeded "the outer limit of any reasonable delay." *Id.* at 653, 682 N.W.2d at 732. The *Williamson* court discussed the applicable standard of review, referencing the holding of *Scott, supra*, that sufficiency of notice when facts are undisputed becomes a question of law. The *Williamson* court found that the standard was whether the compensation court was clearly wrong because of the presence of a substantial dispute of fact in the evidence—a situation not present here. Additionally, and most importantly, *Williamson* did not involve anything remotely resembling this highly unusual situation where temporary total disability benefits were initially paid within 2 months of the injury and continued for another 84 weeks for a total amount of $30,224.50, plus medical bills were paid in the amount of $27,279.85, and thereafter, the issue of notice was raised. Consequently, for a variety of reasons, we find that *Williamson* is a very different case than the one before us and that it does not control the result here.

In conclusion, we find that the record presents a question of law as to whether § 48-133 bars the claim, because the essential facts are undisputed. As a result, we reach an independent conclusion. In doing so, we rely upon the Nebraska Supreme Court's conceptualization of "notice or knowledge" under § 48-133 as set forth in *Scott, supra*. Therefore, we hold that a reasonable employer would have had sufficient notice and knowledge that Jeffrey's back condition was potentially a compensable injury and that investigation thereof should have been undertaken. Accordingly, we reverse the compensation court's finding that Helget did not have sufficient notice or knowledge and the finding that § 48-133 barred Jeffrey's claim.

Consequences of Our Reversal.

Having found that Jeffrey's claim for workers' compensation benefits is not barred, we turn to the matter of what follows from our decision. We begin by noting that the compensation court found that (1) Jeffrey suffered an injury on February 18, 2002, in an accident arising out of and in the course of his employment and (2) Jeffrey failed to give timely notice of his injury to Helget. The compensation court expressly found the remaining issues to be moot. Nevertheless, the compensation court trial

judge's decision says that "the parties may find it helpful to have the Court address the sixth issue," which the pretrial order defined as whether Jeffrey's "death was accidental or an intentional act or the product of willful negligence." The trial judge wrote that Jeffrey "intentionally ingested an overdose of narcotics for the purpose of ending his life," and the judge characterized such act as willful negligence as defined in Neb. Rev. Stat. § 48-151(7) (Reissue 2004), which negligence would bar any recovery of death benefits under the Nebraska Workers' Compensation Act.

On appeal, the review panel affirmed the trial judge's finding as to the lack of notice, but the review panel did not address the cause or legal consequences of the manner of Jeffrey's death and stated that it was "not obligated to engage in an analysis which is not needed to adjudicate the controversy before it," citing *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004). The review panel further wrote, "[G]iven the review panel's affirmance of the trial court's finding that [Jeffrey's] claim is barred based upon the absence of notice defense, a discussion of the other alleged errors would be superfluous." Obviously, after our decision on the notice issue, the issues unaddressed by the trial court are not moot; nor can it now be said that the manner and consequences of Jeffrey's death are still "superfluous." On appeal to this court, Pamela assigns as error the trial judge's conclusion that Jeffrey was guilty of willful negligence. However, Helget did not cross-appeal the core finding that Jeffrey had sustained a compensable injury on February 18, 2002. Thus, the questions are whether Jeffrey's injury was a cause of his death and whether his death was caused by willful negligence.

[14] An order in a workers' compensation action must satisfy the requirements of rule 11 of the Workers' Compensation Court, which rule provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which

> the judge relies. The decision shall provide the basis for a meaningful appellate review.

See, also, *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998) (finding that failure of trial judge to clearly determine issue precluded meaningful appellate review and thus remanding cause to trial judge). We find that when the trial court addressed only issues 1, 2, and 6 of the pretrial order, the court failed to address Jeffrey's documented depression and corresponding treatment prior to March 13, 2004, as well as the law set forth in *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983) (reasoning that even though employee knew she was inflicting mortal wound upon herself, this will not, in all cases, constitute willful negligence within meaning of statute barring recovery; thus, when employee's injuries result in becoming devoid of normal judgment and dominated by disturbance of mind directly caused by injuries, suicide is not willful under Nebraska Workers' Compensation Act). Thus, the trial judge rendered an opinion on what he characterized as a moot issue, and moreover, the trial judged failed to analyze the issue in light of the controlling precedent. Such holding in these circumstances does not satisfy the requirements of rule 11. Therefore, we vacate the trial court's decision on issue 6 of the pretrial order—whether Jeffrey's death was accidental or an intentional act or the product of willful negligence—and we remand the question for the entry of an order on the evidence adduced which comports with rule 11 with reference to issues 3 through 8 of the pretrial order. See *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996) (remand for new decision by trial judge on evidence adduced when judge did not follow rule 11). The unresolved issues from the pretrial order include the extent of any temporary disability caused by the accident; the liability of Helget for the payment of medical and hospital bills incurred by Jeffrey prior to March 13, 2004; whether the drugs causing the toxicity had been prescribed for a compensable condition; the entitlement of Pamela of any medical bills incurred in connection with the death of Jeffrey on March 13, together with funeral and burial expenses; and whether Genevieve, Jeffrey's child, is and has been actually dependent since March 13. Thus, we remand the cause to the trial court for disposition of all the

issues relating to entitlement to workers' compensation benefits flowing from Jeffrey's work accident on February 18, 2002.

CONCLUSION

For the foregoing reasons, we reverse the Workers' Compensation Court's dismissal with prejudice, and we remand the cause to the review panel with directions that it remand it to the trial judge for a decision as required by rule 11.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF MAXWELL T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LLOYD T., ALSO KNOWN AS B.J. T., APPELLANT.

721 N.W.2d 676

Filed September 19, 2006. No. A-05-1477.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **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.
6. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed in part, and in part remanded with directions.

Allan A. Armbruster, Jr., for appellant.

Stuart J. Dornan, Douglas County Attorney, and Chad M. Brown for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

I. INTRODUCTION

Lloyd T., also known as B.J. T., appeals an order by the separate juvenile court of Douglas County, in which order the court found that it had continuing jurisdiction in the matter and adjudicated Lloyd's son, Maxwell T., as a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). For the reasons set forth herein, we affirm in part, and in part remand with directions.

II. BACKGROUND

Maxwell was born to Lloyd and Marsha L. on February 3, 2003, in Omaha, Nebraska. Lloyd and Marsha were divorced pursuant to a decree of dissolution entered in Minnehaha County, South Dakota, on July 19, 2004. Marsha was provided notice of the dissolution proceedings, but did not appear personally or by counsel. The decree granted custody of Maxwell to Lloyd, with supervised visitation rights for Marsha. The decree further provided that Marsha could not remove Maxwell from Minnehaha or Lincoln Counties, South Dakota, without the prior written consent of Lloyd or an order of the court.

At some point, Lloyd apparently committed a parole violation and was returned to the South Dakota State Penitentiary. Lloyd was on parole from two convictions he received in 1997, for grand theft by obtaining property or services with a false credit card and being a habitual offender. In late August 2004, Marsha took physical custody of Maxwell and brought him to Bellevue, Nebraska, where Marsha and Maxwell lived with Marsha's aunt.

On January 20, 2005, Marsha was transported by ambulance to a hospital after ingesting a large quantity of vodka. Marsha reported that she regularly consumed as much as 1½ liters of

vodka per day and that she decided to enter an alcohol treatment program. Marsha stated that there was no one who could care for Maxwell. A police officer was called to the hospital and placed Maxwell in an emergency foster home.

The State filed a petition on January 21, 2005, which alleged that Maxwell was within the meaning of § 43-247(3)(a) in that Maxwell was "homeless or destitute, or without proper support through no fault" of Marsha. The petition alleged that Marsha had been hospitalized on or about January 20 for psychiatric treatment and that she had reported that there was no one to care for Maxwell; the petition asserted that this placed Maxwell at risk for harm. A motion for temporary custody was also filed that day, which motion requested that custody of Maxwell be placed with the Department of Health and Human Services (DHHS). The juvenile court granted the motion for temporary custody that same day, placing custody of Maxwell with DHHS.

A detention hearing was held on February 2, 2005. Marsha appeared and was represented by her attorney and a guardian ad litem. Marsha reported that she was no longer hospitalized, but had entered an alcohol treatment program in Omaha. Marsha was advised of her rights in the proceedings and did not contest the continued detention of Maxwell with DHHS. The court order resulting from this hearing reflects that the court found that jurisdiction was proper and continued custody of Maxwell with DHHS, with reasonable rights of supervised visitation granted to "the parents." There was no mention of Lloyd at this hearing, but the court order reflects that Marsha was ordered to complete an affidavit of identification of Maxwell's father.

An adjudication hearing with respect to Marsha was held on May 4, 2005. Marsha admitted to the allegations in the petition, with the language of the petition changed from Marsha's being hospitalized "for psychiatric treatment" to her being hospitalized "for alcoholism & depression." The court order resulting from this hearing indicates that the court found that jurisdiction was proper, and Maxwell was adjudicated under § 43-247(3)(a). Custody of Maxwell was continued with DHHS. No mention of Lloyd was made at the hearing, but the court order reflects that Marsha was again ordered to complete an affidavit of identification of Maxwell's father.

A disposition and permanency planning hearing was held on June 27, 2005. A court report and case plan prepared by Monica Lewis, the DHHS caseworker for the case, was admitted into evidence. The court report, dated June 23, 2005, listed Lloyd as Maxwell's father and provided an Omaha address for Lloyd. The report, together with other evidence, indicated that Marsha was enrolled in a halfway house chemical dependency treatment program and was making good progress. The case plan listed the permanency objective as reunification, with a target date of October 1, 2005.

Also admitted into evidence was a report by Marsha's guardian ad litem. The report indicated that Marsha desired to be reunited with Maxwell and to have "full care, custody, and control" of him. The report also stated the following:

> Finally, Marsha expressed concerns regarding custody of [Maxwell] upon termination of the Juvenile case. Prior to this Court acquiring Jurisdiction, custody of the child was granted by the state of South Dakota to the child's father, Lloyd . . . pursuant to a divorce decree entered on July 19th, 2004. [Lloyd] is currently incarcerated, and Marsha pressed the County Attorney to bring [Lloyd] under this Court's jurisdiction in order not [to] leave a jurisdictional vacuum upon disposition.

One of the recommendations in the guardian ad litem's report was that Lloyd's "incarceration and his status as the default custodian upon termination of jurisdiction be taken into account at the disposition stage of the proceedings."

The guardian ad litem voiced these concerns at the June 27, 2005, hearing, stating to the court:

> [M]y only concern in terms of a review timeline is that custody of [Maxwell] actually belongs to [Lloyd] under the full decree from another state, and that's something that [Marsha] needs to work on. Arturo Perez, the previous county attorney on this case, had expressed his intention to file against [Lloyd], and we kind of don't know where things are at right now, so that's something to keep in mind as we are setting reviews.

The State responded that it understood Lloyd was incarcerated in South Dakota and that the State would look further into the

matter. The court later stated, "I appreciate the State looking into that other matter because I think as we — as you [Marsha] progress, we want to be able to move in that direction, too." In the court order resulting from this hearing, the court found that jurisdiction was proper, continued custody of Maxwell with DHHS, and granted Marsha reasonable rights of semisupervised visitation transitioning into overnights and weekends. The court found that the permanency objective was reunification. There was no reference to Lloyd in the court order.

On June 29, 2005, the State filed a supplemental petition which alleged that Maxwell was within the meaning of § 43-247(3)(a) with respect to Lloyd. Specifically, the supplemental petition alleged that Maxwell was "lacking proper parental care by reason of the faults or habits of" Lloyd, in that Lloyd was currently incarcerated and unable to care for Maxwell, had had no contact with Maxwell for more than 6 months, and had failed to provide proper parental care for Maxwell and in that because of those allegations, Maxwell was at risk for harm. The supplemental petition listed Lloyd's address as the South Dakota State Penitentiary, in Sioux Falls, South Dakota.

A first appearance hearing on the supplemental petition was held on July 14, 2005. The proceedings are not included in the bill of exceptions, but the court order reflecting this hearing indicates that the State, Marsha's guardian ad litem, Maxwell's guardian ad litem, and Marsha were present. The adjudication hearing on the supplemental petition was set for September 22. The court order states that "[n]otice by publication may be considered if a diligent search fails to indicate [the] location of Lloyd . . . ."

An order filed August 18, 2005, indicates that the court appointed counsel for Lloyd and noted that Lloyd's address was the South Dakota State Penitentiary.

On September 14, 2005, the State filed a motion to continue the adjudication on the supplemental petition because, "[t]hrough inadvertence of the County Attorney's Office," Lloyd was served with a summons which indicated an incorrect hearing date. The motion stated that Lloyd's attorney did not object to the motion. In an order filed September 15, the motion was sustained and the adjudication was continued to October 25.

On September 19, 2005, a review and permanency planning hearing was held with respect to Marsha. Lloyd and his attorney did not appear. The State offered into evidence, among other things, a two-page letter from Lloyd to Lewis, the DHHS caseworker. The court did not receive the letter into evidence, stating that it would be inappropriate since the adjudication for Lloyd was pending and Lloyd's attorney was not present. Marsha's attorney reported that Marsha was doing "wonderfully well" and was ready to move into an outpatient program where Maxwell could reside with her. Marsha's attorney then stated, "I hate to open a can of worms, but [Lloyd], who is the father [and] has a case pending, is currently the custodial parent. I think probably we're looking at filing a custody action sometime in the near future." After this comment, the matter was not further discussed.

Several exhibits were admitted into evidence at the hearing, including a court report prepared by Lewis, dated September 14, 2005, which discussed Lloyd in some detail. The report stated that Lloyd was incarcerated and was anticipated to be released in 2009, that Lloyd wrote to Lewis regarding Maxwell, and that Lewis responded to the letter. The report indicated that Lloyd stated he had custody of Maxwell prior to his incarceration, at which time he released the child to Marsha, and that Lloyd stated he would like to see Maxwell return to Marsha's care if Marsha was sober and able to care for him.

A report by the foster care review board was also admitted into evidence. The report stated that Lloyd and Marsha both claimed Lloyd had custody of Maxwell and that Lloyd indicated he allowed Marsha to have custody of Maxwell when Lloyd returned to incarceration for a parole violation, but that Lloyd indicated Marsha "was not to" remove Maxwell from South Dakota. The report also stated that Marsha said that Lloyd wrote a letter giving Marsha custody of Maxwell.

The court order resulting from the September 19, 2005, review and permanency planning hearing indicates that the court found that jurisdiction was proper. Custody of Maxwell was continued with DHHS, but the court stated that Maxwell could be placed with Marsha once she established housing. The court found the permanency objective to be reunification.

On September 19, 2005, the State filed a praecipe, requesting that summons be issued to Lloyd for the October 25 hearing, and Lloyd was personally served with the summons on September 23. The summons requested that Lloyd personally appear at the hearing.

On October 14, 2005, Lloyd filed the following documents with the juvenile court: a motion to dismiss, a motion for pretrial hearing, a motion for telephonic hearing, a request for production of documents, and a "Notice of Intention to Serve Rule [34A] Records Subpoena" with an attached subpoena duces tecum for Marsha's aunt.

The motion to dismiss sought to dismiss the supplemental petition upon the following grounds: (1) lack of subject matter jurisdiction under Nebraska's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), (2) that Maxwell had not been abandoned or subjected to or threatened with mistreatment or abuse within the meaning of the UCCJEA, (3) that an adjudication hearing had not been held within 90 days after the supplemental petition was filed, and (4) that the supplemental petition was so vague and ambiguous that Lloyd was not on notice of the prohibited conduct alleged to have put Maxwell at risk for harm. The motion for pretrial hearing requested a hearing so that the court "hears and enters its orders on pre-trial motions, sets a date for the completion of discovery prior to trial and schedules a date for an adjudication hearing in this cause." The motion for telephonic hearing requested that Lloyd appear by telephone at the adjudication hearing. Lloyd's request for the production of documents requested that Marsha produce, pursuant to Neb. Ct. R. of Discovery 34 (rev. 2000), documents and items related to various communications between and among Lloyd, Marsha, and Maxwell, related to the time period of September 21 to October 13, 2004. The "Notice of Intention to Serve Rule [34A] Records Subpoena" stated that Lloyd would be issuing and serving a subpoena on Marsha's aunt. The attached subpoena duces tecum requested that Marsha's aunt produce, pursuant to Neb. Ct. R. of Discovery 34A (rev. 2004), documents similar to those requested of Marsha.

The adjudication hearing on the supplemental petition was held on October 25, 2005. Present at the hearing were counsel

for the State, counsel for Lloyd, guardian ad litem for Maxwell, counsel for Marsha, guardian ad litem for Marsha, and Marsha. At the start of the hearing, the court addressed Lloyd's motions. The motion to dismiss was discussed, and a transcript of the June 27 proceedings was admitted into evidence for the purpose of demonstrating that the court was placed on notice at that hearing that Lloyd had custody of Maxwell pursuant to the South Dakota divorce decree. Lloyd's counsel stated that under the UCCJEA, the juvenile court should have contacted the South Dakota court to resolve the jurisdictional issue. The court denied the motion to dismiss and stated, "[T]he jurisdiction of this Court, for the safety and the protection of a child either living or to be found in Douglas County, Nebraska, State of Nebraska, temporarily and during the pendency of any proceeding in this Court, trumps, if you will, any custody order from any other Court." The court further stated:

> So the Uniform Child Custody Act that you quote does not apply to this case, and when and if this Court terminates its jurisdiction, presumably the case goes back to the status quo before it was filed, unless another court changes its custody order. So I am not interfering with that except as is provided by the laws of this State.

The motion for pretrial hearing, request for production of documents, and notice of intention to serve a subpoena were next addressed. The court denied these motions, stating, "[W]e had a first appearance, I notified [Lloyd], I appointed [counsel for Lloyd], all in sufficient time to have conducted discovery . . . ." The court stated that the motions were denied because the matter was set for adjudication and there had not been a request for a continuance of the hearing. The court then addressed the motion for telephonic hearing and asked Lloyd's counsel if Lloyd was available that day, to which counsel responded that he did not know. The motion was denied, and the court proceeded with the adjudication.

Lewis, the DHHS worker for the case, testified that at the time the case began, Marsha was caring for Maxwell and had resided in Nebraska for at least 5 months. Lewis then testified regarding Lloyd and her communications with Lloyd. Lewis stated that Lloyd had communicated with Lewis by mail and

that in one of Lloyd's letters, Lloyd stated that he had given Maxwell to Marsha to care for while Lloyd was incarcerated. Lewis testified that Lloyd had not had any contact with Maxwell for the 10 months that she had been the caseworker. Lewis stated that a clerk at the penitentiary told her that Lloyd would be incarcerated until 2009. Lewis stated that because Lloyd was incarcerated, he had not been able to provide for proper care and parental support of Maxwell. Lewis stated that in her opinion, Maxwell was at risk for harm because Lloyd left Maxwell in Marsha's care, at a time when Marsha was unable to care for him, and because Lloyd was unable to care for Maxwell while in the penitentiary.

Upon cross-examination, Lewis stated that one of Lloyd's letters was dated May 25, 2005, and that she responded to that letter in a letter written June 13. Both letters were received into evidence. In summary, Lloyd's letter asked Lewis to provide him with information regarding Maxwell and whether Maxwell was in her care. The letter also listed the various ways that Lloyd had attempted to contact Lewis for information on Maxwell. Lewis' response letter informed Lloyd that Maxwell was in DHHS' care due to Marsha's needing assistance and stated that Maxwell was doing well. Lewis' letter also stated Marsha had indicated that she would be in danger if Lloyd knew her whereabouts and that Lloyd was violating a court order by trying to locate her. Lewis provided contact information for the judge on the case to Lloyd and advised Lloyd that he could intervene if he chose to do so. Lewis testified that she had received one other correspondence from Lloyd within the last 90 days. Lewis was asked if it was her opinion that Lloyd was "uncaring" about Maxwell's care, to which she responded, "No. Any father who — Any father that contacts [DHHS] and questions about in regards to the whereabouts of [his] child has to be caring." Lewis was also asked if she was aware of Marsha's condition at the time Lloyd gave Maxwell to her, to which Lewis responded she did not know.

Lloyd called Marsha to testify. Marsha stated that she received a videotape from Lloyd in October 2004 and that the videotape depicted Lloyd reading two books to Maxwell. Marsha stated that she had received no additional correspondence from Lloyd

and that to her knowledge, her aunt had not received any correspondence from Lloyd to Maxwell. Marsha stated that Lloyd gave her written consent to remove Maxwell from South Dakota.

A report entitled "Initial Assessment Worksheet For Abuse/Neglect" was admitted into evidence, offered by Lloyd's counsel. The report is dated January 25, 2005, and was completed by a DHHS worker other than Lewis. The report indicated that Lloyd had "full custody" of Maxwell and that Lloyd was incarcerated in South Dakota. The report also stated that the worker did not notify Lloyd that Maxwell was in foster care because Lloyd was incarcerated in South Dakota.

The court order reflecting this hearing, filed November 3, 2005, indicates that the court denied the motion to dismiss and the motion for telephonic hearing. The court again found that jurisdiction was proper, Maxwell was adjudicated under § 43-247(3)(a) with respect to Lloyd, and custody of Maxwell was continued with DHHS. It is from this court order that Lloyd appeals.

III. ASSIGNMENTS OF ERROR

Lloyd asserts eight assignments of error, which can be rephrased and consolidated into the following: (1) The juvenile court erred in finding that it had continuing subject matter jurisdiction in this case, and (2) even if the court did have jurisdiction, it committed several errors in the adjudication of the supplemental petition, including (a) denying Lloyd's motion to dismiss based upon an alleged violation of Lloyd's right to a speedy adjudication, (b) failing to advise Lloyd of his rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2004), (c) denying Lloyd's motion for pretrial hearing, (d) denying Lloyd the use of compulsory discovery proceedings, and (e) finding that Maxwell was within § 43-247(3)(a) with respect to Lloyd.

IV. STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. However, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction

are clearly incorrect. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

[2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

V. ANALYSIS

1. Jurisdiction Under UCCJEA

(a) Application of UCCJEA

Lloyd asserts that the juvenile court erred in finding that the UCCJEA did not apply to the matter. We initially note that the applicable statutory scheme is the UCCJEA, Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004), rather than the Nebraska Child Custody Jurisdiction Act (NCCJA), because the first petition in this child custody proceeding was made in January 2005, well after the date the UCCJEA became operative, January 1, 2004. See § 43-1226 (Supp. 2003).

At the adjudication hearing on the supplemental petition, the judge did verbally state that the UCCJEA did not apply to the case; however, this comment was preceded by language which seemed to indicate that the court was exercising temporary emergency jurisdiction under the UCCJEA, which jurisdiction we discuss below. Whatever the effect of the juvenile court's verbal statement, we find that a case brought under § 43-247(3)(a) fits the definition of a "[c]hild custody proceeding" under the UCCJEA, see § 43-1227(4), and that therefore, the UCCJEA is applicable. Section 43-1227(4) of the UCCJEA provides that the term "[c]hild custody proceeding" shall mean "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue" and that the term "includes a proceeding for divorce, separation, neglect, abuse, [or] dependency . . . in which the issue may appear." The supplemental petition was filed under the dependency statute, § 43-247(3)(a), and essentially alleged neglect of Maxwell by Lloyd, and the decisions made by the juvenile court in the course of these proceedings

affected Maxwell's legal and physical custody. Pursuant to § 43-1227(4), the juvenile court was involved in a child custody proceeding, and the UCCJEA was applicable.

(b) Subject Matter Jurisdiction

Lloyd next asserts that the juvenile court, upon being informed that a South Dakota court had made a prior child custody determination, erred in its refusal to contact and communicate with the South Dakota court and in finding that it had subject matter jurisdiction in the matter for purposes other than temporary emergency jurisdiction. Lloyd appears to admit that the juvenile court's initial exercise of jurisdiction over Maxwell was proper, under the temporary emergency jurisdiction granted under § 43-1241 of the UCCJEA, but asserts that once the juvenile court was aware that custody of Maxwell was granted to Lloyd in a South Dakota divorce decree, the court erred in continuing to exercise jurisdiction.

The pertinent portions of the UCCJEA concerning temporary emergency jurisdiction, codified in § 43-1241, provide:

> (a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.
>
> . . . .
>
> (c) If there is a previous child custody determination that is entitled to be enforced under the [UCCJEA], or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 43-1238 to 43-1240, any order issued by a court of this state under this section shall specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under such sections. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.
>
> (d) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been

> commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under sections 43-1238 to 43-1240, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to such sections, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

In the case before us, the juvenile court, unaware of the South Dakota divorce decree, initially assumed original jurisdiction under Neb. Rev. Stat. § 43-248 (Reissue 2004) when it granted the January 21, 2005, order for temporary custody. The court later adjudicated Maxwell under § 43-247(3)(a), with respect to Marsha, on May 4. It was not until June 27 that the court was informed of the prior out-of-state custody determination. Maxwell was subsequently adjudicated with respect to Lloyd on November 3.

This case is factually similar to *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). Although *In re Interest of L.W.* was decided under the former NCCJA, not the UCCJEA, we find its reasoning to be instructive to the present case. In *In re Interest of L.W.*, the juvenile court, unaware of the existence of a prior Iowa divorce decree granting custody of the child to the mother, initially assumed jurisdiction over the child under § 43-247(3)(a). It was not until nearly 2 years after the initial adjudication of the child that the court was informed of the prior out-of-state custody determination. The Nebraska Supreme Court found that under the NCCJA provision concerning emergency jurisdiction (which is substantially similar to the UCCJEA provision cited above), the juvenile court had temporary emergency jurisdiction to make a temporary custody placement of the child. The court reasoned that it was appropriate for the juvenile court to assume jurisdiction, since the child was physically present in Nebraska and an emergency existed as a result of sexual abuse by the child's stepfather. The court found

that the emergency situation was ongoing; however, it noted that the emergency provision is limited in duration and does not confer jurisdiction to make permanent custody determinations or modify the custody decree. The court determined that pursuant to the NCCJA, the Iowa court retained continuing jurisdiction over the custody determination, and upon remand, it ordered the juvenile court to refrain from modifying the Iowa divorce decree and to communicate with the Iowa court to determine the appropriate forum for the case. See, also, *In re Interest of J.L.H., J.L.H., and R.H.*, 2 Neb. App. 40, 507 N.W.2d 641 (1993) (adjudication affirmed, with (1) instruction to juvenile court to communicate with Missouri court which rendered custody decree to determine more appropriate forum before further adjudicating custody of children and (2) jurisdictional limitation against rendering permanent custody order unless Missouri court affirmatively declines jurisdiction or fails to take appropriate action).

Lloyd argues that at the time the juvenile court was put on notice of the existing South Dakota custody determination, the juvenile court's temporary emergency jurisdiction under § 43-1241 terminated, because an "emergency" no longer existed. Although we agree that emergency jurisdiction is temporary in nature, see *In re Interest of L.W., supra*, we disagree that emergency jurisdiction ceases to exist simply upon notification of another court's custody determination. Notwithstanding the fact that the November 3, 2005, order is a final order adjudicating Maxwell to be a child within the meaning of § 43-247(3)(a), the order does not make a permanent custody disposition of Maxwell. The court's November 3 order merely continues the temporary custody of Maxwell with DHHS. Therefore, so long as an emergency with regard to Maxwell continued to exist, the court retained emergency jurisdiction powers. See *In re Interest of L.W., supra*. Thus, the November 3 adjudication order did not violate the proposition that emergency jurisdiction is temporary in nature, and the question we must now address is whether an emergency situation with Maxwell did in fact continue after the juvenile court became aware of the South Dakota order, so as to support the court's continuing jurisdiction over Maxwell. Clearly, the facts in this case do support such continuing jurisdiction. At the time of the adjudication of the supplemental

petition, Maxwell was in Nebraska, neither Marsha nor Lloyd could assume custody of Maxwell, and there was no evidence that any other person, such as a relative, could do so. Maxwell had no one to care for him, and we find that the emergency situation was ongoing. Therefore, the juvenile court properly exercised jurisdiction under § 43-1241 at the time of the filing and adjudication of the supplemental petition. This holding is subject to the jurisdictional limitation set forth below.

Because the South Dakota court has entered a child custody decree and Lloyd still lives in South Dakota, the South Dakota court retains continuing jurisdiction to make any permanent changes in custody. The juvenile court must immediately communicate with the South Dakota court as required by § 43-1241(d). Further, the juvenile court is without jurisdiction to render a permanent custody order unless the South Dakota court affirmatively declines jurisdiction or fails to take appropriate action.

(c) Parties' Failure to Inform Juvenile Court of Prior Child Custody Determination

[3] Finally, Lloyd appears to argue that the juvenile court was deprived of jurisdiction because of the parties' failure to inform the court of the prior child custody determination. However, this argument is not assigned as error in Lloyd's brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

2. Adjudication of Maxwell

Lloyd alleges that the juvenile court made several errors regarding Maxwell's adjudication. Specifically, Lloyd alleges that the court erred in (1) denying Lloyd's motion to dismiss based upon an alleged violation of Lloyd's right to a speedy adjudication, (2) failing to advise Lloyd of his rights pursuant to § 43-279.01, (3) denying Lloyd's motion for pretrial hearing, (4) denying Lloyd the use of compulsory discovery proceedings, and (5) finding that Maxwell was within § 43-247(3)(a) with respect to Lloyd.

(a) Speedy Adjudication

Lloyd asserts that the juvenile court erred when it denied Lloyd's motion to dismiss based upon an alleged violation of Lloyd's right to a speedy adjudication. Lloyd claims that pursuant to Neb. Rev. Stat. § 43-278 (Reissue 2004), an adjudication must occur within 90 days of the filing of a petition or the State is required to make a showing of good cause, on the record, for why the petition should not be dismissed. Lloyd claims that because the adjudication on the supplemental petition was not held within 90 days of the filing of the supplemental petition and the State did not make a showing of good cause on the record as to why the supplemental petition should not have been dismissed, the court erred in denying Lloyd's motion to dismiss. Section 43-278 provides as follows, in relevant portion:

> Except as provided in sections 43-254.01 and 43-277.01, all cases filed under subdivision (3) of section 43-247 shall have an adjudication hearing not more than ninety days after a petition is filed. Upon a showing of good cause, the court may continue the case beyond the ninety-day period.

In the present case, the supplemental petition was filed on June 29, 2005, and the adjudication hearing was set for September 22. On September 14, the State filed a motion to continue the adjudication on the supplemental petition because, "[t]hrough inadvertence of the County Attorney's Office," Lloyd was served with a summons which indicated an incorrect hearing date. The motion stated that Lloyd's attorney did not object to the motion. The motion was sustained, and the adjudication was continued to October 25. On September 23, Lloyd was served with summons and notice of the October hearing date. The adjudication was held on October 25, more than 90 days after the filing of the supplemental petition.

While § 43-278 provides that an adjudication hearing shall be conducted within 90 days after a petition is filed, this court has held that § 43-278 is directory, not mandatory. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000). As such, the provision does not mandate that a case be dismissed if the adjudication is not completed within 90 days. The facts of the present case indicate that the adjudication was completed approximately 4 months after the supplemental petition

was filed. We note that the passage of some of this time occurred due to a continuance which arose from attempting to properly serve Lloyd and that Lloyd's counsel did not object to the motion for continuance. We do not find an abuse of discretion by the trial court in denying Lloyd's motion to dismiss.

(b) Failure to Advise of Rights Pursuant to § 43-279.01

Lloyd claims that the court erred in failing to advise Lloyd of his rights pursuant to § 43-279.01, including the right to confront and cross-examine witnesses and to compel witnesses to attend and testify. Section 43-279.01 provides, in relevant part, as follows:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) of section 43-247 and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295;
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;
>
> (c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;
>
> (d) Right to confront and cross-examine witnesses;
>
> (e) Right to testify and to compel other witnesses to attend and testify;
>
> (f) Right to a speedy adjudication hearing; and
>
> (g) Right to appeal and have a transcript or record of the proceedings for such purpose.
>
> (2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission, an answer of no contest, or a denial from any parent or custodian as to all or any part of the allegations in the petition. The court shall ascertain a factual basis for an admission or an answer of no contest.

This court has found that when a parent appears, with or without counsel, for an adjudication hearing and the parent is not informed of his or her rights pursuant to § 43-279.01, the resulting adjudication order must be reversed. See *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999). The instant case is distinguishable, however, because Lloyd was not present at the adjudication hearing. The question then becomes whether § 43-279.01 is applicable when a parent is not present at the relevant hearing. The parties cited no case law which addresses this issue, and we have found none.

[4,5] Statutory interpretation presents a question of law. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). 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. *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005). Section 43-279.01(1) provides that a juvenile court must inform a parent of the rights listed in the statute when the parent "appears with or without counsel." Our plain reading of the statute indicates that the language "with or without counsel" indicates that the parent must actually be present in court for the statute to apply and that appearance by counsel alone does not trigger the statute. Lloyd was not present in court at the adjudication hearing. Therefore, § 43-279.01 is not applicable to the present situation and the juvenile court did not err in adjudicating Maxwell under the supplemental petition before Lloyd was provided a rights advisory pursuant to § 43-279.01. We note that Lloyd has not assigned as error a denial of due process by the failure to be informed of these rights, compare *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); nor has Lloyd assigned as error the denial of his motion to appear by telephone. Further, Lloyd's counsel did not move for a continuance at the adjudication hearing in order to secure Lloyd's presence. For all of these reasons, this assignment of error has no merit.

(c) Motion for Pretrial Hearing

Lloyd asserts that the court erred in denying his motion for pretrial hearing. The motion for pretrial hearing requested a

hearing so that the court "hears and enters its orders on pre-trial motions, sets a date for the completion of discovery prior to trial and schedules a date for an adjudication hearing in this cause." The court denied this motion at the beginning of the adjudication hearing, stating that Lloyd's counsel had sufficient time to conduct discovery and that Lloyd had not requested a continuance of the hearing. We find no error in the court's denial of the motion for pretrial hearing, particularly in light of Lloyd's assertions concerning a speedy adjudication.

(d) Compulsory Discovery Proceedings

Lloyd claims that the court erred in denying Lloyd the use of compulsory discovery proceedings. Lloyd's motion for the production of documents requested that Marsha produce, pursuant to discovery rule 34, any materials related to communications between Lloyd, Maxwell, and Marsha. Lloyd also filed a "Notice of Intention to Serve Rule [34A] Records Subpoena," which notice stated that Lloyd would be issuing and serving a subpoena on Marsha's aunt. The attached subpoena duces tecum requested that Marsha's aunt produce, pursuant to rule 34A, documents similar to those requested of Marsha. The court denied these motions along with the motion for pretrial hearing, stating that Lloyd's counsel had sufficient time to conduct discovery and that Lloyd had not requested a continuance of the hearing. Again, we find no error in the court's ruling concerning discovery in light of Lloyd's assertions concerning a speedy adjudication.

(e) Adjudication Under § 43-247(3)(a)

Lloyd claims that the court erred in finding that Maxwell was within § 43-247(3)(a) with respect to Lloyd. Lloyd asserts that the court's only basis for the adjudication was the fact that Lloyd was incarcerated, and Lloyd claims that it was error for the court to adjudicate Maxwell on this basis alone. Lloyd cites *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002), for the proposition that incarceration alone is insufficient, in the absence of other factors, to warrant the termination of a person's parental rights, and Lloyd asserts that this holding should be applied to an adjudication of a child pursuant

to § 43-247(3)(a). We conclude that there was sufficient evidence to support the court's order of adjudication.

In its supplemental petition, the State alleged that Maxwell was "lacking proper parental care by reason of the faults or habits of" Lloyd, in that Lloyd was currently incarcerated and unable to care for Maxwell, had had no contact with Maxwell for more than 6 months, and had failed to provide proper parental care for Maxwell, and in that because of those allegations, Maxwell was at risk for harm.

[6] At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005); *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). See § 43-279.01(3). At the adjudication hearing, the State presented evidence to support the allegations in the supplemental petition. Lewis testified that Lloyd would likely be incarcerated until 2009 and that Lloyd was unable to care for Maxwell while Lloyd was in the penitentiary. Lewis also testified that Lloyd had not had any contact with Maxwell for the 10 months that Lewis had been the caseworker. Lewis stated that in her opinion, Maxwell was at risk for harm because Lloyd left Maxwell in Marsha's care, at a time when Marsha was unable to care for him, and because Lloyd was unable to care for Maxwell while in the penitentiary. Having reviewed the evidence presented at the hearing, we conclude that the State provided sufficient evidence to prove the allegations of the supplemental petition by a preponderance of the evidence. We therefore reject Lloyd's final assignment of error.

VI. CONCLUSION

We find that the juvenile court properly exercised temporary emergency jurisdiction in this case, but that the court must immediately communicate with the South Dakota court as required by the UCCJEA before proceeding further with this matter. Further, the juvenile court is without jurisdiction to render a permanent custody order unless the South Dakota court affirmatively declines jurisdiction or fails to take appropriate action.

Last, we find that the juvenile court did not err in the adjudication of the supplemental petition.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

TODD A. ROBBINS, APPELLANT, V. BEVERLY NETH, DIRECTOR OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

722 N.W.2d 76

Filed September 26, 2006. No. A-04-835.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Venue.** For purposes of Neb. Rev. Stat. § 60-6,205(6)(a) (Cum. Supp. 2002), the administrative license revocation hearing is held at the location of the hearing officer.
6. ____: ____: ____: ____: ____. Under Neb. Rev. Stat. § 60-498.01(6)(a) (Supp. 2003), the administrative license revocation hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director.
7. **Administrative Law.** Properly adopted and filed agency regulations have the effect of statutory law.
8. ____. Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary.
9. **Administrative Law: Waiver.** Regulations governing procedure are just as binding upon both the agency which enacts them and the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force.
10. **Administrative Law: Statutes.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.
11. ____: ____. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.

12. **Statutes: Time.** Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases.
13. **Administrative Law: Venue.** Under Neb. Rev. Stat. § 84-913.03 (Cum. Supp. 2004), the hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.
14. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
15. ____. There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
16. **Statutes: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
17. ____: ____. As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
18. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Affirmed.

David E. Veath for appellant.

Jon Bruning, Attorney General, and Laura L. Neesen for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

Todd A. Robbins appeals the decision of the Box Butte County District Court affirming the order of Beverly Neth, director of the Nebraska Department of Motor Vehicles (the Department), which order administratively revoked Robbins' driver's license for 90 days. Robbins contends that error is present because the administrative license revocation (ALR) hearing was not held in the county of his arrest, as required by the Department's rules and regulations. We affirm, because the Legislature repealed the statutory requirement that the ALR hearing be held in the county of arrest, which action supersedes the Department's regulation stating otherwise.

STATEMENT OF FACTS

On October 26, 2003, Box Butte County Deputy Sheriff Mark Lindburg conducted a traffic stop of a vehicle driven by Robbins. Deputy Lindburg detected the odor of alcohol, and Robbins admitted to having consumed alcohol. Robbins exhibited impairment on a number of field sobriety tests. Deputy Lindburg then arrested Robbins for driving under the influence of alcohol and transported him to a hospital. Robbins submitted to a chemical test, which test indicated he had an alcohol concentration of .112 grams of alcohol per 100 milliliters of blood.

Deputy Lindburg completed the "Notice/Sworn Report/Temporary License" form and forwarded it to the Department, which received the report on November 12, 2003. On November 26, Robbins filed a petition for an administrative hearing. The ALR hearing was held on December 15. The hearing officer, located in Lincoln, Nebraska (Lancaster County), conducted the hearing via telephone. Robbins appeared via telephone from a district court jury room in the courthouse in Alliance, Nebraska (Box Butte County), and Box Butte County Deputy Sheriff Lindburg appeared via telephone from the sheriff's department in Alliance. At the start of the hearing, Robbins' attorney objected to venue and also objected that the hearing was not being conducted by videoconference even though it was technically feasible for the hearing to be conducted in such a manner.

Following the ALR hearing, the hearing officer recommended revocation of Robbins' operating privileges, and Neth, the director of the Department (Director), adopted the recommendation. The Department entered an order revoking Robbins' driver's license for 90 days effective December 13, 2003. Robbins filed an appeal to the Box Butte County District Court, and on January 16, 2004, the Department stayed the revocation of Robbins' driver's license. On July 12, the district court affirmed the Department's order of revocation. Robbins has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Robbins contends that the district court erred in affirming the Director's 90-day revocation of his driver's license, because the ALR hearing was not held in the county in which the

arrest occurred and because the ALR hearing was not conducted by videoconference, when conducting the hearing in such a manner was technically feasible.

STANDARD OF REVIEW

[1,2] A 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. *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998); *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). 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. *Miller, supra.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003).

[4] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below. *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002).

ANALYSIS

Venue for ALR Hearing.

Robbins contends that his ALR hearing, held on December 15, 2003, was conducted in violation of 247 Neb. Admin. Code, ch. 1, § 022.01 (2001), which at the time of the hearing provided that such "[h]earings shall be held either by telephone, in person, or by video conference if technically feasible at the discretion of the Director, in the county in which the arrest occurred. The parties may agree to another venue."

[5] The language in the Department's foregoing rule and regulation reflected the language of Neb. Rev. Stat. § 60-6,205(6)(a) (Cum. Supp. 2002), which previously required that an ALR hearing "shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." In

Gracey v. Zwonechek, 263 Neb. 796, 800, 643 N.W.2d 381, 385 (2002), the Nebraska Supreme Court held that "for purposes of § 60-6,205(6)(a), the hearing is held at the location of the hearing officer." Thus, in this case, the hearing was held in Lincoln because that was the location of the hearing officer.

[6-9] Section 60-6,205 was transferred to Neb. Rev. Stat. § 60-498.01 (Supp. 2003) operative October 1, 2003, and subsection (6)(a) was amended to provide that "[t]he hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director." The language requiring that the hearing be conducted in the county where the arrest occurred was removed from the statute by the Legislature. Thus, at the time of Robbins' December 15, 2003, ALR hearing, the applicable statute did not require the hearing to be conducted in the county in which the arrest occurred, but the Department's rules and regulations still contained such requirement. Robbins argues that the Department was bound to follow its own rule and that thus, venue for his hearing was improper, requiring reversal of the revocation of his driver's license. The following authority at first blush appears to support Robbins' position and is relied upon by the dissent:

> Properly adopted and filed agency regulations have the effect of statutory law. . . . Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary. . . . Regulations governing procedure are just as binding upon both the agency which enacts them and the public, "and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force." . . . "To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken . . . ."

(Citations omitted.) *Schmidt v. State*, 255 Neb. 551, 559, 586 N.W.2d 148, 153-54 (1998). While we cannot disagree with these broad general principles, they do not determine the issue presented in this case. With all due respect, we see the issue

before us differently than does our dissenting colleague. We believe the issue here is whether an administrative regulation has any continuing effect when its statutory underpinning has been explicitly removed by the Legislature. If the Legislature had not expressly spoken on the subject by, in effect, repealing the statutory provision that ALR hearings be held in the county of arrest, we would likely agree with the view taken by the dissent. But, the fact of the matter is that the Legislature has said, by its amendment to the statute, that the hearing need not be in the county of arrest. And, as discussed below, such fact determines the outcome of this appeal.

[10-12] "There is no doubt that the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute." *State ex rel. Spire v. Stodola*, 228 Neb. 107, 109, 421 N.W.2d 436, 438 (1988). In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

In *Stansbury, supra*, the Supreme Court dealt with the Workers' Compensation Court's application of rules promulgated for "transitional cases" where the former statute for determining a vocational rehabilitation plan and determining loss of earning power had been replaced with a new and different statute which was effective a month before the trial. The *Stansbury* court found that the compensation court should have used the new statute and also addressed the attempt by the compensation court to adopt rules providing for different treatment of "transitional cases" than that provided for in the new statute. We quote the *Stansbury* court's opinion at some length as follows:

> The second reason HEP urges that the new statute does not apply to this case is that the compensation court promulgated rules evidencing an intention that "transitional" cases be governed by the old statutory framework. HEP cites to Workers' Comp. Ct. R. of Proc. 42E (1995), which provides: "If an employer received notice of injury before

> January 1, 1994, the employee may continue to receive vocational rehabilitation services from the vocational rehabilitation counselor selected prior to that date." *Irrespective of whether this rule evidences an intent on the part of the compensation court to treat transitional cases differently, the legal reality is that while the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act,* see Neb. Rev. Stat. § 48-163 (Reissue 1993), *the rules cannot modify, alter, or enlarge provisions of a statute entrusted to its administration*, see, *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). In short, the compensation court does not have the power to determine when statutes will apply and when their application will be stayed.
>
> Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases that have not been tried. *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990); *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974). See *Allen v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985). As the amendments to the statute in question were procedural in nature, the new statute was applicable to this case . . . .

(Emphasis supplied.) *Stansbury*, 248 Neb. at 712-13, 539 N.W.2d at 34-35.

Applying the principles of law we have outlined in our analysis, we find that the Legislature's amendment of the statute that removed the requirement that the ALR hearing take place in the county of arrest, which amendment was effective 26 days prior to Robbins' arrest, controls over the Department's rule to the contrary. Any other result would make the Department's rulemaking authority superior to the Legislature's authority, which it clearly is not—particularly in this instance, where the Legislature has expressly spoken prior to Robbins' arrest by its amendment of

the underlying statute to say that the ALR hearing need not be held in the county of arrest. In short, Robbins was not denied any right guaranteed by law, since the procedure he claims to be due was no longer effective at the time of his arrest because of the Legislature's action. The problem was not that Robbins was denied a procedural right, but, rather, that the Department was remiss in not amending its rules and regulations to conform to the Legislature's mandate. But that does not equate to reversible error. In short, the Department's failure to conform to the Legislature's mandate provides no basis for a finding that Robbins' driver's license revocation is invalid on grounds of improper venue, because the venue was proper under the then-effective Legislative pronouncement.

Entitlement to Hearing by Videoconference.

[13] Robbins' final assignment of error is that his ALR hearing was not conducted by videoconference, when conducting the hearing in such manner was technically feasible. Neb. Rev. Stat. § 84-913.03 (Cum. Supp. 2004) provides:

> The hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

The statute uses the word "may," rather than the word "shall," with respect to holding the hearing by videoconference.

[14-18] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Further, as a general rule, in the construction of statutes, the word "shall" is

considered mandatory and inconsistent with the idea of discretion. *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). However, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *State ex rel. Shepherd, supra*; *In re Interest of Brandy M. et al., supra.*

Accordingly, keeping in mind the aforementioned well-established tools of statutory interpretation, the statute at hand is clearly permissive with respect to whether a videoconference is conducted. Further, while Robbins objected to the hearing's not being conducted via a videoconference, there is no showing of any particularized need for a videoconference hearing such that we could say that there was an abuse of the hearing officer's discretion in denying what is a permissive method of holding the hearing. This assignment of error is without merit.

CONCLUSION

Accordingly, we affirm the district court's affirmance of the Department's revocation of Robbins' driver's license.

AFFIRMED.

INBODY, Chief Judge, dissenting.

I must respectfully dissent from the majority's opinion, since Robbins' hearing was invalid because it was not held in accordance with the Department's rules and regulations for the reason that the hearing officer was located in a county other than where the arrest occurred.

The majority relies upon the proposition of law that in order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). However, rather than bolstering the majority's opinion, this proposition simply reaffirms my position. If the statute prohibited an ALR hearing from being held in the county in which the arrest occurred and the Department's rules made such a requirement, then I would agree with the majority that the Department's rule was inconsistent with

the statute, and in that circumstance, clearly the statute would invalidate the Department's rule. However, that is not the case here.

At the time of Robbins' December 15, 2003, ALR hearing, the Department's rule provided: "Hearings shall be held either by telephone, in person, or by video conference if technically feasible at the discretion of the Director, in the county in which the arrest occurred. The parties may agree to another venue." 247 Neb. Admin. Code, ch. 1, § 022.01 (2001). The statute in effect at that time provided: "The hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director." Neb. Rev. Stat. § 60-498.01(6)(a) (Supp. 2003). Thus, at the time of Robbins' December 15 hearing, the applicable statute did not require the hearing to be conducted in the county in which the arrest occurred, but the Department's rules and regulations did so require.

Clearly, the language contained in the Department's rule requiring the ALR hearing to be held in the county in which the arrest occurred is consistent with the language of the statute in effect at that time, even though the statute did not contain the same language. The statute does not prohibit a hearing's being held in the county in which the arrest occurred. The Department's rule requiring the ALR hearing to be held in the county in which the arrest occurred was an additional requirement that the Department imposed on itself, which requirement is not inconsistent with the statute.

I find that the following proposition of law is applicable to this case:

> Properly adopted and filed agency regulations have the effect of statutory law. . . . Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary. . . . Regulations governing procedure are just as binding upon both the agency which enacts them and the public, "and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force." . . . "To

be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken . . . ."

(Citations omitted.) *Schmidt v. State*, 255 Neb. 551, 559, 586 N.W.2d 148, 153-54 (1998).

The Department properly adopted and filed the regulation requiring that an ALR hearing take place in the county in which the arrest occurred, and such regulation has the effect of statutory law. The hearing officer in the instant case was located in Lincoln, Nebraska, within Lancaster County, and the county of arrest was Box Butte County. Since a "hearing is held at the location of the hearing officer," *Gracey v. Zwonechek*, 263 Neb. 796, 800, 643 N.W.2d 381, 385 (2002), Robbins' ALR hearing was not held in accordance with the Department's rules and regulations, because the hearing officer was located in a county other than where the arrest occurred. Thus, I would reverse the decision of the district court and remand this cause with directions to remand Robbins' case to the Department with directions to vacate the order of revocation. Because of this determination, I would not proceed to consider Robbins' remaining assignment of error.

ALICIA LEAH CONN, APPELLEE, V.
BOBBY JOE CONN, APPELLANT.

722 N.W.2d 507

Filed October 3, 2006. No. A-05-1337.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Child Custody: Parental Rights.** A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
4. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

5. **Parental Rights: Visitation.** Factors to consider in determining reasonable visitation rights include age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent.
6. **Parental Rights: Visitation: Appeal and Error.** When a parent whose visitation rights are at issue has been incarcerated, an appellate court will consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated.

Appeal from the District Court for Sherman County: MARK D. KOZISEK, Judge. Affirmed.

Bobby Joe Conn, pro se.

Daniel O. Mingus for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Bobby Joe Conn, previously convicted of conspiracy to murder Alicia Leah Conn and sentenced to 20 to 30 years' incarceration, appeals from the decree dissolving his marriage to Alicia which awarded Alicia custody of the parties' minor child and denied Bobby visitation with the child. Finding no abuse of discretion, we affirm.

BACKGROUND

The parties married in January 2000, and a child was born to the marriage in May. The parties separated in mid-February 2001, and Alicia and the child moved out of the home of Bobby's parents. On September 26, 2001, an apparent friend of Bobby attempted to kill Alicia at her apartment, where she was residing with the child. Alicia sought dissolution of her marriage to Bobby upon becoming aware that Bobby had engaged in a conspiracy to have her killed. On October 11, 2002, pursuant to a jury verdict finding Bobby guilty of conspiracy to commit murder in the first degree, the district court for Sherman County sentenced Bobby to imprisonment for 20 to 30 years with credit for time served. Bobby's parents were also convicted of felony charges arising out of the conspiracy. Alicia's petition for dissolution came on for trial on May 14, 2004. On June 14, the district court entered a decree dissolving the marriage, granting Alicia custody of the parties' child, ordering Bobby to pay

minimal child support, and refusing Bobby visitation with the child. Bobby appealed to this court, and we determined that the district court had failed to afford Bobby a reasonable opportunity to defend himself in the dissolution proceeding and had thereby deprived him of procedural due process. *Conn v. Conn*, 13 Neb. App. 472, 695 N.W.2d 674 (2005). We reversed the district court's dissolution decree and remanded the cause for further proceedings. *Id.*

On September 29, 2005, the district court held a final hearing pursuant to this court's remand. Bobby appeared telephonically. The child was 5 years old at the time of the hearing.

Alicia testified that the child had been in her custody most of the time since the parties' separation. The child stayed with Alicia's sister, Kayla Nilsen, from mid-May 2004 until April 2005. At the beginning of that period of time, Alicia traveled to Lincoln, Nebraska, to "start a new life" and "g[e]t things set up for [the child]." Alicia intended to have the child live with her in Lincoln once she was situated, but that did not occur. Alicia testified that she started a telemarketing job in Lincoln and was informed by an individual on work release from the Nebraska State Penitentiary who was working at the telemarketing firm to "watch [her] back." Alicia testified that the individual, whose name she could not recall, told her that he knew Bobby, that he had "heard stories," and that Alicia should "watch [her] back because it wasn't over." Alicia testified that she became frightened and left Nebraska. When asked why she did not take the child with her, Alicia testified, "She was already growing up seeing me scared, always looking . . . over my shoulder. I didn't want her growing up in that state, always being afraid. And I knew that she was going to be safe with [Nilsen] and my family."

Alicia did not keep in touch with her family after initially leaving the state. Alicia's stepmother testified that she did not know Alicia's whereabouts for 6 to 8 weeks after Alicia left Lincoln. Alicia's father filed a guardianship action on the child's behalf because he "didn't know for sure where Alicia was, and in case anything happened to [the child] or anything, wanted to be legally prepared." Nilsen and her husband were appointed guardians of the child. Nilsen testified that the purpose of the

guardianship was to have power in case of an emergency. During the time that Alicia was absent from the state, Nilsen testified, Alicia would call approximately biweekly to check on the child. Nilsen testified that Alicia did not give her any money for expenses or food for the child but that Nilsen felt she and her husband "were adequate for that job."

Upon her return to Nebraska in October 2004, Alicia resided with her grandmother in Burchard, Nebraska, and had visitation with the child. Alicia testified that she was not financially or emotionally stable enough to support the child at that time. In approximately February 2005, the child began staying with Alicia overnight and for a couple of days at a time before going back to stay with Nilsen and her husband. Nilsen testified that there was a "transition period" in January or February through April 2005 with visitation every 2 weeks. During the transition period, Nilsen observed Alicia's interaction with the child, and Nilsen opined that Alicia was capable of caring for the child. At the end of March or beginning of April, the child began living full time with Alicia in her three-bedroom apartment in Grand Island, Nebraska. We digress to note that following the September 29, 2005, hearing, this court vacated the appointment of Nilsen and her husband as the child's coguardians and remanded the cause for further proceedings. See *In re Guardianship of Breeahana C.*, 14 Neb. App. 182, 706 N.W.2d 66 (2005). In April 2005, Alicia gave birth to another child. Alicia sought custody of the parties' child, testified that she was a fit and proper person to have custody, and believed that it would be in the best interests of the child for the child to be with Alicia. She testified that she and the child were now stable and were both receiving counseling and attending support groups. Alicia's stepmother testified that Alicia's apartment was very clean, that the child has a very close relationship with Alicia, and that Alicia was a fit parent.

Alicia testified that Bobby should not be allowed visitation because he had hired people to kill her and the child was present in the apartment at the time the attempt on Alicia's life occurred. Although Alicia did not believe it was in the child's best interests to be alienated from Bobby, she was concerned that Bobby would be a bad influence on the child and did not believe it was

appropriate for a 5-year-old child to have continual contact and visitation at a prison facility.

Wanda Sierks, Bobby's aunt, testified that she observed Bobby to be a responsible and loving father. Sierks testified that Bobby asked her to act as the child's guardian and that she would be willing to provide the necessary financial and emotional support for the child. Sierks agreed to pick up the child and take the child to visitation with Bobby if the court allowed such visitation. Sierks' husband testified, "I never thought a child should be taken away from its mother or disrupted from a happy home. I was led to believe that she was being abandoned and unloved and going to be up for adoption. But it don't sound like that's the case." Bobby's brother testified that Bobby seemed like a competent father when he observed Bobby's visits with the child. Bobby's brother testified that on numerous occasions, the child had diaper rash and yeast infections when Bobby got the child for visitation. Bobby's brother testified that he had not seen the child in almost 4 years and that he missed her.

On October 12, 2005, the district court filed its decree of dissolution. The court stated that Bobby was incapable of performing his parental obligations due to his incarceration and that Alicia was a fit and proper person to be awarded custody of the child. In denying Bobby visitation, the court found that visitation with Bobby at the time and under the circumstances presented to the court was not in the best interests of the child. The court ordered Bobby to pay child support in the amount of $10 per month. Bobby timely appeals. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Bobby alleges that the district court erred (1) in finding that Alicia was a fit and proper parent for the care and custody of the child and (2) in holding that incarceration was sufficient justification for the denial of visitation.

STANDARD OF REVIEW

[1] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial

court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

[2] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

ANALYSIS

Custody.

Bobby argues that the district court abused its discretion in awarding Alicia custody of the child because Alicia abandoned the child and neglected to care for the child when Alicia departed Nebraska and left the child with Alicia's relatives. Bobby contends that the court should have appointed Sierks, the child's great aunt, the temporary guardian of the child.

[3,4] Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *Id.*; *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). " 'Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.' " *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992), quoting *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

Bobby's argument that Alicia is an unfit mother focuses on the fact that Alicia left the child with relatives when Alicia fled Nebraska after allegedly being threatened. Alicia explained that she was frightened at the time, that she did not want the child to grow up seeing Alicia "always being afraid," and that she knew the child would be safe with Alicia's family. In finding that Alicia was a fit and proper person to be awarded custody, the district

court stated, "The reason for [Alicia's] absence is understandable. The actions of [Alicia] did not indicate an indifference of a parent for a child's welfare over a long period of time. Those actions indicated parental concern for her child." We agree. At the time of the hearing, Alicia was living in a three-bedroom apartment, caring for her two children, and attending a community college. The evidence is insufficient to establish that Alicia was unfit or forfeited her parental rights; therefore, we will not deprive her of custody of the child. This assignment of error is without merit.

Visitation.

Bobby argues that the district court abused its discretion by relying solely on his incarceration to deny his request for visitation. He relies upon the principle of law that incarceration alone is not sufficient justification to deny a prisoner's right to visit his children. See *Nielsen v. Nielsen*, 217 Neb. 34, 348 N.W.2d 416 (1984). However, the fallacy in Bobby's argument is that his incarceration is not the sole reason, or even the most important reason, to deny visitation. A parent's rights are not absolute and must yield to the best interests of the child. *Id.*

[5] Factors to consider in determining reasonable visitation rights include age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent. See *id.* The child was 5 years old at the time of the hearing, was apparently healthy, and was receiving counseling with Alicia. The child was 2 years old when Bobby began serving his sentence of 20 to 30 years' incarceration. The child would need to be transported from Grand Island to Lincoln in order to visit Bobby, and Sierks agreed to provide such transportation. Alicia did not want Bobby to have visitation because he hired people to kill her and the child was present at the time of the attempt. Alicia was concerned that Bobby would be a bad influence on the child, and she did not believe it was appropriate for a 5-year-old child to have visitation at a prison facility. However, Alicia did not believe it was in the child's best interests to be alienated from Bobby. One of Bobby's aunts testified that the child was a

"daddy's girl," but the aunt had last observed Bobby with the child when the child was a little over 1 year old. Although Bobby's first cousin, a correctional officer at the Tecumseh State Correctional Institution, testified that in her employment, she observed fathers with their children, and that the children did not seem scared of their fathers, there was no evidence regarding the procedures for visitation, location, circumstances, or the effect the visitation would have on the child.

[6] In *Bruce v. Bruce*, 11 Neb. App. 548, 656 N.W.2d 281 (2003), this court concluded that the district court's order denying the father visitation based solely on the father's incarceration was an abuse of discretion because the record was devoid of any evidence suggesting that denying such visitation was in the best interests of the children. In the instant case, although the parties did not adduce any expert testimony regarding the impact visitation would have on the child, the district court noted that Bobby last had contact with the child when the child was 16 to 17 months old, nearly 4 years prior to the final dissolution hearing, and that the child had had no contact with her paternal side of the family for almost 4 years. With regard to cases involving termination of parental rights, Nebraska appellate courts have declared that when a parent whose parental rights are at issue has been incarcerated, we consider the nature of the crime committed, as well as the person against whom the criminal act was perpetrated. *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). See, also, *In re Interest of Ditter*, 212 Neb. 279, 322 N.W.2d 642 (1982); *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). We think it is also proper to consider the nature of the crime committed and the person against whom it is committed in cases such as the one before us.

While it is natural to focus on Alicia as the object of Bobby's crime, the subject child was also a victim of Bobby's scheme. Had Bobby's conspiracy achieved its end, the child would have been forever deprived of her mother. Moreover, the attempt to carry out the killing occurred while the child was present in the next room, placing her in considerable risk of physical harm. These acts in detriment of the child's best interests, and not the

incarceration which flows as a consequence thereof, are the principal reasons for denial of visitation. Bobby's argument that mere incarceration is the reason for denial of visitation highlights his lack of comprehension that his child, as well as his estranged wife, was a victim of his crime.

We agree with the district court that the act for which Bobby was convicted reflected negatively on his character, that Bobby evidenced little regard for his child and the impact that his plan would have had on the child, and that the attempted murder placed the child in danger. We conclude that the district court did not abuse its discretion in denying Bobby visitation rights at this time.

CONCLUSION

We conclude that the district court did not abuse its discretion in awarding Alicia custody of the child or in denying Bobby visitation with the child.

AFFIRMED.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, AS LIQUIDATOR OF AMWEST SURETY INSURANCE COMPANY, APPELLEE, V. STEVEN R. KAY ET AL., APPELLEES, AND MARY SCHEINER, APPELLANT.

722 N.W.2d 348

Filed October 10, 2006. No. A-05-130.

1. **Arbitration and Award.** Whether a stay of proceedings should be granted and arbitration required is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Contracts: Arbitration and Award.** Arbitration is purely a matter of contract.
4. **Arbitration and Award.** A party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so.
5. **Arbitration and Award: Courts: Actions.** When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration.

6. **Courts: Actions.** Courts inherently possess the power to stay proceedings when required by the interests of justice, and the decision of whether to grant a motion to stay is vested in the discretion of the trial court.
7. **Constitutional Law: Courts: Actions: Parties: Proof.** In making its decision to stay proceedings, a trial court is to balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that the proceedings will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Cathy S. Trent and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Mark I. Wallach and Sharon A. Luarde, of Calfee, Halter & Griswold, L.L.P., and John H. Binning, Robert L. Nefsky, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee L. Tim Wagner.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

L. Tim Wagner, Director of Insurance of the State of Nebraska, as the liquidator of Amwest Surety Insurance Company (Amwest), filed suit against the former directors and officers of Amwest, including Mary Scheiner, for breaches of certain fiduciary obligations. The district court for Lancaster County considered whether the claims relating to Scheiner should be resolved through binding arbitration. The court denied Scheiner's motion to compel arbitration, and Scheiner appeals. For the reasons set forth herein, we affirm.

BACKGROUND

Amwest is a wholly owned subsidiary of the Amwest Insurance Group, Inc. (AIG), a Delaware corporation. At all relevant times, Amwest operated as a Nebraska corporation. Amwest's main product lines included contract performance and payment bonds, commercial bonds, court bonds, and Small

Business Administration bonds. In 1999, Amwest began experiencing financial difficulties that resulted in downgraded ratings from A.M. Best Company, Inc. In June 2001, the district court adjudged that Amwest was insolvent and ordered the company to be liquidated.

Scheiner was an executive employee and officer of Amwest. Prior to the termination of Scheiner's employment due to a "reduction in force," she entered into two agreements that are relevant to our consideration of the present matter. In November 2000, Scheiner entered into a Key Employee Severance Agreement (Key Employee Agreement) with AIG. The Key Employee Agreement contained an arbitration clause, which provides in relevant part:

> Any and all disputes, controversies or claims arising under or in connection with this Agreement, including without limitation, fraud in the inducement of this Agreement, or the general validity or enforceability of this Agreement, shall be governed by the laws of the State of California, without giving effect to its conflict of laws provisions and shall be submitted to binding arbitration before one arbitrator of the American Arbitration Association conducted in Los Angeles County under the laws of the State of California.

In March 2001, Scheiner also entered into a Separation Agreement and General and Special Release of Claims (Separation Agreement) with AIG "and all of its subsidiaries." The Separation Agreement concerned "the termination of [Scheiner's] employment with [AIG and its subsidiaries]" and also contained an arbitration clause, which clause provides in relevant part:

> As a material part of this Agreement, [Scheiner] and [AIG and its subsidiaries] expressly agree that any and all disputes, controversies or claims arising out of or concerning this Agreement, any alleged breach of this Agreement, or the matters resolved and settled by this Agreement, including but not limited to disputes, controversies or claims arising out of [Scheiner's] employment by [AIG and its subsidiaries] or its termination, or this Agreement, whether arising under theories of liability or damages based on

> contract, tort or statute, shall be determined exclusively by final and binding arbitration before a single arbitrator in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association, unless other rules are provided in this paragraph, that judgment upon the award rendered by the arbitrator may be rendered in any court of competent jurisdiction.

The Separation Agreement contains an integration clause, which provides that "[this] Agreement constitutes a single integrated contract expressing the entire agreement of the parties hereto with respect to the subject matter hereof and supersedes all prior understandings, negotiations or agreements, written or oral, express or implied." Wagner (hereinafter the Liquidator) has expressly disavowed these agreements pursuant to Neb. Rev. Stat. § 44-4821(1)(m) (Reissue 2004).

On June 6, 2003, the Liquidator filed a complaint against several former directors and officers of Amwest, including Scheiner, seeking damages for their acts and omissions while serving in those capacities. The Liquidator filed an amended complaint on January 7, 2004. In the operative complaint, the Liquidator alleged that the defendants, as officers of Amwest and/or as members of the board of directors of Amwest, were aware or should have been aware of Amwest's financial and managerial difficulties and had a heightened duty to take action with respect to the financial and managerial difficulties occurring at Amwest. The Liquidator asserted that the defendants breached this fiduciary duty. The Liquidator also asserted that certain officers of Amwest, including Scheiner, entered into separation agreements that were not properly approved or submitted to the Nebraska Department of Insurance. The Liquidator alleged that these separation agreements allowed these officers to obtain a greater percentage of their debt from Amwest than other creditors of the same class would receive. The Liquidator sought to recover these transfers and sought damages for the alleged breach of fiduciary duties.

On December 15, 2003, Scheiner filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003) on the basis that the district court lacked personal jurisdiction

over her person. The district court denied Scheiner's motion on June 30, 2004.

On August 26, 2004, Scheiner filed a motion to compel arbitration in accordance with the arbitration provisions of the Key Employee Agreement and the Separation Agreement she had entered into with AIG and its subsidiaries. The district court heard Scheiner's motion on September 22. The court received copies of the agreements into evidence at the hearing.

On December 28, 2004, the district court entered an order denying Scheiner's motion to compel arbitration. The court observed that the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act, Neb. Rev. Stat. § 44-4801 et seq. (Reissue 2004), vests extensive authority in the Liquidator in the administration of an insolvent insurance company. The court quoted § 44-4801 in part, which specifically provides that "[t]he act shall be liberally construed to effect the purposes enumerated in this section and shall not be interpreted to limit the powers granted the director by other provisions of the law." The court observed that the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act is replete with features designed to give broad powers to the appointed liquidator, and the court stated that it would therefore construe the act in favor of its declared purpose.

The district court agreed with certain holdings made by the Ohio Court of Appeals in the case of *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 800 N.E.2d 50 (2003), which case and holdings we discuss in detail in the analysis section below. The district court found that the Liquidator in the present case was not seeking to enforce the agreements in question, but was instead seeking to disavow them, per the Liquidator's power under § 44-4821(1)(m). The court found nothing to indicate that the Liquidator adopted any of the agreements or expressly assumed the liabilities contained therein. The court, again referring to a similar holding in *Benjamin v. Pipoly, supra*, held that to permit Scheiner to have her action decided privately and separately from her fellow officers when the Liquidator had disavowed the contract was contrary to the interests of the insureds, claimants, creditors, and the public generally. Accordingly, the

court found that the arbitration agreements were not binding on the Liquidator.

In addition, the district court held that Scheiner had waived her right to compel arbitration. The court, citing several cases from the U.S. Court of Appeals for the Eighth Circuit, stated that a party seeking arbitration may have waived its right to arbitration if it (1) knew of an existing right to arbitration, (2) acted inconsistently with that right, and (3) prejudiced the other party by these inconsistent acts. The court reasoned that Scheiner executed the agreements in question and, thus, must have been aware of the right to arbitrate laid out in those agreements. The court stated that Scheiner acted inconsistently with that right by failing to raise the matter of arbitration during her motion to dismiss for lack of personal jurisdiction. The court stated further:

> It has been more than one year after the lawsuit was filed that . . . Scheiner brought the matter of arbitration before the court and during the process, [Scheiner] has pursued discovery and responded to the [Liquidator's] discovery. The [Liquidator] has incurred expense and devoted time prosecuting this action against . . . Scheiner and would be prejudiced if this action were to be submitted to arbitration.

On January 7, 2005, Scheiner filed with this court a notice of appeal from the district court's December 2004 order. Scheiner subsequently moved for certification pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). An off-the-record hearing was held on January 13 to address the effect of the notice of appeal on the underlying proceedings. During the hearing, the district court entertained the parties' respective arguments regarding whether certification was required under § 25-1315 in order for Scheiner to appeal the order denying Scheiner's motion to compel arbitration. Pursuant to the parties' stipulation to dismiss Scheiner's original appeal, this court issued on January 25 a mandate dismissing the appeal.

On January 26, 2005, the district court entered an order granting Scheiner's motion to certify. The court stated that under Neb. Rev. Stat. § 25-2620(a)(1) (Reissue 1995), an order denying an application to compel arbitration is appealable. The court found that the claims against Scheiner were sufficiently separate and distinct so that an appeal of the order denying her motion to

compel would neither prejudice the balance of the case nor prevent the underlying case from proceeding. The court also found that there was no just reason for delaying appeal in Scheiner's case. Finally, the court reaffirmed its previous findings regarding Scheiner's motion to compel arbitration, again setting forth the findings that were initially set forth in the December 27, 2004, order. Scheiner subsequently perfected her appeal to this court.

ASSIGNMENTS OF ERROR

We initially note that Scheiner's brief does not contain a separate "assignments of error" section stating the assigned errors completely apart from the arguments in her brief. Neb. Ct. R. of Prac. 9D(1)e (rev. 2001) requires a "separate, concise statement of each error a party contends was made by the trial court . . . . Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed." Scheiner's brief marginally complies with these requirements, since on the table of contents page of her brief, under the heading "ARGUMENT," Scheiner sets forth two statements concerning errors made by the district court. Scheiner again sets forth a statement of alleged error before each of two detailed arguments in her brief. Scheiner has clearly intended these statements to be her assignments of error, and accordingly, we treat them as assignments of error. While we ultimately consider Scheiner's "assignments of error" in this case, closer adherence to the above rule (and to long-established briefing practice) is preferable.

Scheiner asserts that the district court erred in (1) holding that the Liquidator was not bound by the arbitration agreements and (2) finding that Scheiner waived her right to compel arbitration.

STANDARD OF REVIEW

[1,2] Although Scheiner suggests that neither this court nor the Nebraska Supreme Court has addressed the appropriate appellate standard for review of an order denying a motion to compel arbitration, the Supreme Court has stated that whether a stay of proceedings should be granted and arbitration required is a question of law. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33

(2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

ANALYSIS

Scheiner first asserts that the district court erred in holding that the Liquidator was not bound by the arbitration agreements. The present case is similar to *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 800 N.E.2d 50 (2003), cited by the district court. In *Benjamin*, the Ohio Court of Appeals considered whether the liquidator of an insolvent insurance company had the power to avoid enforcement of certain arbitration agreements. The Ohio court held that the broad powers conferred to a liquidator under Ohio statutes allowed a liquidator to affirm or disavow any contracts made by insolvent insurance companies, including provisions for arbitration of disputes. The facts and holdings of the *Benjamin* case were very effectively summarized in a recent article in the Journal of Dispute Resolution, and we set forth that summary as follows:

> Ann H. Womer Benjamin appealed the decision of the Franklin County Court of Common Pleas to stay her action against the appellees and order that the case proceed to arbitration. Appellant Benjamin is the Superintendent of the Ohio Department of Insurance and acted as the liquidator of two insolvent companies, Credit General Insurance Company (CGIC) and Credit General Indemnity Company (CGIND). Benjamin continued the claims brought by the former Superintendent of the Ohio Department of Insurance, J. Lee Covington II. The appellees, Michael J. Saxon, Laura B. Darcy, John H. Fehler, Richard J. Babel, Bryan K. Griffin, and Ronald E. Pipoly (collectively, Pipoly) served as officers and directors of CGIC and CGIND prior to the institution of liquidation proceedings.
>
> Benjamin's original suits against Pipoly were tort claims for alleged breaches of fiduciary duties, which were realized while Pipoly held positions as officers and directors in the two insolvent insurance companies, CGIC and CGIND. The alleged breaches were founded on Pipoly's

alleged knowledge and concealment of serious financial and operational problems with CGIC and CGIND and the subsequent failure to correct those problems.

As an officer or director of CGIC and GCIND [sic], Pipoly entered into employment agreements with Phoenix Management Enterprises, Inc., which later became known as PRS Management Group, Inc. (PRS). Each of the employment agreements contained an arbitration provision stating that disputes related to the employment agreement should first be settled between the parties informally. If that failed, disputes would be subjected to binding arbitration in Cleveland, Ohio, subject to the rules of the American Arbitration Association.

In her capacity as the liquidator of the two companies, Benjamin disavowed all agreements to arbitrate and all of Pipoly's employment agreements. The Ohio code permits the liquidator of an insolvent insurance company to enter into new contracts and affirm or disavow contracts made by the insolvent insurance company.

Benjamin challenged each of the findings of the trial court. Benjamin argued that the arbitration clauses contained in the employment agreements were unenforceable against her because she was not a party to the employment agreements and because she expressly disavowed them. Benjamin argued that the strong policies embodied within Ohio's insurance liquidation statutes outweighed the general policy favoring arbitration.

Pipoly argued that Benjamin "stands in the shoes" of the two companies and is, therefore, bound by all provisions in the employment agreements. Appellee contended that Benjamin should be bound by all agreements mandating arbitration. It was further argued by Pipoly that Benjamin should be bound by the terms of the employment agreements and should be estopped from disavowing them. Pipoly stated that Benjamin must enforce the arbitration agreements contained in the employment agreements and other documents.

The trial court agreed with Pipoly and stayed the liquidation proceedings and compelled arbitration. The court

> found that although section 3903.21 of the Ohio Revised Code authorized the appellant to disavow certain contracts, it relied on *Fabe v. Columbus Ins. Co.*[, 68 Ohio App. 3d 226, 587 N.E.2d 966 (1990),] for the proposition that consideration should be given to both the liquidation statutes and the arbitration clause. The trial court found that the companies were bound by the employment agreement and other agreements and were required to send all disputes to arbitration.
>
> On appeal, the Ohio Court of Appeals found that Benjamin's claim should not be forced into arbitration. The appellate court rejected Pipoly's argument that the refusal to compel arbitration violated the Federal Arbitration Act (FAA) because arbitration agreements are unenforceable if there are valid grounds to not enforce an arbitration agreement "at law or in equity for the revocation of any contract." The appellate court relied on the broad power Ohio's legislature had conferred to liquidators to affirm or disavow contracts created by the insolvent company in order to find that failure to compel arbitration was not violative of the FAA.

Frank C. Koranda, Jr., Notes, *On Hostile Ground: Ohio's Notice to Insolvent Insurance Companies with Arbitration Agreements*, 2 J. Disp. Resol. 493, 493-95 (2004).

Summarizing further, the article stated:

> In *Benjamin v. Pipoly*, the Ohio Court of Appeals had to decide whether it was proper for a liquidator's claims against employees of an insolvent insurance company to be stayed pending arbitration when the liquidator was not a party to the arbitration agreements. The court held that Benjamin's claims against the defendants would not be stayed pending arbitration. The court reasoned that because the liquidator was not a party to the arbitration agreement, she was not bound by any of its provisions. The court further reasoned that Ohio provided liquidators of insurance companies with broad powers to conduct liquidation proceedings and that compelling arbitration agreements impinges on these powers and violates public policy.

In order to resolve the issue, the court first recited the broad powers given to liquidators in insurance liquidation proceedings. The court noted that Ohio's insurance-liquidation scheme has many "features designed to vest within the liquidator broad and largely unfettered powers, under the supervision of the courts, to maximize the assets available to her in discharging her duties to claimants, shareholders, and creditors of the insolvent insurance company." The court also noted the code sections that govern arbitration. It then established the basis of its holding that only parties to an arbitration agreement may invoke the arbitration agreement.

The decision recognized that a party can only be required to arbitrate if that party agreed in writing to arbitrate those disputes. Noting that arbitration is a matter of contract, the court stated that a presumption against arbitration arises when a party has not agreed to submit to arbitration.

The decision noted that the appellant never signed either the employment agreement or the mutual agreements to arbitrate raising the presumption against arbitration. The court found that appellees cannot rebut this presumption against arbitration. The court then held that "when a liquidator is appointed by court order . . . she is not automatically bound by the pre-appointment contractual obligations of the insurer." The court held that a liquidator would only be bound if she affirmatively elected to be bound by prior obligations. Because Benjamin was not party to the original agreements, and did not indicate that she wished to be bound by those agreements, the arbitration agreements would not be enforced against her.

Following this holding, the court continued to discuss arbitration agreements in insurance liquidation proceedings and their relationship with prior case law. The court made an effort to expressly overrule *Fabe v. Columbus Ins. Co.*, a case on which Pipoly heavily relied. The decision held that "where . . . private arbitration impinges upon a broad statutory scheme that invests sweeping powers in a state official, enforcement of arbitration ipso facto violates public policy." The decision focused on the policy

> that insurance liquidators should be able to act without interference from other agencies. The court found that the public policy regarding a liquidator's broad power "defeats any general attitude of the courts favoring arbitration." The court found that a liquidator should never be compelled to arbitration against her will because that would interfere with the liquidator's powers and would adversely affect the insolvent insurer's assets.
>
> The court also rejected an argument that the liquidator should be estopped from disavowing the arbitration agreements because the disavowal came too late. The decision refused to recognize the argument that a liquidator is subject to temporal limitations as to when she can disavow a contract. The decision also rejected the argument that the liquidator was seeking a declaration of her rights because the claims in Benjamin's lawsuit are not related to failures under the employment contracts, but rather breaches of fiduciary and statutory duties. Finally, the court reasoned that its decision is not violative of the FAA, contrary to the appellees' arguments, because the liquidators possessed the power to disavow any contract.

Frank C. Koranda, Jr., Notes, *On Hostile Ground: Ohio's Notice to Insolvent Insurance Companies with Arbitration Agreements*, 2 J. Disp. Resol. 493, 499-501 (2004).

In Nebraska, as in Ohio, a liquidator is granted broad statutory powers, including the power "[t]o enter into such contracts as are necessary to carry out the order to liquidate and to affirm or disavow any contracts to which the insurer is a party." § 44-4821(1)(m). Compare Ohio Rev. Code Ann. § 3903.21 (Anderson 2002) (employing essentially identical language). Section 44-4821 provides further, in subsection (3):

> The enumeration in this section of the powers and authority of the liquidator shall not be construed as a limitation upon him or her nor shall it exclude in any manner his or her right to do such other acts not in this section specifically enumerated or otherwise provided for as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

"The purpose of the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act is to protect the interests of insureds, claimants, creditors, and the public with minimum interference with the normal prerogatives of the owners and managers of insurers," and the act "shall be liberally construed to effect the purposes enumerated . . . and shall not be interpreted to limit the powers granted the director by other provisions of the law." § 44-4801.

[3-7] With regard to arbitration, Nebraska statutes provide that "[a] written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract." Neb. Rev. Stat. § 25-2602.01 (Supp. 2005). The Nebraska Supreme Court has held that arbitration is purely a matter of contract. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002). The Supreme Court has further held that a party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration. *Id.* Courts inherently possess the power to stay proceedings when required by the interests of justice, and the decision of whether to grant a motion to stay is vested in the discretion of the trial court. *Id.* In making its decision to stay proceedings, a trial court is to balance the competing needs of the parties, taking into account, among other things, the interest of the courts, the probability that the proceedings will work a constitutional violation on the movant, the presence or absence of hardship or inequity, and the burden of proof. *Id.*

In *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 800 N.E.2d 50 (2003), the Ohio Court of Appeals concluded that in a case in which the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises. In that case, the court concluded that because neither

the appellant nor her predecessor signed the agreements relied upon by the appellees, a presumption against arbitration existed. The court further concluded that the appellees had not and could not sufficiently rebut the presumption, especially in light of the policy considerations contained within the Ohio statutes, which vested broad powers in both liquidators and the courts. The *Benjamin* court stated:

> A liquidator emanates from an order of the court and acts as an arm or extension of the court. A liquidator is appointed to perform specific functions, including preserving and maximizing the value of the insolvent insurer and protecting the interests of both those with direct pecuniary connections to the insurer and the general public. The liquidator must have freedom of action to do those acts most beneficial in achieving her objectives. Within this demesne, the liquidator may affirm or disavow the rights and obligations of the interest with which she is charged, and it would be inconsistent to compel arbitration against her when such an obligation predates her appointment.
>
> Thus we hold that when a liquidator is appointed by court order, as in the instant case, she is not automatically bound by the pre-appointment contractual obligations of the insurer. To be so bound, the liquidator must affirmatively indicate her election to be responsible for the prior obligations of the former operators. Since appellant was not a party to appellees' employment agreements or the assignment thereof and was not a party to any of the mutual agreements to arbitrate, and because there is nothing in the record to demonstrate that she adopted any of these agreements and expressly assumed the liabilities contained therein, the arbitration provisions within these agreements may not be enforced against her.

155 Ohio App. 3d at 182-83, 800 N.E.2d at 58-59.

In the present case, we agree, as did the district court, with the *Benjamin* court's holding that when a liquidator is appointed by court order, such liquidator is not automatically bound by the preappointment contractual obligations of the insurer. Section 44-4821(1)(m) provides that a liquidator shall have the power "to affirm or disavow any contracts to which the insurer is a

party." The Liquidator in the present case is not seeking to enforce the agreements; but instead, he is disavowing them, which is one of his express powers. There is nothing in the record to indicate that the Liquidator adopted any of the agreements or expressly assumed the liabilities contained therein. To allow Scheiner to have her action " 'decided privately and separately from [her] fellow officers when the [L]iquidator has disavowed the [agreements] is contrary to the interests of insureds, claimants, creditors, and the public generally.' " See *Benjamin v. Pipoly*, 155 Ohio App. 3d at 61, 800 N.E.2d at 185, citing *Covington v. Lucia*, 151 Ohio App. 3d 409, 784 N.E.2d 186 (2003). We conclude, as did the district court, that the arbitration agreements at issue are not binding on the Liquidator. We further conclude that the district court properly denied Scheiner's motion to compel arbitration. The district court clearly balanced the competing needs of the parties and took into account the interest of the courts, the presence or absence of hardship on the parties, and other factors. See *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). The decision to deny Scheiner's motion to compel arbitration was well within the district court's discretion. Scheiner's assignment of error is without merit.

[8] Scheiner also asserts that the district court erred in finding that she waived her right to compel arbitration. Given our resolution of Scheiner's first assignment of error, we need not consider Scheiner's second error, since its resolution is not necessary to adjudicate the case and controversy before us. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

CONCLUSION

The district court did not err in holding that the Liquidator was not bound by the arbitration agreements or in denying Scheiner's motion to compel arbitration.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. RICHARD HISEY, APPELLEE.

723 N.W.2d 99

Filed October 17, 2006. No. A-05-1138.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
3. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
4. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Arrests: Probable Cause.** The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigative stop, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards but, because of its less intrusive character, requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
5. **Search and Seizure.** A person has been seized only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.
6. **Constitutional Law: Warrantless Searches.** Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions.
7. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
8. **Warrantless Searches: Proof.** The State has the burden to prove that one of the circumstances substantiating the reasonableness of a warrantless search was present during a warrantless search.

9. **Criminal Law: Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
10. **Constitutional Law: Police Officers and Sheriffs: Evidence.** Whether the exclusionary rule's remedy is appropriate in a particular context is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.
11. **Search and Seizure: Police Officers and Sheriffs.** A good faith exception to the exclusionary rule may apply when an officer's actions are objectively reasonable.
12. **Constitutional Law: Warrantless Searches: Proof.** The State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search.
13. **Constitutional Law: Police Officers and Sheriffs: Evidence.** The purpose of the exclusionary rule is to deter police and adjuncts of law enforcement from conduct that will result in a denial of rights to people.

Appeal from the District Court for Kimball County, KRISTINE R. CECAVA, Judge, on appeal thereto from the County Court for Kimball County, KENT D. TURNBULL, Judge. Judgment of District Court affirmed.

Paul B. Schaub, Special Prosecuting Attorney, for appellant.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Richard Hisey was convicted of operating a motor vehicle while under the influence of alcohol, and of possessing an open alcoholic beverage container while doing so, by the county court for Kimball County. Hisey appealed to the district court for Kimball County, which vacated the convictions and held that evidence obtained after police stopped Hisey should be suppressed. The State appeals. We conclude that because the arresting officer relied on erroneous information contained in Nebraska's Department of Motor Vehicles (DMV) records, the officer did not have probable cause to arrest Hisey. We therefore affirm.

BACKGROUND

On May 1, 2004, Officer Sharon Lewis of the Kimball Police Department arrested Hisey for driving with a suspended license,

driving under the influence, and driving with an open container in his vehicle. At the time of the arrest, Lewis was on duty, in uniform, and on patrol in Kimball, Nebraska, in a marked patrol car. Prior to the arrest, Lewis observed Hisey drive his pickup truck by her patrol car. She watched as Hisey stopped his vehicle in front of his house and exited the vehicle. Lewis then drove her patrol car toward Hisey's parked vehicle because she was "under the impression that . . . Hisey's license was still impounded" and "called to confirm that [impression] with dispatch." Lewis later testified that at the time of the arrest, she had this belief because at an earlier date, she had attended a trial at which Hisey had been convicted of driving under the influence of alcohol and refusal to submit to an alcohol test and his license had been impounded.

Before initiating contact with Hisey, Lewis called the dispatcher for the Kimball County sheriff's office and asked the dispatcher to check the status of Hisey's operator's license. She then pulled her patrol car to a stop next to Hisey, who was standing near the driver's side of his pickup truck. She asked Hisey whether he "[got his] license back." Hisey responded that he did. After Hisey's response, Lewis received a call on her cellular telephone from the dispatcher, who informed Lewis that Hisey's license was currently impounded. Lewis testified that when she received this information, Hisey was not free to leave, and that soon after she received this information, she arrested Hisey for driving with a suspended license.

Lewis informed Hisey he was under arrest. She allowed Hisey to take his dog into his house and then escorted him to her patrol car. She drove him to the Kimball County sheriff's office, and she performed a series of sobriety tests on him. Lewis testified that she performed the sobriety tests because, "[a]t the time [she] had original contact with him, his eyes were bloodshot and watery." She continued, "His face was very red and he was slurring his words. When he walked to the house, he was unsteady and he was walking very, very slow." She testified further that Hisey smelled of alcohol. She also testified that when she pulled up next to Hisey, both of his pickup's doors were open and she was able to see "a container of beer" and an open "12-pack of beer" in the cab of the pickup. She removed multiple cans of beer, at least

one of them open, from the pickup after she arrested Hisey and kept them as evidence. After Hisey performed the sobriety tests, Lewis arrested Hisey for driving under the influence of alcohol and driving with an open container of alcohol in his vehicle.

After Hisey's arrest, but before disposition of the charges against him, it was discovered that his license was not under impoundment at the time of arrest. The information the dispatcher conveyed to Lewis regarding the status of Hisey's license was erroneous. The dispatcher received this erroneous information from the DMV's driver and vehicle records division's records, which mistakenly indicated that Hisey was not eligible to get his impounded license back until May 2, 2004. However, after his prior convictions for driving under the influence and refusal to submit to an alcohol test, the county court ordered Hisey not to drive for a period of 60 days, beginning on March 3, 2004, on each of the two counts, but also directed credit to be given on each count for 32 days served and impoundment for the two charges to be served concurrently. Therefore, Hisey's license was not under impoundment on May 1.

On May 24, 2004, in the county court for Kimball County, Hisey was charged with, inter alia, driving under the influence of alcoholic liquor, second offense, in violation of Neb. Rev. Stat. § 60-6,196(1)(a)(c) (Supp. 2003), and driving with an open container of alcohol in his vehicle, in violation of Neb. Rev. Stat. § 60-6,211.08(2) (Reissue 2004). Hisey filed a motion to suppress all evidence obtained from the stop, search, and arrest. On September 14, the county court for Kimball County overruled Hisey's motion to suppress, opining that Lewis' conduct before and during the arrest was not unlawful. At trial on October 29, a jury found Hisey guilty of driving under the influence of alcoholic liquor and the court found him guilty of driving with an open container of alcohol in his vehicle. Thereafter, the county court sentenced Hisey on the open container conviction and held an enhancement hearing at which the court determined that the conviction for driving under the influence was Hisey's second conviction of this crime and sentenced him accordingly.

Hisey appealed to the district court for Kimball County. He claimed, inter alia, that the trial court erred in failing to sustain his motion to suppress. On August 26, 2005, the district court heard

his appeal. Hisey argued that his Fourth Amendment rights were violated and that evidence discovered as a result of the stop and detention should have been excluded from evidence at trial because the stop was illegal. The district court found that "[Lewis] contacted [Hisey] before she had current independent information about [Hisey's] license status." Because her memory proved to be wrong and the facts she articulated were false, it found, "the initial stop violated the Fourth Amendment of the United States Constitution." The district court further reasoned that Lewis made an "investigatory stop prior to receiving the information from dispatch" and that at that time, "[t]he illegal seizure had already occurred." Therefore, the district court held that "the information and evidence received by [Lewis] after the illegal stop should be suppressed from use in this case," vacated the convictions and sentences, and remanded the cause to county court for a new trial. The State timely appeals.

ASSIGNMENTS OF ERROR

The State alleges that the district court, acting as an intermediate appellate court, erred (1) in finding that there was an illegal stop and (2) in suppressing information and evidence received by Lewis following her contact with Hisey.

STANDARD OF REVIEW

[1,2] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Sparr*, 13 Neb. App. 144, 688 N.W.2d 913 (2004).

[3] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving

due weight to the inferences drawn from those facts by the trial judge. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

ANALYSIS

[4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect citizens against unreasonable seizures by police officers. To determine whether a seizure has occurred in a particular situation, the first step is to categorize the police-citizen encounter. There are three levels of police-citizen encounters:

> "The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of fourth amendment protection. . . . The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a 'seizure' sufficient to invoke fourth amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. . . . The third type of police-citizen encounters, arrests, [is] characterized by highly intrusive or lengthy search or detention. The fourth amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime."

(Citations omitted.) *State v. Van Ackeren*, 242 Neb. 479, 486-87, 495 N.W.2d 630, 636 (1993), quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984).

[5] If there is no seizure, then no Fourth Amendment protection is available.

> "[A] person has been 'seized' . . . only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of

> a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."

State v. Twohig, 238 Neb. 92, 99, 469 N.W.2d 344, 350 (1991), quoting *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

In *Twohig*, the Nebraska Supreme Court further clarified what constitutes a seizure, explaining:

> "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . ."

238 Neb. at 100, 469 N.W.2d at 350, quoting *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

Thus, when a police-citizen encounter involves the voluntary cooperation of the citizen and noncoercive questioning by an officer, there is not a seizure. See *id.* A seizure requires that either an officer asserts physical force to restrain the individual or an individual submits to an assertion of authority. See *State v. Van Ackeren, supra.*

In the instant case, we determine that Hisey was not seized during his initial encounter with Lewis on May 1, 2004, prior to when Lewis received information from the dispatcher about the status of Hisey's license and placed him under arrest.

There is little dispute over the facts of the initial encounter between Hisey and Lewis on May 1, 2004. Lewis was on patrol in her police car shortly before she encountered Hisey. She observed Hisey drive by in his pickup truck and park in front of his house. Because Lewis was under the impression that Hisey's license was still impounded, she called dispatch to confirm her suspicion and pulled up next to Hisey to speak with him about his license.

When Lewis pulled up next to Hisey, Hisey was already out of his vehicle. She parked in such a way that Hisey was not blocked in. Lewis did not impede Hisey's movement by making a traffic stop. At no time did Lewis activate the emergency lights on her patrol car. Hisey was free to walk away from Lewis at this time.

When Lewis first spoke with Hisey as she rolled to a stop, she inquired, "Hey, did you . . . get your license back?" This inquiry, as far as the record reflects, was not intense or threatening. Lewis was alone, and there is nothing in the record suggesting that her demeanor was in any way intimidating. We find nothing in the record which indicates that a reasonable person in Hisey's situation would believe that he was not free to leave when Lewis began questioning him about his license. Therefore, in the initial encounter, before Lewis stated that Hisey was under arrest, Hisey was not seized. We disagree with the district court that this initial encounter constituted an illegal stop and find that this encounter did not violate the Fourth Amendment. Because we disagree with the district court's reasoning, we do not stop our analysis at this point as the district court did, but continue to determine whether the evidence should be suppressed based on circumstances which occurred after the initial encounter.

After the initial encounter with Hisey, Lewis received a call on her cellular telephone from the dispatcher, informing her that Hisey's license was under impoundment on the relevant date. Lewis testified that when she received this information, Hisey was not free to leave. Soon after receiving this information, she arrested Hisey for driving with a suspended license. This constituted a seizure and falls under the third level of police-citizen encounters. See *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[6-8] Acting without a warrant, Lewis arrested Hisey and gathered evidence later used to convict him. Warrantless searches are generally unreasonable under the Fourth Amendment, subject to a limited number of specific exceptions. See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3)

inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id.* The State has the burden to prove that one of these circumstances was present during a warrantless search. See *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). In this case, the State argues that Lewis had probable cause to arrest Hisey without a warrant.

We digress at this point to note that the State argues, despite the penalty handed down in the sentencing order by the county court for Hisey's March 3, 2004, driving under the influence and refusal to submit to an alcohol test convictions, that Hisey's license was impounded until May 2, 2004. We disagree. Our reading of the sentence imposed by the county court indicates that his driving privileges were restored prior to May 1. The information contained in the DMV records was inconsistent with the sentencing judgment of the county court. We therefore consider whether Lewis had probable cause, based upon erroneous information originating from the DMV records, to arrest Hisey.

[9] "The concept of probable cause is not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 931, 492 N.W.2d at 30. "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant." *Id.* at 929, 492 N.W.2d at 30. Probable cause is determined by an objective standard of reasonableness: "whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found." *State v. Voichahoske*, 271 Neb. at 75, 709 N.W.2d at 670.

We must determine whether Lewis' reliance on erroneous information contained in DMV records was reasonable under the circumstances. No Nebraska court has addressed the precise issue of whether it is reasonable for a police officer to rely on erroneous information resulting from a mistake made by the DMV. However, the Nebraska Supreme Court did consider a similar issue in *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). The *Allen* court considered whether "evidence obtained as a result of a warrantless investigative traffic stop, conducted solely on the basis of inaccurate vehicle registration information

transmitted to police by their dispatcher, should have been suppressed as the fruit of an unreasonable seizure which violated the Fourth amendment." 269 Neb. at 71, 690 N.W.2d at 586. In *Allen*, a police officer requested the police department's dispatcher to check the registration on a minivan. The dispatcher did not repeat the license number before running the check and mistakenly ran a check on the wrong license number. As a result of this mistake, the officer pulled over the driver of the minivan and discovered that the driver was operating the minivan on a suspended license. The driver argued that the evidence discovered pursuant to the stop should have been suppressed.

The *Allen* court held that there was an unreasonable seizure in violation of the Fourth Amendment, explaining:

> This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to [the officer], as it is undisputed that the information was false due to the dispatcher's mistake in running the wrong license plate number. [The officer] had no other reason for initiating the stop. Thus, the record reflects that neither [the officer] nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.

Id. at 77-78, 690 N.W.2d at 590.

The case before us is similar to *Allen*. Once again, this is not a case in which police possessed factual information supporting reasonable suspicion, much less probable cause, of criminal activity. Neither Lewis nor the dispatcher possessed any *true* fact that would support probable cause. The "fact" forming the basis for probable cause—that Hisey's license was under impoundment—was false. Therefore, Lewis' arrest of Hisey was not based on any reasonably trustworthy information and there was no probable cause for the arrest.

[10] However, " ' "whether the exclusionary rule's remedy is appropriate in a particular context [is] an issue separate from the

question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." ' " *Id.* at 78, 690 N.W.2d at 590, quoting *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Therefore, we must determine whether the district court was correct in ordering suppression of the evidence. The State argues that the exclusionary rule should not apply because Lewis' conduct was neither willful nor negligent.

[11,12] A good faith exception to the exclusionary rule may apply when an officer's actions are objectively reasonable. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). The good faith exception has been developed in several U.S. Supreme Court cases. See, *Arizona v. Evans, supra* (evidence seized in violation of Fourth Amendment due to error by court employees fell within good faith exception to exclusionary rule); *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (evidence obtained by police officers reasonably relying on search warrant issued by detached and neutral magistrate should not be suppressed even though warrant is later found to be unsupported by probable cause). The State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search. *State v. Allen, supra.*

In *Arizona v. Evans, supra*, the U.S. Supreme Court determined that if erroneous information is supplied by a court employee to police and an officer makes an arrest based on such information, the good faith exception to the exclusionary rule applies. In *Evans*, a police officer arrested the respondent based upon a computer inquiry that mistakenly indicated that there was an outstanding warrant for the respondent's arrest. The mistake was caused by a court employee who failed to keep the respondent's status current. The Court held that evidence obtained as the result of clerical errors by court employees was an exception to the exclusionary rule. The Court reasoned that "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime . . . they have no stake in the outcome of particular criminal prosecutions." *Id.* at 15. The Court therefore concluded that application of the exclusionary rule would have little effect on the conduct of court employees.

The court in *State v. Allen, supra*, determined that the situation is different when police, not court clerks, are responsible for errors. The *Allen* court held that the good faith exception does not categorically apply when law enforcement personnel are responsible for the erroneous information upon which police officers rely. The *Allen* court reasoned that "the exclusionary rule will have a significant effect on those responsible for seeking and transmitting vehicle registration information which can be used as a basis for an investigative stop." 269 Neb. at 81, 690 N.W.2d at 593. In the case before us, however, neither a court employee nor a police official was responsible for the mistake; rather, the mistake occurred in the records of the DMV.

We conclude that the rationale in *Allen* controls the result in the instant case. The critical question is whether DMV employees, unlike the court employees in *Arizona v. Evans, supra*, may be fairly characterized as " 'adjuncts to the law enforcement team.' " *Shadler v. State*, 761 So. 2d 279, 285 (Fla. 2000). The DMV is a component department of Nebraska's executive branch. Neb. Rev. Stat. § 81-101 (Reissue 2003). On its Internet Web page, the DMV proclaims: "The mission of [the DMV] is to promote safety through education and regulation of drivers and motor vehicles and to collect revenues that provide resources for state and local government operations." Nebraska Department of Motor Vehicles, http://www.dmv.state.ne.us (last visited Sept. 7, 2005). The DMV is composed of several divisions designed to effectuate its mission, one of which is the driver and vehicle records division. *Id.*

Several statutes also govern the duties of the DMV. One provides that when a judge orders license revocation or impoundment, the director of the DMV "shall immediately revoke the license and make available to the Superintendent of Law Enforcement and Public Safety an updated record of such revocation," after which it will be "the duty of the Nebraska State Patrol to enforce the conditions of such revocation . . . ." Neb. Rev. Stat. § 60-496 (Reissue 2004). Another states that a peace officer may revoke a party's operator's license for refusal to submit to a chemical test to determine whether the party is under the influence of alcohol or for a positive test of being under the influence of alcohol and that when the peace officer so acts, he

does so as an "agent for the Director of Motor Vehicles." Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003). The DMV is also responsible for administrative license revocations, which are intended to protect the public from the health and safety hazards of drunk driving and deter drunk driving. See *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996).

The Nebraska State Patrol and other state law enforcement agencies have duties related to those of the DMV. It is the duty of the Nebraska State Patrol to ensure that drivers do not violate the rules and regulations promulgated by the director of the DMV. See Neb. Rev. Stat. § 81-2005 (Supp. 2005). It is also the duty of the Nebraska State Patrol, along with other law enforcement officers in the State of Nebraska, to enforce "the laws regulating the registration, operation, and use of vehicles upon the highway." Neb. Rev. Stat. § 81-2006 (Reissue 1999).

This analysis demonstrates that the DMV is closely related to law enforcement in the State of Nebraska and is integral to enforcement of the laws concerning motor vehicles and persons who operate vehicles. The duties of the DMV are clearly interrelated with law enforcement duties. The DMV helps regulate and enforce the laws pertaining to licensing and driving in Nebraska.

We also find instructive the decision of the Supreme Court of Florida in *Shadler v. State*, 761 So. 2d 279 (Fla. 2000). In *Shadler*, the court held that "the exclusionary rule applies to an error committed by the Florida Department of Highway Safety and Motor Vehicles through its Division of Driver Licenses." 761 So. 2d at 280. In *Shadler*, a police officer received information from a fellow officer and a dispatcher that the defendant's license was suspended. The officer who received the information then stopped the defendant and, at that time, performed a computerized check of his license through the Florida "Department of Highway Safety and Motor Vehicles, Division of Driver Licenses," which verified that the defendant's license was suspended. *Id.* The officer arrested the defendant based on this information and discovered contraband during a search incident to the arrest. On appeal, the issue was whether the contraband should be suppressed because the information upon which the officer acted was erroneous.

In reviewing the issue, the *Shadler* court analyzed the duties of Florida's Department of Highway Safety and Motor Vehicles. The court found that the department was "a vital part of the law enforcement infrastructure" of the state, *id.* at 284, and was "essentially a law enforcement agency," *id.* at 285. The court further found that error by the department in maintaining licensing status records "puts thousands of Florida's citizens at risk of unlawful arrests and subsequent seizures" and that "exclusion of evidence in cases such as the one at bar will surely serve to encourage accurate record-keeping of driver's license information." *Id.* at 285. Therefore, the court held that an error made by the department was basically a law enforcement error, and it therefore found that "the trial court correctly excluded the evidence obtained during the unlawful search." *Id.* at 286.

[13] We similarly find that the evidence obtained during Hisey's arrest should be suppressed. The purpose of the exclusionary rule is to deter police and adjuncts of law enforcement from conduct that will result in a denial of rights to people. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). We find that the threat of exclusion of evidence will likely encourage DMV employees charged with recording and transmitting information on license impoundments to exercise greater caution. The purpose of the exclusionary rule will therefore be served if the evidence from the arrest in this case is suppressed. While our analysis differs from that of the district court, we conclude that the court's judgment was correct. See *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

CONCLUSION

We find that while the initial stop of Hisey was not unlawful, the subsequent arrest of Hisey was made without probable cause and was unlawful. The evidence obtained during Hisey's arrest should be suppressed. We therefore affirm the judgment of the district court.

AFFIRMED.

ASHLAND-GREENWOOD PUBLIC SCHOOLS, APPELLANT, V. DEWAYNE L. THORELL AND NEBRASKA WORKERS' COMPENSATION TRUST FUND, APPELLEES.

723 N.W.2d 506

Filed October 17, 2006. No. A-05-1446.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
5. **Workers' Compensation: Trust Funds: Records.** In the case of an obvious injury inevitably leading to undisputed actual knowledge on the part of the employer of the employee's preexisting permanent disability, such as an amputated arm, the written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) may be dispensed with.
6. ____: ____: ____. The actual knowledge exception to the written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) because of the loss of a limb has never been extended to back injuries.
7. ____: ____: ____. In order to qualify under Neb. Rev. Stat. § 48-128(1)(b) (Reissue 2004), the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.
8. **Workers' Compensation: Trust Funds: Liability: Records.** The purpose of the written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) is to put in place a strictly limited method of proving a predicate fact before liability for benefits may be shifted to the Workers' Compensation Trust Fund.
9. **Workers' Compensation: Trust Funds.** The purpose of Neb. Rev. Stat. § 48-128 (Reissue 2004) is to provide employers with an incentive to hire those who suffer from permanent disability, but the statute restricts the benefits to those employers who consciously hire those they know to be suffering from prior permanent disabilities.
10. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission refers to a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with the production of evidence by conceding for purposes of litigation that the subject of the admission is true.
11. **Pleadings: Evidence.** Formal acts that may operate as judicial admissions include statements made in pleadings, and the rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned.

12. **Workers' Compensation: Trust Funds: Records.** The written records requirement of Neb. Rev. Stat. § 48-128 (Reissue 2004) is merely evidentiary and must be sensibly construed so as not to defeat the statute's larger remedial purpose.
13. **Attorney and Client: Compromise and Settlement.** A lawyer cannot settle a client's claim without express authority from the client.
14. **Workers' Compensation.** The Nebraska Workers' Compensation Act is to be liberally construed for the benefit of claimants.
15. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Jon Bruning, Attorney General, Lisa Martin-Price, and Chris Seifert, Senior Certified Law Student, for appellee Nebraska Workers' Compensation Trust Fund.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

DeWayne L. Thorell's former employer, Ashland-Greenwood Public Schools (Ashland-Greenwood), has filed this action seeking to shift part of the burden of paying Thorell's weekly permanent total disability benefits to Nebraska's Workers' Compensation Trust Fund (Trust Fund), formerly known as the Second Injury Fund. Ashland-Greenwood asserts that because it retained Thorell in its employment after having knowledge of his preexisting permanent disability, the Trust Fund bears part of the responsibility for such permanent total disability payments under Neb. Rev. Stat. § 48-128 (Reissue 2004). The Nebraska Workers' Compensation Court trial judge found that although the basic requirements of § 48-128 for such contribution by the Trust Fund were satisfied, the provision of such statute that "the employer must establish by written records that [it] had knowledge of the preexisting permanent partial disability . . . at the time the employee was retained in employment" was not proved. Ashland-Greenwood now appeals to this court the affirmance of the trial judge's decision by the Workers' Compensation Court

review panel. We hold that the trial judge erred as a matter of law in rejecting Ashland-Greenwood's claim for contribution from the Trust Fund by imposing upon Ashland-Greenwood a requirement of current possession of the written records and by failing to consider the import of the 1987 "[J]oint Application for Approval of Final Lump Sum Settlement" and the order of the district court of Douglas County approving such settlement between Thorell and Ashland-Greenwood. We reverse the decision of the review panel and direct the review panel to remand the matter to the trial judge with directions to determine the nature and extent of the Trust Fund's contribution to Thorell's permanent total disability payments.

FACTUAL AND PROCEDURAL BACKGROUND

Although we are presented with a record containing voluminous exhibits concerning Thorell's medical history over an extended period of time, as well as numerous evaluations of his resulting disability by various counselors, we largely dispense with recitation thereof, because the core facts necessary to resolve this appeal were largely stipulated to by the parties or there is no meaningful dispute about them. Additionally, the decision of the trial judge was detailed, comprehensive, and well organized, and thus provides a convenient backdrop for our review and analysis.

Thorell worked as a teacher for Ashland-Greenwood from 1972 until early in 1998. He suffered a serious back injury arising out of and in the course of such employment in 1979, after which he ultimately underwent three lumbar spine operations. Although he returned to work, he continued to experience residual pain and cramping, and he received intermittent temporary total disability payments for 50⅔ weeks at the rate of $153.02 per week, together with nearly $32,000 in medical expenses from the 1979 accident and injury.

On November 2, 1987, a "[J]oint Application for Approval of Final Lump Sum Settlement" was filed and approved by the then presiding judge of the Nebraska Workers' Compensation Court. The settlement application named Ashland-Greenwood and its insurer as defendants and Thorell as plaintiff. The settlement provided for a lump-sum payment of $9,554.07, calculated on

the basis of "permanent partial disability of 25% to the body as a whole," together with "[a]dditional consideration" of $9,500, for a total settlement of $19,054.07. The record shows that such settlement was also filed in the district court for Douglas County and approved by a judge of that court.

Thereafter, on January 5, 1995, Thorell suffered another injury arising out of and in the course of his employment with Ashland-Greenwood, when he tripped over a student's bookbag, which injury resulted in lumbar spine surgery in March 1998 and cervical spine surgery in October 1998. Thorell has not worked since early 1998 and testified that his condition prevents him from ever returning to work. The January 1995 accident and injury is the subject of this litigation.

On July 23, 2003, Ashland-Greenwood filed its petition in the Workers' Compensation Court against Thorell and the Trust Fund. Ashland-Greenwood alleged that Thorell had suffered injuries to his back in the course of his employment as a result of an accident on January 5, 1995, and that prior to such accident, Thorell had sustained "a significant back injury which resulted in a 25% permanent partial disability to the body as a whole." Ashland-Greenwood further alleged in its petition that it had "specific knowledge of said prior injury throughout the term [of Thorell's] employment, and retained . . . Thorell in [its] employ with full knowledge of the preexisting back injury," and that it retained written records documenting the prior injury. Ashland-Greenwood then alleged the statutory prerequisites of § 48-128, which provides for a shifting of a portion of the liability for the workers' compensation benefits from the employer to the Trust Fund. We summarize § 48-128 as follows: If an employee has a preexisting permanent partial disability, which is likely to be a hindrance or an obstacle to his or her obtaining employment and which was known to the employer prior to the occurrence of any subsequent compensable injury, and such employee receives a subsequent compensable injury resulting in additional permanent partial disability or permanent total disability so that the degree or percentage of disability caused by the combined injuries is substantially greater than that which would have resulted from the last injury considered alone, then the employer at the time of the last injury shall be liable only for

the degree or percentage of disability that had resulted from the last injury, and the additional disability shall be compensated out of the Trust Fund.

Thorell's answer to the petition alleged that he is permanently and totally disabled, and we note that § 48-128 does not affect Thorell's payments other than who pays what portion of the benefits. The Trust Fund filed a general denial and prayed that Thorell be awarded benefits from the Trust Fund "only after due proof of all elements set forth in Neb. Rev. Stat. § 48-128 (1993)." Additional facts from the trial evidence will be discussed either in our summary of the trial judge's decision or in our analysis of the issues presented on appeal.

TRIAL JUDGE'S DECISION

The trial judge's decision began by noting that the parties initially stipulated that Thorell was employed by Ashland-Greenwood on January 5, 1995, at which time he sustained an injury in an accident arising out of and in the course of his employment, and that he gave proper notice of the accident and injury to Ashland-Greenwood. The trial judge found that on January 5, Thorell was earning an average weekly wage of $525 and that he had incurred periods of temporary partial disability and temporary total disability thereafter.

The trial judge first decided the question of the nature and extent of Thorell's injury and its causal nexus to the accident, which the parties had stipulated Thorell suffered. The judge found that Thorell had proved the nature and extent of his injury, as well as the necessary causal connection to his employment. The trial judge then turned to the matter of disability, finding that "the legitimacy of the defendant Thorell's assertion that he was rendered permanently and totally disabled as a result of the stipulated accident does not appear to be in serious contention." Even so, the judge, after referring to specific medical and vocational rehabilitation opinions, which we do not detail, concluded that Thorell was in fact rendered permanently and totally disabled as a result of the January 5, 1995, accident. The judge also found that Thorell was temporarily totally disabled from February 5, 1998, through November 1, 1999, entitling him to temporary total disability payments for such period in the amount of $350 per week and a like amount for permanent and total disability from and

after November 1, 1999. Although the trial judge made specific findings and an award with respect to medical benefits, such are not an issue in this appeal, and we discuss that matter no further. The judge made no provision for vocational rehabilitation, citing Thorell's injuries, limitations, and age.

The trial judge then turned to the seminal issue in the case, which he described as "whether or not [Ashland-Greenwood] has sufficiently proven or otherwise established its entitlement to shift liability for the payment of certain [permanent total disability] benefits to the defendant Thorell to the . . . Trust Fund." In the trial judge's discussion of the key issue, he concluded that under § 48-128(1)(b), Ashland-Greenwood must establish by written records that it had knowledge of Thorell's preexisting permanent partial disability at the time Thorell was retained in employment. The trial judge noted the Trust Fund's strenuous objection that "no written records have been produced" by Ashland-Greenwood. The trial judge concluded that "the evidence submitted does indicate that no such written record is to be found." The trial judge found that Ashland-Greenwood "essentially concedes that it lacks the necessary 'written record' but argues that it had actual knowledge of [Thorell's] disability." The judge further found that at one time in the past, Ashland-Greenwood possessed the required written records memorializing its actual knowledge of Thorell's preexisting permanent disability.

While the evidentiary record certainly contains evidence allowing the conclusion that Ashland-Greenwood had actual knowledge of Thorell's preexisting injury when retaining him in its employment after the 1979 injury, we do not recite that evidence, because as discussed more fully in our analysis section, actual knowledge in a case such as this is simply insufficient as a matter of law to trigger the provisions of § 48-128 under established precedent.

The evidence with respect to written records comes from several sources, including Craig Pease, the superintendent of schools for Ashland-Greenwood from 1988 through the time of trial. In his testimony, Pease discussed the matter of storage of certain documents between 1979 and 1995. Pease testified that the old records were stored in the basement of the school facility but that

in 1988, there was an asbestos cleanup, during which "a lot of things . . . were removed and destroyed by the asbestos company because of asbestos materials, and there would have been . . . some old paperwork, and that would have been down there." Pease also discussed a reconstruction project involving the basement in approximately 1996 or 1997 when the basement was renovated by taking the roof off the building and placing an addition on top thereof, which resulted in disruption of the contents of the basement because the basement did not have a roof throughout the winter.

Additionally, Ann Taylor testified that she worked at Ashland-Greenwood continuously for 23 years, first as secretary to the superintendent and then as business manager beginning in approximately 1982 or 1983. Taylor testified that she retired in 1994. Taylor stated that she prepared and signed the first report of injury concerning Thorell's January 10, 1979, injury. Taylor also testified about two other first reports of other unrelated injuries of Thorell. Taylor testified that all three such first reports would have been stored in the office vault but that "every five or ten years," such documents would be "pack[ed] in boxes, label[ed,] and store[d] in the basement of the school building." Taylor also testified that "workers' comp claims . . . would be in the personnel files for a while," but that they would be cleaned out after a year or two and stored in the basement. Taylor admitted that she did not know which documents may or may not have been destroyed. When shown a copy of the "[J]oint Application for Approval of Final Lump Sum Settlement" previously referenced herein, Taylor testified that it would have been a document retained by Ashland-Greenwood and placed in storage in the basement, but she acknowledged that she did not "know one way or the other where those documents may have gone."

The trial judge cited this court's decision in *Baughman v. United-A.G. Co-op*, 7 Neb. App. 936, 586 N.W.2d 836 (1998), as precedent he was bound to follow, and he concluded:

> This Court like the court in Baughman has no doubt that [Ashland-Greenwood] had actual knowledge of the defendant Thorell's preexisting permanent disability as well as possession of a written record at some point in the past memorializing that actual knowledge. Yet, neither circumstance is

> sufficient. Fair or unfair, the Legislature has mandated that a strictly limited method of proving an employer's knowledge must be established. [Ashland-Greenwood] simply has not met that requirement. Hence, [Ashland-Greenwood's] claim against the . . . Trust Fund must be denied as one of the requisite elements for the shifting of liability has not been met.

Ashland-Greenwood sought review by a three-judge review panel of the Workers' Compensation Court, which affirmed the trial judge's decision in a brief opinion. Ashland-Greenwood now appeals to this court.

ASSIGNMENTS OF ERROR

Ashland-Greenwood presents two assignments of error, which we restate as follows: (1) The review panel erred as a matter of law in not accepting the factual finding by the trial judge that Ashland-Greenwood had possession of a written record in the past memorializing its knowledge of Thorell's preexisting permanent disability, given that there was sufficient competent evidence in the record to support such a factual determination, and (2) the review panel erred as a matter of law in affirming the trial judge's dismissal of Ashland-Greenwood's action against the Trust Fund, because the trial judge erred as a matter of law in finding that Ashland-Greenwood had failed to satisfy the written records requirement of § 48-128(1)(b).

STANDARD OF REVIEW

[1-3] The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the appellate court reviews the findings of the single judge who conducted the original hearing. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

ANALYSIS

Change by Review Panel of Trial Judge's Factual Determination.

[4] Ashland-Greenwood's first assignment of error is that the review panel made a different factual determination about the written records kept by Ashland-Greenwood than did the trial judge, but the review panel did so without finding the trial judge's factual conclusions clearly wrong. The trial judge's key finding on the crucial facts was that Ashland-Greenwood had knowledge of Thorell's preexisting disability, as well as "possession of a written record at some point in the past memorializing that actual knowledge. Yet neither circumstance [was] sufficient." The review panel's decision is more specific in that it said that according to Taylor, the "[J]oint Application for Approval of Final Lump Sum Settlement" and other such records " 'would have been' " retained by Ashland-Greenwood, but that Taylor "had no knowledge regarding the present location of [Thorell's] records." The review panel's decision further stated that "[w]hile the customary business practices of the school district would indicate the necessary [Thorell] records were retained by the district, exactly what record was retained and when it was lost or destroyed is unknown." The review panel then concluded that the "facts of the case do not easily encourage an exception to the statutory written record requirement." We are not convinced that the review panel made a different factual determination than did the trial judge, but even if it did, it is clear that the determinative matter for both the trial judge and the review panel was the "current possession" of the written records. As discussed in detail below, such focus of the trial judge and the review panel is incorrect. In conclusion, any difference in factual findings between the trial judge and the review panel is not material to our decision. Thus, we discuss this assignment no further. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

Effect of Lump-Sum Settlement and Location of Written Records.

[5,6] Initially, we deal with the fact that the trial judge found that Ashland-Greenwood had "actual knowledge" of Thorell's preexisting disability yet retained him as an employee after his 1979 accident and the resulting disability. It is true that in the

case of an obvious injury inevitably leading to undisputed actual knowledge on the part of the employer of the employee's preexisting permanent disability, such as an amputated arm, the written records requirement may be dispensed with. See *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981), supplemented by *Akins v. Happy Hour, Inc.*, 209 Neb. 748, 311 N.W.2d 518 (1981). However, we have said that the actual knowledge exception to the written records requirement because of the loss of a limb has never been extended to back injuries. See *Baughman v. United-A.G. Co-op*, 7 Neb. App. 936, 586 N.W.2d 836 (1998). We hold to that position, and to the extent it was proved that Ashland-Greenwood possessed actual knowledge of Thorell's preexisting permanent partial disability, such is insufficient as a matter of law to shift any of the burden for permanent total disability payments under § 48-128.

[7,8] The key statute in this case, § 48-128(1)(b), provides as follows:

> In order to qualify under this subsection, the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.

When reduced to its essence, the purpose of the written records requirement is to put in place a strictly limited method of proving a predicate fact before liability for benefits may be shifted to the Trust Fund. See *Baughman v. United-A.G. Co-op, supra.*

[9] In *Baughman*, we defined the purpose of § 48-128 as providing employers an incentive to hire those who suffer from permanent disability, but we acknowledged that the statute restricts the benefits to those employers who do so "with knowledge that they are doing [so]." 7 Neb. App. at 949, 586 N.W.2d at 845. In *Baughman*, we said:

> [T]he hiring of the permanently disabled is to be a very purposeful thing before the employer gets the benefit of shifting liability. The purposefulness is insured, at least in theory, by the written records requirement. To impute knowledge where it did not actually exist would frustrate the policy that the benefit of the [Trust] Fund (the shifting

> of liability for benefits for a subsequent injury) goes only to those employers who consciously hire those they know to be suffering from prior permanent disabilities.

7 Neb. App. at 949-50, 586 N.W.2d at 845.

With this framework in place, we turn to the trial judge's premise for his refusal to shift to the Trust Fund any of the liability for benefits attributable to Thorell's subsequent 1995 injury. The judge's premise was that although Ashland-Greenwood at one time had records memorializing its knowledge of Thorell's permanent disability, Ashland-Greenwood was unable to prove what we shall call "current possession" of such written records, and that therefore its proof was insufficient. In support of that conclusion, the trial judge cited our decision in *Baughman v. United-A.G. Co-op*, 7 Neb. App. 936, 586 N.W.2d 836 (1998). However, *Baughman*, when closely examined, does not address the issue of whether, when the claim is advanced against the Trust Fund, the employer's "current possession" of the written records is required before the employer can receive the benefits provided by § 48-128. Instead, *Baughman* focuses extensively on the employer's decision to hire the disabled or retain a disabled person in his or her employment. The claim in *Baughman* was that the crucial information from written records about the employee's preexisting disability was in the possession of the employer's insurer and that such information should be imputed to the employer so as to satisfy the written records requirement—there was no evidence or factual finding, as is true here, that sufficient written records were in the employer's possession at some point in time, just not at the time of the claim and trial against the Trust Fund. We rejected the imputation from insurer to employer proposition in *Baughman*, citing *Alaska Intern. v. Second Injury Fund*, 755 P.2d 1090 (Alaska 1988), where the Supreme Court of Alaska refused to impute the knowledge held by the workers' union, as evidenced by the union's written records to the employer, so as to satisfy the written records requirement of Alaska's second injury fund statute. In other words, our focus in *Baughman* was on the fact that it is the employer, rather than the insurer, who makes the hiring decision, remembering that § 48-128 requires that the employer do so with knowledge of the preexisting disability as proved by written records. Thus, the fact

that the insurer has the written records, which could be sufficient, does not satisfy the requirement of § 48-128, because it is the employer's knowledge which is crucial. *Baughman* does not address the issue of whether current possession of the necessary written records is required under § 48-128, and we have found no Nebraska case which directly does so.

The instant case presents a different issue than did *Baughman.* Here, Thorell sustained an injury in 1979 with resulting permanent partial disability of at least 25 percent, which is the level of preexisting disability required by § 48-128(1)(c) in order to trigger the benefit provided for in § 48-128 to the employer. The undisputed evidence is that as a result of the 1979 injury, a "[J]oint Application for Approval of Final Lump Sum Settlement" between Thorell, Ashland-Greenwood, and its insurer was entered into on the basis of payment for the remaining weeks of permanent partial disability attributable to a 25-percent disability, plus additional compensation. Under the law as it then existed, such a settlement had to be filed with and approved by the Workers' Compensation Court, and then filed in and approved by the district court. See Neb. Rev. Stat. § 48-139 (Reissue 1988). The evidence shows that such an application was filed in the Workers' Compensation Court on November 2, 1987, and the application is in our record as an exhibit to the Taylor deposition. Additionally, another exhibit, a records search request submitted to the clerk of the Nebraska Workers' Compensation Court, produced an order and decree from the district court for Douglas County approving the lump-sum settlement for Thorell from Ashland-Greenwood and its insurer "by reason of a permanent partial disability of 25% to the body as a whole," according to such decree. The district court order was file stamped as "received and filed" November 10, 1987, by the Nebraska Workers' Compensation Court. Those two exhibits standing alone establish that Ashland-Greenwood had knowledge of Thorell's preexisting 25-percent disability to the body as a whole—and the evidence is undisputed that Thorell thereafter remained an employee of Ashland-Greenwood. Such documents, and no one disputes their authenticity, were filed in the Nebraska Workers' Compensation Court and, according to Taylor's testimony, were retained in Ashland-Greenwood's records. The fact that nearly

20 years later, Ashland-Greenwood cannot find these documents in its possession is not the determinative fact that the trial judge and the review panel concluded it was.

[10,11] This brings us to the matter of "judicial admissions." A judicial admission refers to a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with the production of evidence by conceding for purposes of litigation that the subject of the admission is true. *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 491 N.W.2d 368 (1992), citing *Johns v. Carr*, 167 Neb. 545, 93 N.W.2d 831 (1958). Formal acts that may operate as judicial admissions include statements made in pleadings, and the rule of evidence is that matters contained in pleadings are judicial admissions insofar as the adversary is concerned. See *Nichols Media Consultants v. Ken Morehead Inv. Co., supra.*

The joint application and the district court order filed in the Nebraska Workers' Compensation Court in November 1987 as part of the judicial proceeding to complete the "[J]oint Application for Approval of Final Lump Sum Settlement" are admissions by Ashland-Greenwood, a party to such proceeding, as well as a judicial determination, which conclusively establish Ashland-Greenwood's knowledge of Thorell's permanent partial disability of 25 percent of the body as a whole by virtue of the January 1979 work injury.

Without doubt, the lump-sum settlement documents are "written records" which establish Ashland-Greenwood's knowledge of Thorell's preexisting disability. The Trust Fund brief does not argue otherwise; rather, the Trust Fund asserts that § 48-128 "requires an employer to produce at trial actual written records *in its possession* to prove the proposition that the employer had knowledge of the employee's permanent preexisting disability." (Emphasis supplied.) Brief for appellee at 27.

[12] However, contrary to the Trust Fund's assertion quoted above, there is nothing in the language of § 48-128 that requires possession of the written records at the time of the subsequent injury or at the time the claim for contribution from the Trust Fund is made. We have found no Nebraska authority to support the Trust Fund's assertion. It seems that "current possession" of

the written records by the employer was assumed by the trial judge and the review panel to be part of the § 48-128 requirements. But, the reality is that the "written records" requirement is nothing more than a statutorily mandated method of proving a specific fact—that the employer had knowledge of the employee's preexisting disability at the time the employee was hired or was retained in employment. As emphasized by the Supreme Court of Arizona in discussing its written records requirement under Arizona's second injury fund statute, "the 'writing requirement is merely evidentiary, and must be sensibly construed so as not to defeat the statute's larger remedial purpose.'" (Emphasis omitted). See *Special Fund Div. v. Industrial Com'n*, 191 Ariz. 149, 153, 953 P.2d 541, 545 (1998), quoting *Special Fund Div. v. Industrial Com'n*, 189 Ariz. 162, 939 P.2d 795 (Ariz. App. 1997) (Fidel, J., dissenting). We hold that the written records requirement of § 48-128 is merely an evidentiary rule that must be sensibly construed.

Therefore, the crucial question here is not whether there is "current possession" of the written records (although such could be crucial in some factual patterns); rather, the question is whether the written records offered by the employer tend to prove the predicate fact: Did the employer have knowledge of the employee's preexisting disability when hiring the worker or when retaining him or her in employment? To answer our own question, we suggest that there could hardly be better written records to prove the predicate fact of the employer's knowledge of the preexisting disability than documents, drawn from the records of two courts which memorialize a statutory judicial proceeding, to which the employer was a party, for a settlement of a previous workers' compensation claim based on a 25-percent permanent disability of the body as a whole.

[13] The "[J]oint Application for Approval of Final Lump Sum Settlement" is unique, because it is a pleading containing admissions of Ashland-Greenwood of the central predicate fact in the present case—that Thorell claimed to have sustained a 25-percent permanent partial disability of the body as a whole from the 1979 work accident. Further, the district court's order approving the settlement "by reason of [the claim of] permanent partial disability of 25% to the body as a whole" is even more powerful

proof of Ashland-Greenwood's knowledge of Thorell's preexisting disability. Ashland-Greenwood was a named party to that district court proceeding and is bound by the court's findings. At oral argument, counsel for the Trust Fund argued that the settlement documents do not establish Ashland-Greenwood's knowledge, because (and we paraphrase) the settlement was prepared by the insurer and its lawyer, and was likely done so without the knowledge of Ashland-Greenwood. This argument ignores several key points. The application names Ashland-Greenwood as a party (as well as its insurer), and the lawyer clearly signed for both of such parties. Additionally, the law is clear that although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client. *Luethke v. Suhr*, 264 Neb. 505, 650 N.W.2d 220 (2002). This record does not contain even a hint that the settlement was not authorized by Ashland-Greenwood. In fact, the then business manager for Ashland-Greenwood, Taylor, testified that "[Thorell] did settle a lump sum settlement." And, in response to questioning by Ashland-Greenwood's counsel, she testified that the application would have been retained by Ashland-Greenwood and would have gone into the storage room in the basement.

[14,15] The fact that nearly 20 years later, Ashland-Greenwood cannot produce a copy of such documents from its records repository is really immaterial to the fact that must be proved. To hold that at the time the claim against the Trust Fund is tried, the written records must be in the "current possession" of the employer is to exalt form over substance, as well as impose a requirement not found in § 48-128. Moreover, to so hold would also ignore the policy that the Nebraska Workers' Compensation Act is to be liberally construed for the benefit of claimants. See *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). To graft onto § 48-128 a requirement that the written records need to be in the current

possession of the employer frustrates the purpose of § 48-128, which provides an incentive to employers to hire those who have preexisting disabilities, and, at the same time, to do so would be to ignore the function of the written records requirement, which is merely to establish a method of proof of a fact. In the final analysis, a requirement that the employer have "current possession" of the written records, particularly when the records are of a lump-sum settlement based on a claim of 25-percent permanent partial disability, imposes an artificial and arbitrary element of proof not found in § 48-128.

RESOLUTION

Because the trial judge imposed upon Ashland-Greenwood a requirement of current possession of the written records and did not consider the import of the "[J]oint Application for Approval of Final Lump Sum Settlement" proceeding as evidenced by the written records thereof, remembering their status as official court records and admissions of Ashland-Greenwood, we hold that the trial judge erred as a matter of law in rejecting Ashland-Greenwood's claim for contribution from the Trust Fund. Thus, the review panel erred in affirming the decision of the trial judge. Accordingly, we reverse the decision of the review panel and direct that the review panel shall remand the matter to the trial judge with directions for him to determine the nature and extent of the Trust Fund's contribution to Thorell's permanent total disability payments.

REVERSED AND REMANDED WITH DIRECTIONS.

GEM HUBBART, APPELLEE, V. HORMEL FOODS CORPORATION, APPELLANT.

723 N.W.2d 350

Filed October 24, 2006. No. A-06-096.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of

the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
4. ____. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
5. **Workers' Compensation: Proof.** To obtain a modification of a workers' compensation award, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident.
6. ____: ____. An applicant seeking modification of a workers' compensation award must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

James L. Quinlan, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Hormel Foods Corporation (Hormel) appeals from the judgment of the review panel of the Nebraska Workers' Compensation Court affirming in part and in part reversing the award of the trial court and remanding the cause. For the reasons set forth in this opinion, the judgment of the review panel is affirmed in part and in part reversed, and the cause is remanded with directions.

PROCEDURAL HISTORY

On May 17, 2001, Gem Hubbart filed an amended petition in the Nebraska Workers' Compensation Court, alleging that "on or about February 8, 2001, [Hubbart] sustained injuries to her bilateral upper extremities in an accident arising out of and in

the course of her employment with [Hormel]." Hubbart asserted that her

> accident and injury occurred as a result of cumulative trauma when [she] was required to engage in the excessive use of her hands in a repetitive fashion during the performance of her work . . . causing her hands to [become] symptomatic and disabl[ed], requiring her to cease employment and seek medical care . . . .

Hubbart indicated that she "was restricted from returning to work until she received carpal tunnel release . . . which surgery [was] set for 3/20/01" and that she had "become depressed secondary to her work related injuries."

On October 25, 2001, Hubbart and Hormel entered into a "Joint Stipulation for Dismissal." In the joint stipulation, the parties agreed that on February 8, Hubbart "sustained injuries to her right and left upper extremities in the nature of carpal tunnel syndrome arising out of and in the course of her employment with [Hormel]"; that "all reasonable and necessary medical expenses incurred by [Hubbart] as a result of the accident have been paid or will be paid by [Hormel]"; and that an agreed-upon vocational rehabilitation counselor should be appointed. On November 2, the compensation court entered its "Order of Dismissal Without Prejudice," generally approving of the parties' joint stipulation and noting that "there exist no present controversies between the parties."

On August 8, 2002, Hubbart filed a "Motion for Approval of Medical Care." In the motion, Hubbart claimed that her "treating physician has opined that she is in need of a repeat right carpal tunnel release which [Hormel] has failed and refused to pay for." Accordingly, Hubbart asked that the court "determine [Hubbart's] entitlement to further care and treatment in the form of the repeat right carpal tunnel surgery." On October 1, the compensation court entered an order, providing the following:

> On the stipulation of the parties, an order of dismissal without prejudice was entered November 2, 2001 which made certain limited findings and dismissed [Hubbart's] petition without prejudice. Neither the stipulation of the parties nor the order of the Court made any findings regarding [Hubbart's] entitlement, if any, to future medical care.

> A dispute now exists regarding the necessity for a repeat carpal tunnel surgery, which if approved, will involve not only the cost of surgery, but liability for payment of temporary total disability, possible additional member impairment and a claim for vocational rehabilitation services, all without entry of an award. Having been previously dismissed without prejudice, the proper procedure is to refile a petition. [Hubbart's] motion is denied without prejudice . . . .

On October 30, 2002, Hubbart filed an amended petition. In the amended petition, Hubbart noted the parties' prior joint stipulation and claimed that "subsequent thereto issues arose concerning [Hubbart's] need for additional medical care and treatment associated with her bilateral carpal tunnel syndrome in the form of a repeat right carpal tunnel release." Hubbart further claimed that "a vocational rehabilitation plan [had been proposed] in the form of a GED program as proposed by an agreed upon vocational expert which [Hormel] has failed and refused to approve absent a reasonable controversy." Hubbart alleged that

> the outstanding issue to be addressed by the Court in connection with this Petition is the compensability of [Hubbart's] need for a repeat right carpal tunnel surgery to address her work related injuries, and her entitlement to the vocational rehabilitation plan as set forth by the agreed upon vocational expert

in addition to any temporary total and permanent partial disability benefits, as well as any "temporary indemnity benefits," which we infer to mean temporary partial disability benefits, arising from her surgery. Hormel filed its answer on November 5, generally denying Hubbart's allegations and stating that it "approved the original vocational rehabilitation plan but has refused to date to approve an extension of said plan" and that it had paid any and all benefits to which Hubbart was entitled.

After a hearing was had on December 23, 2002, the trial court entered its award on April 30, 2003. In its award, the court held that on January 8, 2001—a month earlier than the date originally pled and stipulated to—Hubbart "was in the employ of [Hormel] as a laborer, and while so employed and on said date and while engaged in the duties of her employment, she suffered bilateral carpal tunnel syndrome as a result of an accident arising out of

and in the course of her employment." The court found that Hubbart was entitled to benefits and awarded temporary total and permanent partial disability benefits. The court further held as follows:

> The parties disputed the necessity of a repeat carpal tunnel release on the right hand as recommended by Dr. Bergstrom. I have reviewed the reports of Dr. Bergstrom and Dr. Teideman and find the recommended surgery reasonably necessary to relieve [Hubbart's] continuing symptoms. [Hormel] shall pay the expense associated with the repeat surgery and future medical expenses reasonably necessary for treatment of [Hubbart's] right carpal tunnel syndrome. There will obviously also be a future period of temporary total disability. [Hormel] is entitled to credit for medical expenses paid.
>
> . . . .
>
> [Hubbart] is entitled to vocational rehabilitation services to restore her to suitable employment within the permanent physical restrictions identified by Drs. Pitz and Bergstrom. If [Hubbart] desires to be evaluated as to her suitability for rehabilitation services, she should contact the Court either by letter, telephone, or in person at the Capitol Building in Lincoln, Nebraska, within 30 days after the date of this Award. . . . If [Hubbart] fails or declines without reasonable cause to indicate her desire for rehabilitation services in the manner and within the time above specified, she shall be deemed to have waived any and all right to such services.

On August 14, 2003, Hubbart filed a motion for vocational services. In her motion, Hubbart asserted that the "nature and extent of [Hubbart's] injuries and her financial circumstances resulted in [Hubbart's] becoming destitute causing, in part, loss of her home during which time she fell out of touch with [her] counsel following the time and entry of this award, and was residing in a homeless shelter." Hubbart claimed that her attorney "made efforts to locate [her] through her last known address, probation officer, and friends" and that she "had eventually reestablished a new home at which time [her] counsel was able to contact her and asked her to come in to retrieve her worker's [sic]

compensation check." Hubbart suggested that "[t]he delay in [her] request for vocational rehabilitation services was directly impacted by her financial circumstances as a direct result of her injuries," and she prayed "for consideration of leave to allow her to seek vocational rehabilitation services."

After a hearing on August 21, 2003, the compensation court entered an order finding "good cause for [Hubbart's] failure to contact her counsel and the Court regarding an evaluation for vocational rehabilitation, which was due primarily to her homelessness and related circumstances." The court essentially gave Hubbart an additional 30-day period in which to indicate that she desired to be evaluated as to her suitability for rehabilitation services.

On February 17, 2004, Hubbart filed an "Application to Modify." In her application, Hubbart claimed that she "requested further medical care and treatment in the form of a repeat left carpal tunnel surgery" and that "[Hormel] has failed and refused to pay for the cost of additional surgery which . . . was eventually performed on November 21, 2003." Hubbart alleged that Hormel "has failed and refused to pay for temporary total disability benefits following the time of [Hubbart's] surgery" and that Hubbart "has developed mental overlays secondary to her work-related injuries which [have] rendered her totally disabled at present." She further claimed that the "matters in dispute are payment of [Hubbart's] medical care [and] temporary total disability benefits, together with waiting penalties and attorney fees due to [Hormel's] failure and refusal to pay for accrued medical and indemnity benefits absent a reasonable controversy."

On May 25, 2004, Hormel filed an amended answer to Hubbart's application to modify. In its amended answer, Hormel "admit[ted] that it has not paid for the cost of left carpal tunnel surgery nor any temporary total disability benefits associated with such surgery for the reason that the condition is not related to or caused by [Hubbart's] employment with Hormel." Hormel generally denied Hubbart's claims and listed two affirmative defenses to the application: that "[Hubbart's] claim for benefits related to 'mental overlay secondary to her work related injuries' is barred by the statute of limitations" and that

"[the same] claim . . . is barred by the doctrine of res judicata." Therefore, Hormel asked that Hubbart's application be dismissed with prejudice.

A hearing was had on Hubbart's application to modify on June 2, 2004. Both parties entered numerous exhibits into evidence, and the contents of these exhibits will be discussed as necessary in the analysis section of this opinion. Hubbart testified in her own behalf. Hubbart said that she came to the United States from Thailand 30 years earlier. Hubbart testified that since the initial litigation began with Hormel, she had not worked anywhere else. She said that she worked for Hormel for 5 years 7 months and that during the course of her employment with Hormel, her work required her to use both hands all day long. Hubbart testified that she first sought medical attention for her hands in February 2001. Hubbart said that she saw a nurse at Hormel and complained of pain in her hands and that the nurse gave her aspirin for the pain. After she had been in pain for 2 weeks, she was sent to see a doctor. Hubbart said that she also saw two other doctors and that all three doctors "agreed that the problems with [her] hands were related to [her] work." Hubbart testified that at the time of trial, she was being treated by Dr. Richard Bergstrom.

Hubbart testified that when she filed her first suit against Hormel in 2001, she had been fired by Hormel; that she was unemployed and without an income; and that subsequently, she became depressed. Hubbart said she had thoughts of suicide. She began to consult with Dr. Thomas McKnight. However, her depression lessened when she began to see a "job expert," "[b]ecause [she] had something [she] looked forward to, and [she] knew [she could] get a job or get [an] education." Hubbart testified that she had surgery on her right hand in March 2001, but that she continued to have problems with her hands after the surgery. She said that doctors recommended that she have a second surgery done on her right hand, which she eventually had on January 30, 2003. Hubbart testified that she did not have any way to pay for that surgery; however, Hubbart said that her doctor performed the surgery because "he [felt] sorry for [her] because [her] hand really hurt" and that "he agreed that [she could] make . . . payment[s] on the surgery."

Hubbart testified that after her second surgery on her right hand, her vocational rehabilitation benefits ceased. She was without an income, so she rented her house to some illegal aliens, who had marijuana in the house. Hubbart testified that "the police put [her] in jail because it was [her] house [and that] when [she went] to the court, the judge [gave her] one year probation." Hubbart testified that she eventually moved into a homeless shelter because her electric utility service was shut off and she had to "move to [the] shelter to get warm." Hubbart testified that she and her attorney "lost communication between one another for a period of time." On April 30, 2003, the compensation court entered an order awarding Hubbart medical expenses and vocational rehabilitation benefits.

Hubbart testified that after she had the second surgery on her right hand in January 2003, she began to use her left hand more. She began to have increasing problems with her left hand, and she explained the problems to Dr. Bergstrom; in the fall of 2003, Dr. Bergstrom suggested that she have surgery on her left hand. Hubbart testified that she asked Hormel to pay for the surgery on her left hand, but that Hormel refused. When asked how the refusal made her feel, Hubbart said, "Hurt, . . . angry, . . . hopeless." Hubbart said that she discussed her depressed thoughts and feelings of hopelessness with Dr. Eugene Oliveto, a psychiatrist, and with a counselor for Lutheran Family Services. Hubbart said that at the time of trial, she was still being treated by Dr. Oliveto and taking medication for her depression. Hubbart said that she wanted Hormel to pay for her ongoing treatment with Dr. Oliveto or with a counselor for Lutheran Family Services.

Hubbart testified that Dr. Bergstrom performed surgery on her left hand on December 9, 2003, but that she had not been able to pay him for performing the surgery. She then described the current state of her hands:

> Both of my hands hurt, [they are] swollen, but I have to take medication for that. I need to take the medication to keep from swelling . . . . It's really hard for me to do anything, any work. I have to ask my husband to help me. He [does] everything for me.

Hubbart said that mentally, she felt "[k]ind of . . . depressed and kind of . . . hopeless" and that she did not "know what's going to happen in [her] future." She admitted that she got divorced in 1996 and that she became depressed as a result, but said that she did "get over that." Hubbart testified, "I've been through it with Hormel, I've been through what they [have] done to me. I've been through the gentleman over there fir[ing] me without no reason . . . . And my hand[s] hurt right now, and I cannot do what I used to do." At the conclusion of Hubbart's testimony, she rested. At the conclusion of all evidence, the trial court took the matter under advisement.

On November 5, 2004, the trial court filed a "Further Award." In its further award, the trial court found and held as follows:

> The Court has previously determined that on January 8, 2001, [Hubbart] suffered bilateral carpal tunnel syndrome as a result of an accident arising out of and in the course of her employment by [Hormel]. [Hubbart] previously underwent bilateral surgeries but on December 9, 2003, underwent a second procedure on her left hand by Dr. . . . Bergstrom after experiencing increasing recurrent symptoms. . . . Dr. Bergstrom provided a sufficient medical causation opinion and opined the second procedure was reasonably necessary . . . . The records indicate the second procedure was effective in reducing [Hubbart's] left hand symptoms. [Hubbart] further argued that secondary to her physical injuries, loss of function and pain syndrome she became disabled due to depression. The evidence is uncontroverted that [Hubbart] has in the past and currently suffers depression, but causation is disputed between the parties. [Hubbart] was referred to Lutheran Family Services for evaluation and treatment. Her family physician, the Lutheran Family Services psychologist and [the] psychiatrist all attribute her depression to her physical injuries, loss of function and pain syndrome, although acknowledging other stressors are contributory . . . . Drs. Terry Davis and Jones-Thurman, who examined [Hubbart] at [Hormel's] direction, likewise diagnosed her depression and indicated it was due in part to her injuries but emphasized other situational factors such as unemployment, drug

> use and a recent criminal arrest and conviction. Dr. Jones-Thurman reported, "she does appear to have some depression and anxiety and these may be related to various factors including her medical condition . . . she appears to have several situational factors which have probably contributed to her anxiety and depression." . . . It is not necessary [Hubbart] establish that her depression was caused solely or exclusively by her physical injuries, loss of function and pain syndrome. The evidence does establish her injuries to be a significant, contributing cause of her depression which at present renders her temporarily totally disabled. At the time of her accident and injury [Hubbart] was receiving an average weekly wage of $341.20 being sufficient to . . . entitle her to benefits of $227.47 per week for temporary total disability regarding her left hand from December 9, 2003, through May 20, 2004, a period of 23 2/7 weeks and thereafter and in addition thereto the sum of $227.47 per week for a 12 percent permanent functional impairment of her left upper extremity.

The trial court further found that Hubbart was "entitled to temporary total indemnity of $227.47 per week from and after May 25, 2004, through the date of trial for so long thereafter as [Hubbart] shall remain temporarily totally disabled due to her depression." The court ordered Hormel to pay Hubbart's current medical bills as well as "future medical expenses reasonably necessary for treatment of [Hubbart's] carpal tunnel syndrome and counseling for her depression as recommended by Dr. . . . Oliveto." The court also noted that it made "no finding regarding [Hubbart's] entitlement to vocational rehabilitation services as she has not reached maximum medical improvement regarding her depressive symptoms."

On November 18, 2004, Hormel filed an application for review with the review panel of the Nebraska Workers' Compensation Court. After a hearing, the review panel entered its order of affirmance in part and reversal and remand in part. The review panel first found that "[t]he trial court's finding that [Hubbart's] depression was related to the accident and injury of January 8, 2001, is not clearly wrong and is supported by the record." The review panel noted that "[t]here are sufficient expert medical

opinions from the physicians and psychologists at Lutheran Family Services that [Hubbart's] depression is related to her physical injuries from the accident."

The review panel further found that the trial court erred in failing to evaluate or mention Hormel's affirmative defenses of res judicata and the statute of limitations:

> The further award . . . of the trial court entered on November 5, 2004, found that [Hubbart's] mental stresses were work related and put [Hubbart] on a running award for temporary total disability benefits due to depression. The trial court made no mention of [Hormel's] affirmative defenses that the mental overlay was barred by the statute of limitations or the doctrine of *res judicata*.
>
> A review of the record shows that [Hubbart] had a prior claim in this case for psychological injuries. This is borne out by [Hubbart's] Amended Petition . . . filed May 17, 2001, where [Hubbart] made a specific request . . . for damages due to depression secondary to work related injuries. The request in the petition of May 17, 2001, for psychological injuries is supported by the facts in this case wherein [Hubbart] sought treatment in June of 2001, by her family physician Dr. McKnight . . . and Dr. McKnight treated [Hubbart] for anxiety and prescribed anti-depressants . . . . [Hubbart] was further treated by Dr. McKnight on August 7, 2001, . . . again for anxiety and depression. Dr. McKnight confirmed that his treatment for depression and psychiatric injury was specifically related to [Hubbart's] work related injuries in his report dated August 8, 2001 . . . .
>
> The record shows that there [were] more than two years before the next claim for depression was made in the [Application to Modify] of [February] 17, 2004. Depending on how the evidence is viewed, this may or may not be outside the statute of limitations and the claim for psychiatric injuries may or may not be barred by the doctrine of *res judicata* even though the issue had been previously raised. The issues of the statute of limitations and *res judicata* were not specifically discussed by the trial court even though [Hormel] specifically pled the affirmative defenses

> and there is evidence in the record that may or may not support [Hormel's] position as indicated above.
>
> [Hormel] is entitled to a reasoned decision by the trial court pursuant to Rule 11 of the Rules of Procedure of the Nebraska Workers' Compensation Court. The review panel will therefore reverse and remand the issue of whether or not [Hubbart's] claim for indemnity for psychiatric injury is compensable pending resolution of the issues of the statute of limitations and *res judicata* by the trial court pursuant to Rule 11. Rule 11 requires that all parties are entitled to a reasoned decision which contains findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rational[e] for the decision so that all interested parties can determine how and why a particular result was reached. Rule 11 requires the judge to specify the evidence upon which the decision is based. Such findings provide the basis for a meaningful appellate review and should be undertaken by the trial court concerning the affirmative defenses of the statute of limitations and *res judicata* as they may pertain to a running award for psychiatric injury.

The review panel further found that although the trial court had mistakenly stated Hubbart " 'underwent a second procedure on her left hand,' " this error was harmless, and that "there is support in the record for the trial court's finding that [Hubbart's] left hand carp[a]l tunnel syndrome surgery and resulting impairment [were] related to the accident and injury of January 8, 2001." Hormel has timely appealed to this court.

ASSIGNMENTS OF ERROR

Hormel alleges, restated, that the trial court (and, later, the review panel) erred when it failed to conclude that Hubbart's claim for depression was barred by the doctrine of res judicata, that the trial court (and, later, the review panel) erred when it failed to dismiss Hubbart's claim for depression because Hubbart failed to meet her burden of proof, and that the review panel was clearly wrong when it found that the record contained sufficient evidence to support a causal relationship between Hubbart's December 2003 surgery and her January 2001 accident.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

ANALYSIS

Doctrine of Res Judicata.

Hormel alleges that the trial court erred when it failed to find that Hubbart's compensation claim for depression was barred by the doctrine of res judicata. Further, Hormel asserts that the review panel erred when it failed to dismiss Hubbart's claim for her depression based on the doctrine of res judicata. We address these two assignments of error together.

In its order, the review panel concluded that the trial court did in fact err when it failed to address Hormel's affirmative defenses, one of which was the doctrine of res judicata. Specifically, the review panel held:

> The issues of the statute of limitations and *res judicata* were not specifically discussed by the trial court even though [Hormel] specifically pled the affirmative defenses and there is evidence in the record that may or may not support [Hormel's] position as indicated above.
>
> [Hormel] is entitled to a reasoned decision by the trial court pursuant to Rule 11 of the Rules of Procedure of the Nebraska Workers' Compensation Court. The review panel will therefore reverse and remand the issue of whether or not [Hubbart's] claim for indemnity for psychiatric injury is compensable pending resolution of the issues of the statute of limitations and *res judicata* by the trial court pursuant to Rule 11. Rule 11 requires that all parties are entitled

> to a reasoned decision which contains findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rational[e] for the decision so that all interested parties can determine how and why a particular result was reached. Rule 11 requires the judge to specify the evidence upon which the decision is based. Such findings provide the basis for a meaningful appellate review and should be undertaken by the trial court concerning the affirmative defenses of the statute of limitations and *res judicata* as they may pertain to a running award for psychiatric injury.

[3,4] An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Id.* The review panel concluded, and we agree, that the trial court failed to address the affirmative defenses raised by Hormel regarding Hubbart's claims for depression. The review panel found that remand was necessary for the trial court to specifically address these issues. Since the trial court did not address the issues of res judicata or the statute of limitations, we will not address these issues. We therefore find that the review panel's conclusion that remand was required for the trial court to address these issues was proper and affirm that part of the review panel's order.

Burden of Proof Regarding Depression.

Hormel next alleges that the trial court (and, later, the review panel) erred when it failed to dismiss Hubbart's compensation claim for depression, because Hubbart failed to meet her burden of proof under Neb. Rev. Stat. § 48-141 (Reissue 2004).

Section 48-141 provides, in relevant part:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments, approved by order pursuant to section 48-139, shall be final, but the amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court;

> or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage or by reason of the death of the dependent.

[5,6] To obtain a modification, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). The applicant must prove there exists a material and substantial change for the better or worse in the condition—a change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made. *Id.*

We find that the trial court evaluated Hubbart's application to modify based on her depression using an incorrect standard. In its November 5, 2004, award, the trial court noted the following: "It is not necessary [Hubbart] establish that her depression was caused solely or exclusively by her physical injuries, loss of function and pain syndrome. The evidence does establish her injuries to be a significant, contributing cause of her depression which at present renders her temporarily totally disabled." However, as noted above, in order to obtain a modification to a prior award, an applicant must prove that the increase in his or her incapacity was due *solely* to the injury resulting from the original accident. Therefore, we find that the portion of the trial court's award finding Hubbart to be temporarily totally disabled as a result of her depression must be reversed and that the cause must be remanded to the review panel for remand to the trial court for evaluation of the claim using the proper standard.

Sufficient Evidence.

Finally, Hormel contends that the review panel was clearly wrong in finding that sufficient evidence existed in the record to support the trial court's finding of a causal connection between Hubbart's December 2003 surgery and her January 2001 injury. Hormel also contends that the review panel erred in finding that the trial court committed harmless error when it relied on an erroneous expert opinion.

The trial court held that Hubbart's December 2003 surgery was a result of her previous carpal tunnel injury suffered during her employment with Hormel. Specifically, the trial court noted:

> The Court has previously determined that on January 8, 2001, [Hubbart] suffered bilateral carpal tunnel syndrome as a result of an accident arising out of and in the course of her employment by [Hormel]. [Hubbart] previously underwent bilateral surgeries but on December 9, 2003, underwent a second procedure on her left hand by Dr. . . . Bergstrom after experiencing increasing recurrent symptoms. . . . Dr. Bergstrom provided a sufficient medical causation opinion and opined the second procedure was reasonably necessary . . . .
>
> . . . .
>
> . . . [Hubbart] is entitled to [have her] medical expenses paid. [Hormel] shall pay future medical expenses reasonably necessary for treatment of [Hubbart's] carpal tunnel syndrome . . . .

In affirming the trial court's findings regarding the causal connection between Hubbart's December 2003 surgery and her January 2001 injuries, the review panel provided:

> [Hormel] alleges the evidence fails to show [Hubbart's] December, 2003, left hand carp[a]l tunnel surgery was caused by the accident and injury of January 8, 2001.
>
> The primary basis for [Hormel's] contention that the left hand carp[a]l tunnel surgery was not work related is that the trial court erred in making the statement . . . that the surgery to the left hand was recurrent because the surgery was "a second procedure on her left hand." [Hormel] is correct in its assertion that this is an incorrect factual statement by the trial court. [Hubbart] did not undergo a second procedure on her left hand. Although this is error, the Court finds that it is harmless error which does not affect the compensability of [Hubbart's] left hand carp[a]l tunnel surgery claim. The mistake in the alleged "second procedure on her left hand" was due to the fact that Dr. Bergstrom was reading prior medical records that could be interpreted as a second surgery having been done on the left hand and Dr. Bergstrom interpreted it to [be] the left

hand. In fact, the second surgery was to the right hand. Be that as it may, the trial court's finding is still accurate based upon the medical records before the Court. The basis of the trial court's finding that the left hand is work related is in reliance on Dr. Bergstrom's opinion that it is recurrent because this was a second surgical event. Even though it was not a second surgical event, the medical evidence still shows that the left hand carp[a]l tunnel was recurrent.

The parties had originally agreed that both the left and right hand carp[a]l tunnel syndrome [was] work related as set forth in the Order of Dismissal of November 2, 2001 . . . . At that time, [Hormel] is correct in its argument that Dr. Pitz found that the left carp[a]l tunnel had resolved and there was no permanent impairment associated with the left hand as set forth in [Hormel's] brief . . . . However, a reading of Dr. Pitz's report of August 13, 2001, . . . shows that Dr. Pitz believes there is a good chance that the carp[a]l tunnel syndrome to the left hand will recur. A complete reading of Dr. Pitz's statement . . . concerning the left hand is as follows: "As for the left carp[a]l tunnel syndrome, at the present time that is resolved. I do not believe that there is any impairment associated with the left hand or upper extremity. It should be noted, however, that it is possible for carp[a]l tunnel syndrome to recur later or slowly progress over time to the point where significant compression of the median nerve could occur that would require surgical intervention. I do not believe that there is any way to predict with any certainty whether or not . . . Hubbart's left hand will eventually develop carp[a]l tunnel syndrome that requires surgical intervention." The prophecy that Dr. Pitz stated in his August 13, 2001, report comes to fruition when Dr. Bergstrom operates on the left hand for carp[a]l tunnel syndrome on December 9, 2003. Since [Hormel] originally stipulated that [Hubbart] had left hand carp[a]l tunnel syndrome, the fact that it did recur finds support in the report of Dr. Pitz . . . and also in the reports of Dr. Bergstrom . . . . Dr. Bergstrom also corrects his misconception of the number of surgical procedures on [Hubbart's] left hand and also discusses that [Hubbart] had

> overuse syndrome to the left hand due to the prior right hand surgery . . . .
>
> The review panel finds that the incorrect statement by the trial court that [Hubbart] "underwent a second procedure on her left hand" is harmless error and that there is support in the record for the trial court's finding that [Hubbart's] left hand carp[a]l tunnel syndrome surgery and resulting impairment [were] related to the accident and injury of January 8, 2001.

In June 2001, Dr. Kenneth Pitz opined that while Hubbart did have carpal tunnel syndrome in her left hand, "it is only very mild . . . and therefore surgery is not indicated." However, he did note that "[t]here is no way to predict whether or not she will require carpal tunnel release in the future." Later, in a report dated August 13, 2001, Dr. Pitz noted, "At the present time with no ability to advance any further with [Hubbart's] rehab I believe with reasonable medi[c]al certainty that she has reached maximum medical improvement." He opined, "As for the left carpal tunnel syndrome, at the present time that is resolved. I do not believe that there is any impairment associated with the left hand or upper extremity." However, Dr. Pitz again noted that a worsening of Hubbart's left carpal tunnel syndrome was possible in the future: "[I]t is possible for carpal tunnel syndrome to recur later or slowly progress over time to the point where significant compression of the median nerve could occur that would require surgical intervention." Dr. Pitz again opined that it was impossible to predict whether or not Hubbart would require carpal tunnel surgery on her left hand.

Dr. Bergstrom, in a report dated November 18, 2003, noted:

> [Hubbart] is requesting that a repeat surgery be carried out on the left carpal tunnel. From the history, which is present in my notes and those of Dr. Pitz, I feel . . . with a reasonable degree of [medical] certainty that the aggravating and precipitating factor in the development of . . . Hubbart's symptoms of bilateral carpal tunnel syndrome was her employment at . . . Hormel . . . .

Dr. Bergstrom, in a letter dated December 18, 2003, noted that "Dr. Pitz had also done a left carpal tunnel release in March 2001. I did a repeat left carpal tunnel release 9 December 2003 . . . ."

As noted earlier by the review panel, Dr. Bergstrom incorrectly noted that prior to December 2003, Hubbart had received carpal tunnel surgery on her left hand. However, on May 14, 2004, Dr. Bergstrom was deposed, and in his deposition, this error was brought to his attention. Dr. Bergstrom stated that his opinion remained "with a reasonable degree of medical certainty or probability that [his] ongoing treatment of . . . Hubbart, including the left carpal tunnel release, was reasonable and necessary as a result of the cumulative trauma she sustained during the course of her employment with Hormel." Further, on May 20, Dr. Bergstrom filled out a questionnaire in which he opined that "Hubbart's bilateral carpal tunnel syndrome arose as a result of cumulative trauma sustained during the course of her employment at Hormel"; that "Hubbart's bilateral carpal tunnel syndrome has made her susceptible to physical aggravations, from ordinary activities of daily life, which activities would not have otherwise affected her but for the underlying injury"; and that "the aforementioned work-related injuries and aggravations arising secondary thereto necessitated the performance of [Hubbart's] left carpal tunnel release performed on December 9, 2003."

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Based on the opinions given by Drs. Pitz and Bergstrom, it is apparent to this court that the review panel did not err in affirming the trial court's determination that Hubbart's need for left carpal tunnel surgery resulted from the injuries she sustained while working for Hormel. Clearly, there is evidence to support the trial court's finding. While it is true that the trial court erroneously noted that Hubbart had two left carpal tunnel surgeries, it is clear that the trial court relied on the opinion of Dr. Bergstrom regarding causation and that Dr. Bergstrom's opinion regarding causation did not change even after he became aware that Hubbart had not had left carpal tunnel surgery before December 9, 2003. Therefore, this error was harmless, as the review panel properly held. We find that the trial court's finding that Hubbart's need for left carpal tunnel surgery was caused by her employment with Hormel was not clearly wrong, and the review panel properly

affirmed this portion of the trial court's award. This assignment of error is without merit.

CONCLUSION

We find that the trial court evaluated Hubbart's application to modify based on her depression using an incorrect standard, and we accordingly reverse the portion of the review panel's order that affirmed the trial court's award finding Hubbart to be temporarily totally disabled as a result of her depression. The cause is remanded to the review panel for remand back to the trial court for an evaluation of Hubbart's claim using the proper standard and to address the issue of res judicata. Finding no other error in the review panel's order, we affirm the remainder of the review panel's order in its entirety.

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

IN RE INTEREST OF ETHAN M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DANIEL M., APPELLANT, AND THERESA S., APPELLEE.

IN RE INTEREST OF CHLOE H. AND KATRINA H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. AMANDA H., APPELLANT, AND JAMES N. AND STANLEY H., APPELLEES.

723 N.W.2d 363

Filed October 31, 2006. Nos. A-06-179 through A-06-181.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Parent and Child.** Under Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2004), reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

3. ____: ____. Under Neb. Rev. Stat. § 43-283.01(4)(b)(iv) (Reissue 2004), reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that the parent of the juvenile has committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent.
4. ____: ____. Neb. Rev. Stat. § 43-283.01 (Reissue 2004) addresses when efforts at reunification of the family are required, but makes such efforts dependent on the conduct of the parent of the juvenile toward either the juvenile or another minor child of the parent.
5. **Parent and Child: Words and Phrases.** Under Neb. Rev. Stat. § 43-245(11) (Reissue 2004), parent means one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition.
6. **Parental Rights: Proof.** The determination to excuse reasonable efforts at reunification under Neb. Rev. Stat. § 43-283.01(4) (Reissue 2004) should be supported by clear and convincing evidence.
7. **Parental Rights: Minors: Statutes: Words and Phrases.** The term "aggravated circumstances," as used in Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2004), embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child and would place the child in a position of an unreasonable risk to be reabused.
8. **Parental Rights: Circumstantial Evidence: Proof.** Circumstantial evidence may be used to establish child neglect or child abuse.
9. ____: ____: ____. Circumstantial evidence may be used in a disposition proceeding in which the burden of proof is "clear and convincing."
10. **Circumstantial Evidence: Proof.** A fact proved by circumstantial evidence is nonetheless a proven fact.
11. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
12. **Parental Rights: Proof.** A finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect.

Appeal from the District Court for Sherman County: GARY G. WASHBURN, County Judge. Judgment in No. A-06-179 reversed, and cause remanded with directions. Judgments in Nos. A-06-180 and A-06-181 affirmed.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, for appellant Daniel M.

Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, P.C., L.L.O., for appellant Amanda H.

Jon Bruning, Attorney General, Monika E. Anderson, Special Assistant Attorney General, and Mark Eurek, Sherman County Attorney, for appellee State of Nebraska.

Jason S. White for appellee Theresa S.

Gregory G. Jensen for appellees James N. and Stanley H.

William J. Erickson, guardian ad litem.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

Daniel M. appeals the disposition order of the Sherman County Court, sitting as a juvenile court, regarding Daniel's son, Ethan M. Amanda H. appeals the disposition order of the Sherman County Court, sitting as a juvenile court, regarding Amanda's daughters, Chloe H. and Katrina H. While these three appeals are separately docketed, they have been consolidated for briefing and argument, and we find it most efficient to write one opinion, given that Daniel and Amanda are now married and were living together with the three children at the time of the events involved in this case—even though Daniel is the natural father of only one of the three children and Amanda is the natural mother of only the other two of the three children.

I. FACTUAL BACKGROUND

Ethan, born January 18, 2000, is the biological child of Daniel and Theresa M., now known as Theresa S. due to her remarriage. Daniel and Theresa were divorced in January 2002, and Daniel received primary physical custody of Ethan.

Amanda is the biological mother of Chloe, born August 9, 2000, and Katrina, born March 27, 2004. Chloe's biological father is James N., and Katrina's biological father is Stanley H. Amanda was never married to either James or Stanley.

Daniel and Amanda, along with Ethan, Chloe, and Katrina, began living together in September 2004. Daniel and Amanda were married on February 15, 2005 (after the juvenile petitions herein were filed). In January, Chloe sustained bruises on her body, scratches about her face and neck, and a black eye. Although Amanda initially blamed Ethan for Chloe's injuries and

maintained that story for several months, Amanda ultimately admitted that she caused Chloe's injuries. Daniel also came to admit that he was aware that Chloe's injuries were caused by Amanda, but he, too, let the blame lie with Ethan for several months.

Katrina suffered a fractured elbow diagnosed on December 22, 2004, and a fractured skull diagnosed on January 26, 2005. Daniel and Amanda deny inflicting such injuries. The skull fracture and a subdural hematoma were diagnosed after Katrina suffered two seizures. Ethan sustained no injuries. On January 27, all three children were removed from the home and placed into emergency foster care.

II. PROCEDURAL BACKGROUND

At the outset, it is important to point out that there was some confusion as to whether the exhibits and testimony would be offered and considered in only a particular child's case or in all three cases collectively. The bill of exceptions reveals that all exhibits and testimony apparently would be considered in all three cases collectively. Upon inquiry at oral argument, counsel agreed that such was the procedure followed, and as a result, we consider all the exhibits and testimony as being admitted in all three cases.

1. ETHAN

On April 19, 2005, the amended juvenile petition for Ethan was filed, alleging that he was "in a situation dangerous to life or limb or injurious to the health or morals of such juvenile" pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), because other children residing within the family structure had suffered injuries, including a black eye, bruises, scratches, a fractured arm, and a subdural hematoma. Daniel pled "no contest" to the allegations, and Ethan was adjudicated accordingly.

On July 5, 2005, the guardian ad litem filed his objection to the case plan and court report filed on May 31 and alleged that reunification of Ethan with Daniel and Amanda is not in Ethan's best interests and that such reunification is "unnecessary and unwise under the provisions of [Neb. Rev. Stat.] § 43-283.01(4) [(Reissue 2004)]." On July 14, Daniel filed his amended objection to the May 31 case plan. In Daniel's objection, he alleges

that (1) the case plan fails to establish as a priority the reunification of Ethan with Daniel, from whose home Ethan was removed; (2) the case plan fails to establish a reasonable and timely date for reunification of Ethan with Daniel; (3) the goals of the case plan are not specific enough to allow for the successful reunification of Ethan with Daniel; (4) the case plan purports to provide to the Nebraska Department of Health and Human Services (DHHS) the authority to add new tasks to such plan at the discretion of DHHS and without court approval; (5) the case plan includes tasks which duplicate tasks that have been completed by Daniel; (6) the case plan requires Daniel to complete tasks that are not reasonably related to correcting or ameliorating the conditions leading to the adjudication of Ethan; and (7) immediate reunification of Ethan with Daniel is in Ethan's best interests and is not contrary to his welfare.

On September 16, 2005, DHHS sent a letter informing the court that beginning October 17, Ethan was being placed with his biological mother, Theresa. On September 19, Daniel filed his "Objection to Change of Placement and Application for Stay," and a stay of the placement with Theresa was granted by the juvenile court via a journal entry filed on December 29.

After a hearing, the juvenile court rendered its decision on January 26, 2006. The juvenile court (1) approved and adopted the case plan and court report; (2) sustained the guardian ad litem's objection to the case plan and court report, finding by clear and convincing evidence that Daniel and Amanda have subjected Ethan to aggravated circumstances, including but not limited to chronic abuse, and finding that DHHS thus is not required to make reasonable efforts to reunify Ethan with Daniel and Amanda; (3) committed Ethan to the care, custody, and control of DHHS; (4) approved the immediate change of placement of Ethan from the home of his paternal grandparents to the home of his biological mother, Theresa; and (5) ordered Daniel and Amanda to comply with specific goals of the case plan which relate to continued visitation but not reunification, said conditions to remain in effect for a period of 1 year. On January 18, 2006, DHHS sent a letter informing the court that effective January 28, Ethan was being placed with his biological mother, Theresa.

Daniel timely appeals from that portion of the juvenile court's order of January 26, 2006, concerning Ethan.

2. CHLOE AND KATRINA

On January 28, 2005, the juvenile petition for Chloe was filed, and on April 19, the amended juvenile petition for Katrina was filed. The petitions alleged that they were minor children as defined by § 43-247(3)(a). Specifically, the petitions alleged that Chloe sustained intentional injuries while in the care and custody of a parent or caretaker while she was in "the family home or shop," that Katrina sustained unexplained injuries while in the care and custody of the parent or caretaker through neglect while she was in "the family home or shop," and that there were injuries to other children in the family, which injuries were caused by Amanda's neglect or may have been caused by actions of Amanda or other persons residing in "the family home or at the shop." Amanda admitted the allegations in Chloe's petition and pled "no contest" to the allegations in Katrina's petition. Chloe and Katrina were adjudicated accordingly.

On June 20, 2005, Amanda filed her objections to the May 31 case plan. In Amanda's objections, she alleged that (1) the case plan fails to establish as a priority the reunification of Chloe and Katrina with Amanda, from whose home the girls were removed; (2) the case plan fails to establish a reasonable and timely date for reunification of Chloe and Katrina with Amanda; and (3) the goals of the case plan are not specific enough to allow for the successful reunification of Chloe and Katrina with Amanda. On July 5, the guardian ad litem filed his objections to the May 31 case plan and court report, alleging that reunification of Chloe and Katrina with Daniel and Amanda is not in the girls' best interests and that such reunification is "unnecessary and unwise under the provisions of [Neb. Rev. Stat.] § 43-283.01(4) [(Reissue 2004)]."

After a hearing, the juvenile court rendered its decision on January 26, 2006. The juvenile court (1) approved and adopted the case plan and court report; (2) sustained the guardian ad litem's objection to the case plan and court report, finding by clear and convincing evidence that Daniel and Amanda have subjected Chloe and Katrina to aggravated circumstances, including but not limited to chronic abuse, and finding that DHHS thus is not

required to make reasonable efforts to reunify Chloe and Katrina with Daniel and Amanda; (3) committed Chloe and Katrina to the care, custody, and control of DHHS; (4) found that physical placement of Chloe with her biological father, James, and Katrina with her biological father, Stanley, appears appropriate; and (5) ordered Daniel and Amanda to comply with specific goals of the case plan which relate to continued visitation but not reunification, said conditions to remain in effect for a period of 1 year.

Amanda timely appeals from that portion of the juvenile court's orders of January 26, 2006, affecting Chloe and Katrina.

III. ASSIGNMENTS OF ERROR

Daniel alleges that the trial court erred in (1) finding that the existence of aggravated circumstances eliminated the need for reasonable efforts to reunify Ethan with Daniel, (2) failing to consider and determine whether Ethan's best interests required reasonable efforts at reunification with Daniel, (3) finding that continuation of Ethan in Daniel's home is not in Ethan's best interests, (4) finding that reasonable efforts have failed to prevent or eliminate the need for removal of Ethan from the home or make it possible for Ethan to safely return to the home of Daniel and Amanda, (5) approving the change of placement of Ethan from the home of his grandparents to the home of Theresa, and (6) ordering a final disposition that is not in the best interests of Ethan.

Amanda alleges that the trial court erred in (1) finding that the guardian ad litem proved by clear and convincing evidence that Daniel and Amanda have subjected the juveniles to aggravated circumstances, including but not limited to chronic abuse; (2) finding that DHHS is not required to make reasonable efforts to reunify the juveniles with Amanda; (3) finding that Amanda failed to prove by a reasonable preponderance of the evidence that the case plan and court report are not in the best interests of Chloe and Katrina; and (4) finding that the reasonable efforts made by DHHS have failed to prevent or eliminate the need for removal from the home or make it possible for the juveniles to safely return home.

IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of

the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

V. ANALYSIS

1. Who Is the Parent of Whom?

[2,3] This case involves the fundamental question of whether DHHS must make reasonable efforts to reunify the "family." Before that question can be answered with respect to any of the three children involved in these cases, there is a predicate question: "Who is the parent of whom?" The question arises by virtue of the language of Neb. Rev. Stat. § 43-283.01 (Reissue 2004), which states in relevant part:

> (4) Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

[4,5] Section 43-283.01 addresses when efforts at reunification of the "family" are required, but makes such efforts dependent on the conduct of "[t]he parent of the juvenile [toward either] the juvenile or another minor child of the parent." These cases involve multiple children with differing biological parents. For purposes of our analysis of these cases, the answer is provided by Neb. Rev. Stat. § 43-245(11) (Reissue 2004), which

says that "[p]arent means one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition."

Therefore, given that Daniel and Amanda were not married when the petitions were filed, Amanda is deemed to be the parent of Chloe and Katrina but not of Ethan, and Daniel is the parent of Ethan but not of Chloe and Katrina. During oral argument of these cases, there were numerous suggestions that we decide the cases by considering the "whole family" or the "family unit" composed of Daniel, Amanda, Ethan, Chloe, and Katrina, but § 43-245(11) does not allow us to do so. Thus, there are two family units: one consisting of Amanda, Chloe, and Katrina and another one consisting of Daniel and Ethan.

(a) Ethan

[6] Daniel argues that the juvenile court erred in finding that the existence of aggravated circumstances eliminated the need for reasonable efforts to reunify Ethan with Daniel. In *In re Interest of Jac'Quez N.*, 266 Neb. 782, 789-90, 669 N.W.2d 429, 435 (2003), the Nebraska Supreme Court said:

> Upon due consideration, we hold that a finding of a fact, such as aggravated circumstances under § 43-283.01(4)(a), that excuses the requirement of reasonable efforts at reunification under § 43-283.01(4) must be based on clear and convincing evidence. In connection with our ruling, we note that dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights. It follows that the requisite standard of proof for such determination should be at the level required for a termination of parental rights, and therefore the determination to excuse reasonable efforts at reunification under § 43-283.01(4) should be supported by clear and convincing evidence.

As outlined above, because Daniel became a stepparent of Chloe and Katrina after the petitions in these cases were filed, he is not their "parent" for purposes of determining the necessity of reasonable efforts at reunification with Ethan under § 43-283.01. Thus, whatever his actions or shortcomings may have been with respect to Chloe and Katrina, the fact is that our analysis in Ethan's case excludes consideration of what happened to Chloe

and Katrina because Daniel was not their "parent." And, because Amanda is likewise not a parent of Ethan, her actions toward Chloe and Katrina are not material when determining whether DHHS must make reasonable efforts to reunify Daniel and Ethan.

[7] The record is clear that Ethan sustained no physical injuries while living with Daniel (and Amanda), nor is there evidence of any other type of abuse or neglect. In *In re Interest of Jac'Quez N., supra*, the Nebraska Supreme Court relied upon *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 77, 824 A.2d 213, 233 (2003), in which the Superior Court of New Jersey concluded that

> the term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be reabused.

Given that our Supreme Court embraced this definition of aggravated circumstances, we find that with respect to Ethan, there was no clear and convincing evidence of aggravated circumstances on the part of Daniel which would eliminate the requirement that reasonable efforts be made to preserve and reunify the family composed of Daniel and Ethan. As a result, in case No. A-06-179, we reverse the trial court's finding that such efforts need not be made with respect to Daniel. However, we are careful to point out that in our view, a child could be found to have been chronically abused by virtue of being present when his or her parent subjected a sibling or siblings to chronic abuse. But, again, as a matter of law under § 43-245(11), Daniel was not Chloe's or Katrina's parent, nor were the girls Ethan's siblings.

(b) Placement of Ethan With Theresa

Daniel next argues that the juvenile court erred in approving the change of placement of Ethan from the home of his paternal grandparents to the home of Ethan's biological mother, Theresa, in California. When the juvenile court approved the placement of Ethan with Theresa in California, such action would obviously flow from the finding that the State did not have to make reasonable efforts to reunify Ethan with Daniel. However, given our finding that reasonable efforts to reunify Ethan and Daniel must be made, a placement of Ethan with Theresa in California

poses a substantial and unnecessary hindrance to efforts of reunification of Ethan with Daniel. Additionally, Daniel was awarded physical custody of Ethan at the time of Theresa and Daniel's California divorce—although the record before us is unclear as to whether this result derived from the parties' agreement or from a court decision after a custody contest. Nevertheless, the record before us contains substantial information about Theresa which reveals that she has mental illnesses of consequence, as well as a history of periodically leaving the marital home for significant timeframes, leaving Daniel to care for Ethan. We recognize that Theresa attributes such behavior to Daniel's abuse of her and Ethan, which assertion Daniel denies. Nonetheless, the fact is that by virtue of the California divorce decree, Daniel is Ethan's custodial parent.

Therefore, after consideration of these circumstances, and given our reversal of the trial court's finding that reasonable efforts to reunify Ethan with Daniel need not be made, we are compelled to conclude that Ethan should not be placed in California with Theresa (and must be returned if so placed) and that Ethan should be placed in a situation in Nebraska that is conducive to reunification with Daniel, be that in a foster care placement with his paternal grandparents or some other placement.

Additionally, as is evident from our discussion of Daniel's next assignment of error, Ethan's placement naturally includes consideration of immediate reunification with Daniel, but such is obviously dependent on the circumstances which exist at the time this matter is returned to the jurisdiction of the Sherman County Court, sitting as a juvenile court. Accordingly we sustain Daniel's second assignment of error.

(c) Ethan's Best Interests

Daniel also argues that the juvenile court erred in finding that continuation of Ethan in Daniel's home is not in Ethan's best interests. We have already reversed portions of the disposition order, which reversal means that DHHS must make reasonable efforts to reunify Ethan with Daniel, and we have reversed the placement of Ethan in California with Theresa.

As to whether Ethan should be placed in Daniel's home, it is significant that Daniel has complied with all tasks required by the case plan and all recommendations made to him by the DHHS

caseworker. Daniel has attended parenting classes, completed a psychological evaluation, participated in therapy sessions, and attended all visitations with Ethan. The visitation reports show that Daniel and Ethan have a positive relationship and that all visits ended in hugs and kisses. Ethan's therapist testified that Ethan wants to go back home with Daniel. Daniel's therapist testified that he is amazed by Daniel's ability to handle stress in an appropriate manner, and he cannot identify anything where Daniel needs improvement. Despite all of Daniel's positive efforts, his visitation with Ethan (which initially was essentially unlimited and could be supervised by the paternal grandparents) has been inexplicably reduced by DHHS, such that all visits must now be supervised by an agency retained by DHHS. Given our conclusions detailed above and Daniel's complete and successful cooperation with the case plan, the visitation limitations imposed by DHHS are overly strict and unreasonable. Yet, given that our perspective is that of an appellate court, we are unwilling to order that Ethan be immediately returned to Daniel's custody, because such determination is best made by the trial court, given the passage of time during the appeal process. Equally important is that the best interests calculus for Ethan now clearly includes two important facts: First, Daniel and Amanda are now married, and second, our conclusions concerning Amanda's conduct as to Chloe and Katrina require that caution be exercised in returning Ethan to Daniel's custody, because Amanda, as Ethan's stepparent, is now obviously implicated when considering Ethan's best interests.

2. Chloe and Katrina

Amanda argues that the juvenile court erred in finding the existence of aggravated circumstances and thereby eliminating the need for reasonable efforts to reunify Chloe and Katrina with Amanda. As stated previously, a finding of a fact, such as aggravated circumstances under § 43-283.01(4)(a), that excuses the requirement of reasonable efforts at reunification under § 43-283.01(4) must be based on clear and convincing evidence. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003).

Amanda admits to one incident in which she inflicted bruising, scratches, and a black eye on Chloe. Amanda said she was under

stress due to Katrina's seizures and took out her frustrations on Chloe. Even if frustration was the reason for such conduct, it is certainly no excuse for abusing a child. We note that Amanda blamed Chloe's injuries on Ethan for 2 months before admitting her culpability. The photographs of Chloe's injuries are disconcerting to say the least, because they reveal a frightening level of abuse; although fortunately, Chloe did not sustain serious physical injuries.

[8-12] Katrina, while an infant of 9 and then 10 months, sustained a fractured elbow and then a skull fracture with a subdural hematoma. There is no direct evidence of how these injuries were suffered, but neither Daniel nor Amanda, who were then living in the household, assign blame to each other or to any other person. Nor does either of them offer any plausible explanation which would eliminate human action as the cause of the infant's injuries. In *In re Interest of McCauley H.*, 3 Neb. App. 474, 529 N.W.2d 77 (1995), this court adopted the proposition that circumstantial evidence may be used to establish child neglect or child abuse. Although *In re Interest of McCauley H.* was an adjudication case—in which cases the burden of proof is "preponderance of the evidence"—circumstantial evidence may also be used in a disposition proceeding in which the burden of proof is "clear and convincing." A fact proved by circumstantial evidence is nonetheless a proven fact. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995). Circumstantial evidence is not inherently less probative than direct evidence. *Id.* While the trial court did not make a specific finding of who inflicted such injuries on Katrina, its finding of "aggravated circumstances" which eliminated the need for DHHS to make reasonable efforts to reunify Amanda with her daughters at least implicitly suggests that the court considered Amanda to be culpable. After our de novo review of the record, we affirm the trial court's conclusion. It is important to recall what this court has stated in an earlier case:

> In endorsing the use of circumstantial evidence to establish child neglect or child abuse, it has been stated that "[l]earned commentators have pointed out that in many such cases the only proof available is circumstantial evidence since abusive actions usually occur within the privacy of the

> home, the child is either intimidated or too young to testify, and the parents tend to protect each other." *Higgins*[*v. Dallas Cty. Child Welfare Unit*], 544 S.W.2d [745,] 750 [(Tex. Civ. App. 1976), *overruled on other grounds, In re Interest of S.H.A.*, 728 S.W.2d 73 (Tex. App. 1987)]. See, also, Rowine H. Brown et al., *Medical and Legal Aspects of the Battered Child Syndrome*, 50 Chi.-Kent L. Rev. 45 (1973).

In re Interest of McCauley H., 3 Neb. App. at 480-81, 529 N.W.2d at 82.

> [A] finding of abuse or neglect may be supported where the record shows (1) a parent's control over the child during the period when the abuse or neglect occurred and (2) multiple injuries or other serious impairment of health have occurred which ordinarily would not occur in the absence of abuse or neglect.

Id. at 480, 529 N.W.2d at 82.

Amanda had control over Katrina when Katrina sustained her elbow and skull fractures. Although there was some evidence that Katrina was in daycare during the time in which the skull fracture could have occurred, there have been no charges filed against the daycare provider and the provider testified that neither Daniel nor Amanda accused her of causing Katrina's injuries. We have previously held that when parents offer no explanation as to a child's injuries and have no suspicions about the daycare providers or the other individuals who cared for the child previous to the injuries, and when the child's injuries would not have ordinarily occurred in the absence of abuse or neglect, expert testimony is not necessary to establish abuse. See *In re Interest of Sarah C. & Jason C.*, 10 Neb. App. 184, 626 N.W.2d 637 (2001). It is unnecessary for the State to prove the identity of the individual who inflicted a child's injuries. See *id.*

However, in this case, there is convincing expert medical evidence that Katrina's injuries were such that they would not ordinarily occur in the absence of abuse or neglect and that they were inflicted by human agency. In reaching this conclusion, we find the testimony of Dr. Jeffrey DeMare and his reports to be persuasive, given his established expertise with respect to child abuse and resulting injuries to small children. We briefly summarize Dr. DeMare's opinions as follows: He opined that the skull fracture

and hematoma were not caused by the seizures, but, rather, that Katrina's head injury was inflicted by "someone with a significant amount of strength and force to cause this injury. [A] fall from a couple of stories or a high-speed car accident . . . is an accurate comparison." Dr. DeMare said that while a fall from 3 to 6 feet can cause a skull fracture, Katrina's symptoms indicated that far more force was used, and that the symptoms would have manifested almost immediately and certainly within 20 minutes. Katrina suffered two seizures between January 20 and 25, and on each occasion, she was at home with Amanda in the 20 minutes prior to the seizures.

Dr. DeMare testified that the elbow injury was a "bucket-handle" fracture, which is rarely seen and occurs only when an adult pulls on a baby's limb hard enough to break the bone apart, because in a small child, the tendons in the joint are stronger than the bone at the joint, so "you've got two pieces [of bone] and you pull them apart, instead of the connective tissue breaking, you actually break the bone." Dr. DeMare said that this is a "very specific . . . injury in kids and it implies a specific mechanism as to how it happens." He further said that this injury is very painful until the bone is immobilized, because the bone grinds against itself. Given that a child of Katrina's age lacks mobility and requires constant care and monitoring, the absence of a parental explanation was characterized as a further sign of abuse. With respect to Chloe, Dr. DeMare said that the number, location, and placement of the injuries indicated adult infliction on multiple occasions. After thoroughly reviewing the record, we find clear and convincing evidence that Amanda—as Katrina's parent, caregiver, and custodian—was responsible for Katrina's injuries by either inflicting them herself or by failing to protect Katrina from abuse by Daniel, the only two realistic causative agents shown by the evidence. However, we find it much more likely that Katrina was abused by Amanda, given her admitted brutalization of Chloe.

We now turn to the question of whether "aggravated circumstances" have been proved. We recall the definition of that concept earlier set forth in this opinion: The nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the

child, and would pose an unreasonable risk that the child would be reabused. See *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003). We are convinced that both Chloe and Katrina have been abused on multiple occasions while in Amanda's control, and thus, each child has been chronically abused and is at risk for additional abuse. The nature of the previous abuse is such that under the above definition, "aggravated circumstances" have been proved and reasonable efforts to reunify Amanda with her daughters Chloe and Katrina need not be undertaken. We affirm the trial court's finding in this regard.

VI. CONCLUSION

For the reasons stated above, we find that DHHS must make reasonable efforts to reunify Ethan with Daniel. We further find that Ethan should not be placed with Theresa in California and that if Ethan is so placed, he must be returned to Nebraska. Thus, Ethan's case is reversed and remanded for further proceedings consistent with our opinion.

We find that there is clear and convincing evidence that Chloe and Katrina were chronically abused by Amanda and that DHHS therefore does not need to make reasonable efforts to reunify Chloe and Katrina with Amanda, and thus, the lower court's decision is affirmed.

Clearly, the result in these cases is driven by the statutory definition of "parent" in § 43-245(11), coupled with the fact that Daniel and Amanda did not marry until after the juvenile petitions were filed, which fact could potentially have the paradoxical consequence that Ethan resides with Amanda, whom we have found has chronically abused Chloe and Katrina. To the extent that a shortcoming in the statutory definition of "parent" is thereby revealed, the remedy is by legislative action, since we cannot rewrite the statute.

JUDGMENT IN NO. A-06-179 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENTS IN NOS. A-06-180 AND A-06-181 AFFIRMED.

BARBARA L. POPPE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HEATHER A. POPPE, DECEASED, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

723 N.W.2d 661

Filed November 14, 2006. No. A-05-289.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Negligence.** There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (1) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct or (2) a special relation exists between the actor and the other which gives to the other a right to protection.
3. ____. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
4. ____. No special relationship imposing a duty arises out of either an investigatory traffic stop or its resulting brief detention.
5. **Courts.** The Nebraska Court of Appeals does not have authority to reverse the holdings of the Nebraska Supreme Court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

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

Dana Roper, Lincoln City Attorney, and Joseph J. Rupp for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

A police officer seeking Robin Siefker briefly detained Siefker after stopping Siefker's automobile, but the officer failed to identify Siefker. Siefker later drove in the wrong direction and collided with another vehicle, killing Heather A. Poppe (Poppe). The personal representative of Poppe's estate, Barbara L. Poppe (appellant), sued the City of Lincoln (the City), alleging negligence. The district court dismissed the action, concluding that

no duty existed, because the complaint did not show that a special relationship existed between Poppe and the police or that a custodial relationship existed between the police and Siefker. We affirm.

BACKGROUND

Appellant's complaint alleged that at approximately 10:18 p.m. on November 27, 2002, employees of the Lincoln Police Department received a call from a concerned citizen reporting that Siefker had come to the citizen's house, given her a briefcase which Siefker said contained his will, and told her to give it to Siefker's attorney if anything happened to Siefker. The citizen reported Siefker was driving a blue or green 1998 Dodge pickup. Employees of the Lincoln Police Department logged the call as a possible threat of suicide and issued a dispatch assigning an officer to locate Siefker and check on his welfare.

Between 10:20 and 11:30 p.m., the officer conducted investigative activities designed to locate Siefker and did, in fact, stop and interview Siefker at approximately the 900 block of Gaslight Lane in Lincoln, but failed to identify the individual as Siefker. Appellant alleged in the complaint that the officer negligently performed his duties by failing to require the individual stopped to produce a driver's license or other form of identification, by failing to note the license plate and identify the registered owner of said vehicle, and by failing to detain Siefker and check on his welfare.

At approximately 12:40 a.m. on November 28, 2002, a collision occurred between a vehicle driven westbound by Poppe on Interstate 80 and a 1998 Dodge pickup truck driven eastbound by Siefker in the westbound lanes of Interstate 80. Poppe sustained injuries in the collision which caused her death.

The complaint alleged that negligence of the City's police officer directly and proximately caused the accident, and the complaint set forth two causes of action: for wrongful death and for Poppe's conscious pain and suffering after the collision but prior to death. The complaint also alleged that in compliance with Nebraska's Political Subdivisions Tort Claims Act, appellant timely served a tort claim on the City, and that the City denied the claim.

In response to appellant's complaint, the City filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), asserting that the complaint failed to state a claim upon which relief could be granted. The district court sustained the City's motion to dismiss. The court stated that appellant had not alleged facts to establish that the City owed a duty to Poppe. The court stated that the police did not take charge of Siefker sufficiently to establish a custodial relationship. The court found that the City did not owe a duty to Poppe to control the conduct of Siefker and determined that the complaint could not be amended to cure the defect. The court dismissed the complaint with prejudice. This appeal timely follows.

ASSIGNMENT OF ERROR

Appellant alleges that the court erred in granting the City's motion to dismiss.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006).

ANALYSIS

To recover under the Political Subdivisions Tort Claims Act, a claimant must prove all four of the basic elements of negligence: duty, breach of duty, proximate causation, and damages. See *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006). In the case before us, we must determine whether the complaint alleges facts sufficient to establish a legal duty.

[2] The Nebraska Supreme Court has adopted Restatement (Second) of Torts § 315 at 122 (1965), which states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

See, *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). Comment *c.* to § 315 of the Restatement provides that the relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316 through 319 of the Restatement.

SPECIAL RELATIONSHIP BETWEEN POLICE OFFICER AND POPPE—§ 315(b)

Liability of police officers for failing to protect a citizen from harm caused by criminal conduct is established if the police have specifically undertaken to protect a particular individual and the individual has specifically relied upon the undertaking. *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). Such a duty arises when a "special relationship" exists between the police department and the victim that sets the victim apart from the general public and there are explicit assurances of protection that give rise to reliance on the part of the victim. See, *Bartunek v. State, supra*; *Brandon v. County of Richardson, supra*. The complaint did not allege facts to establish that the police had a special relationship with Poppe, and appellant effectively concedes the same in her brief.

SPECIAL RELATIONSHIP BETWEEN POLICE OFFICER AND SIEFKER—§§ 315(a) AND 319

[3] Appellant argues that the police had a special relationship with Siefker because the officer had physically stopped Siefker and had a duty to control him. Applying § 315(a) of the Restatement to the facts of this case, we acknowledge the police would have a duty to control the conduct of Siefker in such a manner as to prevent him from causing physical harm to another if a special relationship existed between the police and Siefker. In *Bartunek v. State, supra*, the Nebraska Supreme Court recognized that the parameters of § 315(a) of the Restatement are further defined by § 319. That section provides, "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a

duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.* at 129. The illustrations provided for § 319 are (1) the escape of a delirious smallpox patient from a hospital for contagious diseases and (2) the escape of a "homicidal maniac" from a sanitarium for the insane. See *id.* at 130. The Supreme Court stated that "the illustrations to this section make plain that the phrase 'takes charge' is intended to refer to a custodial relationship." *Bartunek v. State*, 266 Neb. at 462, 666 N.W.2d at 441.

In the instant case, appellant alleged that the police officer stopped Siefker's vehicle but failed to identify and detain Siefker. The allegations of the complaint imply that the officer was negligent because he failed to "take charge" of Siefker. However, under § 319 no duty arises from failing to take charge of the third person; rather, the duty to exercise reasonable care to control the third person to prevent harm to another arises only after one has taken charge of the third person. Thus, § 319 requires that we determine whether the traffic stop and brief detention constituted "taking charge" of Siefker.

[4] In *Jones v. Maryland-National Capital*, 82 Md. App. 314, 571 A.2d 859 (1990), a Maryland appellate court held that no "special relationship" arises out of either an investigatory traffic stop or its resulting brief detention. We are unable to find a Nebraska appellate case addressing the issue, but the Nebraska Supreme Court has held that persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda* rights or warnings. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). We conclude that the police officer's temporary stop of Siefker did not create a custodial relationship which imposed a duty on the officer to control Siefker's subsequent behavior.

FORESEEABILITY

[5] In urging this court to find liability, appellant relies on a concurring opinion in *Jean W. v. Commonwealth*, 414 Mass. 496, 514, 610 N.E.2d 305, 315 (1993) (Wilkins, J., concurring; Abrams, J., joins), which announced an intention to abolish the "public duty rule." Appellant argues that the police officer in the instant case was in a position to prevent foreseeable harm and

had a duty to all foreseeable victims. Adopting a position finding liability based upon a duty owed to the public at large and not based on special relationships would be contrary to the current state of the law in Nebraska. The Nebraska Court of Appeals does not have authority to reverse the holdings of the Nebraska Supreme Court. *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

CONCLUSION

Because appellant failed to plead the existence of facts sufficient to establish that the City—by and through its agents and employees—owed a special duty to protect Poppe from the harm caused by Siefker, we conclude upon our de novo review that the district court did not err in sustaining the City's motion to dismiss pursuant to rule 12(b)(6). We therefore affirm the judgment of the district court which granted the City's motion and dismissed appellant's complaint with prejudice.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RASHAD A. McKAY, APPELLANT.

723 N.W.2d 644

Filed March 28, 2006. No. A-05-558.

This opinion has been ordered permanently published by order of the Court of Appeals dated May 2, 2006.

1. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
2. **Lesser-Included Offenses: Jury Instructions: Evidence.** The test adopted by the Nebraska Supreme Court to determine whether a lesser-included offense instruction should be given involves two parts: First, the court must determine whether the alleged offense is a lesser-included offense of another, and second, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense.
3. **Lesser-Included Offenses.** In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense.

4. **Assault: Lesser-Included Offenses.** Third degree assault is a lesser-included offense of assault by a confined person.
5. **Prisoners: Proof: Words and Phrases.** "Legal" confinement, as required by Neb. Rev. Stat. § 28-932(1) (Cum. Supp. 2004), requires a showing that the defendant was technically in actual custody in a correctional facility and not that his confinement was substantively lawful.
6. **Words and Phrases.** Although the distinction between the terms "legal" and "lawful" is frequently clouded and the terms are often used interchangeably, there is in fact a distinction of some importance.
7. ____. To say of an act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden, by law.
8. ____. To say of an act that it is "legal" implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner.
9. **Evidence: Proof: Words and Phrases.** Neb. Rev. Stat. § 28-932(1) (Cum. Supp. 2004) does not require the State to demonstrate "lawful" confinement, substantively, but, rather, requires the State to show only "legal" confinement, technically.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

W. Patrick Dunn for appellant.

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

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Rashad A. McKay appeals his conviction on a charge of assault by a confined person. On appeal, McKay challenges the district court's allowing the State to reopen its case after resting and the court's refusal to give the jury a lesser-included offense instruction on third degree assault. We find no abuse of discretion by the court in allowing the State to reopen its case, and we conclude that a lesser-included offense instruction was not warranted, because there was no rational basis for the jury to acquit McKay of the greater offense and convict him of the lesser offense. Accordingly, we affirm.

II. BACKGROUND

The events giving rise to this case occurred at the Douglas County Correctional Facility in Omaha, Nebraska, on June 2, 2004. On that date, McKay and two other men, Sterling McKoy

and Barry Swindle, were in the bullpen area of the correctional facility waiting to be transported back to the housing units after separate court appearances. The three were escorted from the bullpen area to the housing units by a correctional officer, Joyce Brooks. Brooks testified that the three were walking "single file, one behind the other"; that Swindle was in front of McKoy, who was in front of McKay; and that Brooks was walking behind McKay.

According to Brooks, the group had to climb stairs to get to the third floor of the housing unit. Brooks testified: "Once we reached the third floor, me and . . . McKay were still on the stairwell and . . . Swindle was hit by . . . McKoy. At this time . . . McKay came up the stairs and he proceeded to assist . . . McKoy in hitting Inmate Swindle." Brooks further testified that McKay struck Swindle with a closed fist "several times," that Swindle fell to the ground, and that while Swindle was on the ground, McKay "continued to hit him" and kicked him. Brooks testified that she "pulled [McKay] off" Swindle but that when she attempted to get control of McKoy, McKay "went back over to Inmate Swindle" and continued "hitting him."

On September 22, 2004, an information was filed charging McKay with assault by a confined person, a violation of Neb. Rev. Stat. § 28-932(1) (Cum. Supp. 2004). On October 12, McKay filed a written waiver of appearance and plea of not guilty. The case was tried before a jury on February 28 and March 1, 2005.

After presenting testimony from Brooks and Swindle, the State rested its case. McKay moved for discharge, arguing that the State failed to present any evidence that he was "legally" confined at the time of the incident—an element of the offense. See § 28-932(1). The court commented that the State needed to show "how he's there, how it is not by mistake or some other process that he is there." The court further commented that "[t]o say that a correctional guard can testify to the legality of his detainment is a stretch" and that the State had not carried its burden. Nonetheless, the court granted the State leave to research the issue overnight and adjourned for the day.

The next day, the State argued that the testimony of Brooks was sufficient to demonstrate McKay was legally confined at the

time of the incident, that the issue of "legal" confinement was a question for the jury, and that in the alternative, the court should either allow the State to reopen its case and present additional evidence on the issue or give the jury an instruction on third degree assault as a lesser-included offense to the charged offense of assault by a confined person. The court again commented that the State had "wholly failed to show legal confinement," but the court granted the State leave to reopen its case on the issue.

The State then reopened its case and offered a certified copy of a judgment from the U.S. District Court for the District of Nebraska showing that on June 2, 2004, the date of the incident herein, McKay was found guilty in federal court of conspiracy to possess with intent to distribute crack cocaine. The State then rested its case again.

The court held a jury instruction conference prior to McKay's presenting his defense. Before McKay called his first witness, he requested that the court add a lesser-included offense instruction which would instruct the jury that third degree assault is a lesser-included offense to the charged offense of assault by a confined person. McKay argued that the jury could find him guilty of third degree assault "if they cannot find the element of legally confined." The court at that time stated, "I agree with you. It would be a lesser-included [offense]." The court indicated that the issue would be discussed further.

McKay presented testimony by both McKoy and himself suggesting that McKay did not strike Swindle and that McKay only attempted to break up the fight between McKoy and Swindle. McKoy testified that Swindle had elbowed McKoy to start the altercation, that McKoy had punched Swindle, and that McKay had tried to break up the fight. McKoy testified that he never saw McKay hit or kick Swindle. McKay testified that he tried to break up the fight and that he tried to help Brooks stop the fight because she was not able to stop the fight by herself. McKay testified that he never struck or kicked Swindle. McKay then rested his case.

The court held another jury instruction conference after the close of all evidence. McKay again requested an instruction on third degree assault as a lesser-included offense to the charged offense of assault by a confined person. The State objected to

the request and argued that because of the certified copy of McKay's federal court conviction, there was no rational basis for the jury to acquit McKay of the greater offense but convict him of the lesser offense. The State further pointed out McKay had testified that prior to the incident, he had just returned from court and had been convicted. The court denied McKay's request for the instruction.

On March 2, 2005, the court entered an order reflecting that the jury had returned a unanimous verdict of guilty. On April 1, the court sentenced McKay to 3 to 5 years' imprisonment, to be served consecutively to any other term being served. This appeal followed.

III. ASSIGNMENTS OF ERROR

McKay's two assignments of error on appeal are that the district court erred in allowing the State to reopen its case and in refusing to instruct the jury on third degree assault as a lesser-included offense to the charged offense of assault by a confined person.

IV. ANALYSIS

1. Reopening Case

McKay challenges the district court's granting of the State's motion to withdraw its rest and introduce additional evidence on the issue of whether McKay was legally confined at the time of the incident. McKay argues that it was an abuse of discretion for the court to allow the State to adduce additional evidence on an issue which the court had concluded the State had failed to prove in its case prior to resting. We conclude that on the facts of this case, it was not an abuse of discretion for the court to allow the State to withdraw its rest.

[1] The Nebraska Supreme Court has held: " 'Even in criminal prosecutions the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.' " *State v. Thomas*, 236 Neb. 84, 94, 459 N.W.2d 204, 211 (1990) (quoting *State v. Putnam*, 178 Neb. 445, 133 N.W.2d 605 (1965)), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). Accord *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). In *State v. Thomas, supra*, the State adduced testimony

from witnesses and documentary evidence and rested its case. The defendant then moved for a directed verdict on the issue of the statute of limitations, because the State had not adduced any evidence demonstrating that any exception to the otherwise applicable statute applied. The court granted the State's motion to withdraw its rest and permitted the State to adduce evidence on whether the defendant fit within an exception to the otherwise applicable statute of limitations. On appeal, the Supreme Court found no abuse of discretion by the trial court in permitting the State to withdraw its rest.

In *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001), this court found an abuse of discretion by the district court in allowing the State to withdraw its rest and adduce additional evidence. Important to this court's decision in *State v. Gray*, however, was the fact that after the State had rested its case in an enhancement proceeding, the district court, on its own motion, assessed the State's evidence and then notified both the State and a judge presiding over a different enhancement proceeding involving the same defendant that the State's evidence appeared to be insufficient. The district court, in both cases, then allowed the State to withdraw its rest and adduce additional evidence. This court, in finding an abuse of discretion, specifically noted that the district court had advised the State of insufficiencies in its proof and "allowed the State to put in more evidence to attempt to plug the gaps in its proof." *Id.* at 993, 606 N.W.2d at 495. This court's finding of an abuse of discretion demonstrated concern about the district court's failure to maintain an appearance of impartiality and becoming "an advocate for the State's need to put in more and better evidence, rather than simply deciding whether the evidence adduced" was sufficient. *Id.* at 995, 606 N.W.2d at 497. Also important was the underlying conclusion that the evidence adduced by the State prior to resting was, in fact, insufficient.

We find the facts of the present case to be more comparable to the facts in *State v. Thomas, supra*, and to be distinguishable from the facts in *State v. Gray, supra*. In the present case, the district court did not become an advocate for the State, did not raise on the court's own motion any alleged insufficiency of the

State's evidence, and did not raise on the court's own motion the issue of the sufficiency of the evidence. Rather, the court was presented with the issue as raised by McKay, and the court decided that issue. Further, as our analysis below demonstrates, the evidence adduced by the State prior to resting was not clearly insufficient to demonstrate legal confinement; the district court's suggestions to the contrary appeared to be based on the court's misunderstanding of the legal requirements for a showing of legal confinement—a matter we further discuss below. As such, the present case is not even a case where allowing the State to withdraw its rest actually resulted in allowing the State to fill gaps in its proof; as our analysis below demonstrates, the State's proof of legal confinement was sufficient prior to its initial rest. For these reasons, we do not find an abuse of discretion by the district court in allowing the State to withdraw its rest. This assigned error is without merit.

2. Lesser-Included Offense Instruction

McKay also asserts that the district court erred in refusing to instruct the jury on third degree assault as a lesser-included offense to the charged offense of assault by a confined person. McKay argues both that third degree assault is a lesser-included offense and that the evidence was such that the jury could rationally have acquitted him of the greater offense and convicted him of the lesser offense. We disagree.

[2,3] The test adopted by the Nebraska Supreme Court to determine whether a lesser-included offense instruction should be given involves two parts. See, *State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004); *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). The court must first determine whether the alleged offense is a lesser-included offense of another. See *id.* The test for making this determination is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case. *State v. Smith, supra.* See *State v. Williams, supra.* In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same time having committed the lesser offense. *Id.* Otherwise stated, a lesser-included offense is one which is fully

embraced in the higher offense. *Id.* Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *Id.*

[4] There is no dispute in this case that the first part of the test is satisfied. The elements of assault by a confined person, the greater offense, and third degree assault, the lesser offense, are such that it is impossible to commit the greater offense without at the same time having committed the lesser offense. See Neb. Rev. Stat. § 28-310 (Reissue 1995) and § 28-932(1). The elements of the two offenses are identical, see *id.*, except that assault by a confined person has the additional requirement that the defendant be "legally confined," § 28-932(1).

As such, the real issue in this case is whether the evidence produces a rational basis for a verdict acquitting McKay of the offense charged, assault by a confined person, and convicting him of the lesser offense, third degree assault. Stated differently, the issue is whether the evidence produces a rational basis for the jury to conclude that McKay, while committing an assault, was not legally confined at the time of the incident. We determine that the district court correctly found that there is not a rational basis for such a conclusion.

[5] McKay argues to this court, as he argued to the district court and as the district court apparently agreed, that the State was required to prove that his confinement at the time of the incident "had some legal basis - for instance, that it was the result of some order lawfully entered by a court of competent jurisdiction." Brief for appellant at 6. Although the district court apparently agreed with this assertion, we find that "legal" confinement, as required by § 28-932(1), requires a showing that the defendant was technically in actual custody in a correctional facility and not that his confinement was substantively lawful.

As both parties note on appeal, the term "legally confined" is not defined in the statute. We agree with the State, however, that prior Nebraska Supreme Court interpretations of the meaning of legal confinement, as opposed to lawful confinement, are instructive and guide the outcome in this case. To that end, the

Nebraska Supreme Court's analysis in *State v. Reeves*, 199 Neb. 725, 261 N.W.2d 110 (1978), is most illustrative. In *State v. Reeves*, the court was presented with the meaning of the term "legal custody" in Neb. Rev. Stat. § 28-736 (Reissue 1975), concerning escape from custody. The question presented was whether the defendant had been in legal custody when placed under arrest pursuant to a search warrant that was subsequently suppressed. The defendant argued that because the warrant was suppressed, his arrest and law enforcement's custody of him were not "legal."

[6-8] The Nebraska Supreme Court explicitly recognized the difference between the terms "legal" and "lawful." In interpreting § 28-736, the court noted that the statute did not require "lawful" custody or a "lawful" arrest, but, rather, required only that the defendant be in "legal" custody. The court noted:

> Although the distinction between the terms "legal" and "lawful" is frequently clouded and the terms are often used interchangeably, there is in fact a distinction of some importance. This distinction is set forth in the narrative following the definition of "lawful" as stated in Black's Law Dictionary (4th Ed.), p. 1032. It reads as follows: "The principal distinction between the terms 'lawful' and 'legal' is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is 'lawful' implies that it is authorized, sanctioned, or at any rate not forbidden, by law. To say that it is 'legal' implies that it is done or performed in accordance with the forms and usages of law, or in a technical manner."

State v. Reeves, 199 Neb. at 727-28, 261 N.W.2d at 112-13.

The Nebraska Supreme Court concluded that the term "legal custody" in § 28-736 concerned only whether the defendant was, technically, placed under arrest and in the custody of law enforcement. See *State v. Reeves, supra*. The defendant's guilt or innocence of the charge for which he was being held, substantively speaking, was immaterial. See *id*. See, also, *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 713, 618 N.W.2d 715, 719 (2000) (quoting Black's Law Dictionary (7th ed. 1999), which defined arrest as including " 'lawful arrest' " where person is taken into " 'legal custody' "). This distinction

is important even though the terms have, on occasion, been unclearly used interchangeably. See, e.g., *State v. Auman*, 232 Neb. 341, 344, 440 N.W.2d 254, 257 (1989) (suggesting that § 28-932 is intended to discourage "lawfully" confined person from injuring another).

[9] In light of the Nebraska Supreme Court's discussion in *State v. Reeves, supra*, of the important distinction between the terms "legal" and "lawful" in statutes, we are obliged to conclude that § 28-932(1) does not require the State to demonstrate "lawful" confinement, substantively, but, rather, requires the State to show only "legal" confinement, technically. The State's evidence adduced prior to its initial rest clearly demonstrated that at the time of the incident, McKay was in custody at the Douglas County Correctional Center, was being transported from a bullpen area to a housing area, and was being escorted by a corrections officer. This evidence was clearly sufficient to demonstrate that McKay was, technically, in custody of law enforcement at the time of the incident. The State was not required to show that this custody was pursuant to any valid court order or judgment. The evidence adduced after the State withdrew its rest only further supported the fact that McKay was in legal custody at the time of the incident.

Turning, then, to the question of whether the evidence presented a rational basis for the jury to acquit McKay of the greater offense of assault by a confined person and to convict McKay of the lesser offense of third degree assault, we must determine whether there was any rational basis for the jury to conclude that McKay was not legally confined at the time of the incident. McKay's arguments on this issue, both before this court and in the district court, all turn on the substantive issue of whether the jury might have concluded that the State did not sufficiently prove that his confinement was lawful or pursuant to a valid court order or judgment. As noted, the State was not required to prove that.

Our review of the evidence leads us to determine that the district court properly concluded that there was no rational basis for the jury to find that McKay was not in legal custody. The evidence presented by the State showed that the incident occurred in a correctional facility while McKay, McKoy, and Swindle

were being transported back to their housing units after they had made court appearances and while being escorted by a corrections officer. McKay, McKoy, and Swindle each similarly testified that they were being transported from the bullpen area to their housing units. There was absolutely no evidence presented upon which the jury might have concluded that McKay was not in legal custody at the time of the incident. There was no rational basis for the jury to find that the additional element of legal confinement was not present. As such, there was no rational basis for a finding acquitting McKay of the greater offense but convicting him of the lesser offense. This assignment of error is without merit.

V. CONCLUSION

We find no merit to McKay's assignments of error. The district court did not abuse its discretion in allowing the State to withdraw its rest and adduce additional evidence, and the district court correctly denied McKay's request for a lesser-included offense instruction. As such, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF DEZTINY C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. CHRISTOPHER C., APPELLEE.

723 N.W.2d 652

Filed November 14, 2006. No. A-06-242.

1. **Juvenile Courts: Parent and Child.** Pursuant to Neb. Rev. Stat. § 43-283.01(4)(a) (Reissue 2004), reasonable efforts to preserve and reunify the family are not necessary if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Stuart J. Dornan, Douglas County Attorney, and Eric D. Strovers for appellant.

Brandie M. Fowler for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

The State of Nebraska appeals an order finding that termination of Christopher C.'s parental rights would not be in the best interests of his minor child, Deztiny C. On appeal, the State asserts that the juvenile court erred in finding the State failed to prove that (1) Christopher abandoned Deztiny, (2) Christopher neglected Deztiny, (3) termination of Christopher's parental rights would be in Deztiny's best interests, and (4) reasonable efforts were not required to preserve and reunify the family. We affirm the juvenile court's order.

II. BACKGROUND

1. CHRISTOPHER AND ANDREA'S RELATIONSHIP

Deztiny was born on March 4, 1998, to Andrea B. and Christopher. Christopher characterized his relationship with Andrea as "volatile." He claimed Andrea was "suicidal" and an "alcoholic."

During Christopher and Andrea's relationship, Christopher was convicted of criminal charges on three separate occasions. In 1998, Christopher was convicted of third degree assault, willful reckless driving, and operating a motor vehicle to avoid arrest. A child neglect charge stemming from the incident was later dropped. Christopher was sentenced to 18 months of probation. In 1999, he was convicted of misdemeanor assault on Andrea. Later, in 1999, he violated probation and was sentenced to serve 90 days in jail. In 2000, Christopher was charged with misdemeanor child abuse and fined $50 after Deztiny wandered away from the house through an open garage door.

Christopher and Andrea ended their relationship in 2000, and Andrea retained custody of Deztiny. According to Christopher's testimony, a district court judge entered a paternity order in 2001 which established that Christopher is Deztiny's father and granted him visitation. Christopher testified that after the court granted visitation, his visits with Deztiny "became sporadic," because he "just couldn't get ahold of Andrea." Christopher

testified he called the judge's secretary and was told that he "should seek counsel."

The evidence shows that in 2002, the district court for Douglas County entered a paternity order, which established that Christopher is Deztiny's father and ordered him to pay monthly child support of $50 beginning April 1, 2002.

On January 27, 2004, the State removed Deztiny and her half brother from Andrea's custody. The State alleged the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The parental rights of Andrea are not at issue in this appeal because the record reveals she died on January 18, 2005.

2. Christopher's Contact With DHHS

On February 11, 2004, Christopher met with Andrea Bigham, Deztiny's initial Nebraska Department of Health and Human Services (DHHS) caseworker, to discuss how to obtain custody of Deztiny. Bigham testified she told Christopher that "if he wanted to be a party to this case, he would need to show up to court [on February 25, 2004,] and ask to formally intervene." She told Christopher that he needed to complete a background check and provide DHHS with a copy of his paternity decree. Christopher complied with both requirements.

Regarding visitation, both Bigham and Christopher testified she told him that she would send a "referral" to Visinet and that "[Visinet] would be contacting him for visitation, but it would have to be supervised." Bigham testified that she sent the referral but that she did not conduct any followup.

On February 25, 2004, the juvenile court ordered that Deztiny remain in DHHS' custody. Although Christopher was not a party to the hearing, he did attend.

At the hearing, Bigham informed the juvenile court that Christopher would "like to have visits" with Deztiny. The court asked Christopher if he had a copy of the order granting visitation, and Christopher stated he gave a copy to Bigham and did not have an additional copy with him. Christopher told the court he intended to intervene and that he was "in the steps of hiring [an attorney]" and was "trying to find the right one." The juvenile court stated that it could not grant Christopher visitation until Christopher provided proof that he is Deztiny's father.

The court "highly recommend[ed]" that Christopher contact an attorney.

In February 2004, Deztiny's case was transferred to a new DHHS caseworker, Nicole Nietfeld. Nietfeld testified that Christopher "may not have been aware that [she was his] case worker" between February 2004 and May 2005 and that Christopher was not given any information of how to contact her in order for him to intervene. He eventually spoke to Nietfeld on May 16, 2005, and told her he wanted custody of Deztiny but would be willing to "start out with visitation first."

Nietfeld testified that Christopher told her he had not contacted DHHS between February 2004 and May 2005 because he was "scared of Court" and "didn't know what to expect." Christopher testified that he had been afraid but that he had been "waiting by the telephone for someone from [DHHS] to call," because Bigham said she "set [him] up visits with 'Omni Visit.' " He testified that when no one called, he called DHHS probably a "couple dozen" times. When Nietfeld was asked about DHHS' procedure with regard to telephone messages, she testified, "I don't think we have a procedure in regards to phone messages." She stated that although those with DHHS try to return telephone calls to the "best of our ability," she did not think there is "actually a policy."

Nietfeld testified that in general, when fathers have expressed an interest in intervening, DHHS "does attempt to make contact with the fathers." She testified that she did not attempt to make any contact with Christopher, because Bigham "had made the [initial] contact." Nietfeld testified that the initial conversation between Bigham and Christopher was the only contact DHHS had with Christopher in regard to intervening.

3. Supplemental Petition

On August 16, 2005, the juvenile court granted Christopher supervised visitation with Deztiny. On August 18, the State filed a seven-count supplemental petition asserting that Christopher's lack of parenting caused Deztiny to come within the meaning of § 43-247(3)(a). The State sought to terminate Christopher's parental rights pursuant to Neb. Rev. Stat. § 43-292(1), (2), and (7) (Reissue 2004). The State also asserted that termination of Christopher's parental rights was in Deztiny's best interests and

that reasonable efforts to reunify the family were unnecessary pursuant to Neb. Rev. Stat. § 43-283.01 (Reissue 2004). The hearing on the supplemental petition took place on December 15, 2005, and was continued on February 15, 2006.

4. Testimony at Termination Hearing

Nietfeld testified that Christopher began supervised visits with Deztiny in October 2005 and brought meals, games, and crafts that were "age appropriate." Between October 2005 and February 2006, Christopher missed four of the twice-a-week visits. According to Nietfeld, in the first few visits, Christopher told Deztiny he wanted to provide for her. DHHS told Christopher that he should not "talk about the nature of this case" to Deztiny. Nietfeld testified that since then, the visits were going "better." Nietfeld also testified to one incident where, because the visiting room had been overbooked, Christopher raised his voice and "slammed [two bags of games] down."

Nietfeld testified that she was unaware of any contact between Christopher and Deztiny prior to May 2005, when Christopher initially contacted Nietfeld. Contradicting Nietfeld's testimony, Christopher stated that he saw Deztiny on March 4, 2005. He testified that he went to her school and gave her a card, stuffed rabbit, and television for her birthday.

While Nietfeld testified to her concerns regarding Christopher as a parent, which we have discussed above, when asked about her professional opinion, she testified that terminating Christopher's parental rights would be in Deztiny's best interests, based on Christopher's criminal history. Nietfeld also testified that it would be in Deztiny's best interests to remain with her maternal grandmother, because Deztiny needed "permanency" and the grandmother was willing to adopt Deztiny. Deztiny had been placed with her grandmother after being moved from her foster home in September 2004.

According to Christopher's testimony, he no longer had "a problem controlling [his] temper." When describing his current situation, Christopher testified that he was in a 10-week parenting class at Child Saving Institute and had already completed 2 weeks. He testified that he physically saw Deztiny "all the time"—at the grocery store, riding in her grandmother's car, and at church. He testified that he is currently paying child

support by having it automatically withdrawn from his paycheck. Between April 2002 and December 2005, Christopher paid $1,822.03 in child support and had an arrears balance of $394.06, plus interest.

At the termination hearing, the juvenile court found by a preponderance of the evidence that Deztiny came within the meaning of § 43-247(3)(a). The court also found by clear and convincing evidence that Deztiny came within the meaning of § 43-292(7). The court dismissed the termination of parental rights claim under § 43-292(1) and (2) for lack of clear and convincing evidence. Additionally, the court concluded that termination of Christopher's parental rights was not in Deztiny's best interests and that the State was required to make reasonable efforts to reunify Christopher and Deztiny. The State timely filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, the State has assigned four errors. First, the State asserts that the juvenile court erred in finding that Christopher had not abandoned Deztiny pursuant to § 43-292(1). Second, the State asserts that the juvenile court erred in finding that Christopher had not neglected Deztiny pursuant to § 43-292(2). Third, the State asserts that the juvenile court erred in finding that termination of Christopher's parental rights was not in Deztiny's best interests. Fourth, the State asserts that the juvenile court erred in finding that reasonable efforts to preserve and reunify the family were required pursuant to § 43-283.01.

IV. ANALYSIS

1. Standard of Review

In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

2. TERMINATION OF PARENTAL RIGHTS

Natural parents have a fundamental liberty interest in the care, custody, and management of their child. See *In re Interest of Mainor T. & Estela T., supra*. That interest is a natural right, subject only to the paramount concern of the public in protecting the rights of the child. See *id.* In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004).

In the present case, the juvenile court held that the State failed to prove, by clear and convincing evidence, the grounds for parental termination enumerated in § 43-292(1) and (2). The juvenile court also held that termination of Christopher's parental rights was not in Deztiny's best interests and that the State was required to make reasonable efforts to reunify Christopher and Deztiny. We conclude that Christopher's parental rights should not be terminated.

(a) Abandonment Under § 43-292(1)

The State asserts that the juvenile court erred in failing to find that Christopher abandoned Deztiny pursuant to § 43-292(1). At the 2006 hearing, the State argued that Christopher failed to show a continuing parental interest, that Christopher failed to timely intervene and secure visitation, and that Christopher failed to support Deztiny. We affirm the juvenile court's finding that Christopher did not abandon Deztiny.

Pursuant to § 43-292(1), a court may terminate parental rights between the parents and juvenile when the court finds such action to be in the best interests of the juvenile and when parents have abandoned the juvenile for 6 or more months immediately prior to the filing of the petition.

For purposes of § 43-292(1), abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Dylan Z., supra*. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Under § 43-292(1), parental intent is a question of fact and may

be determined by circumstantial evidence. See *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). When analyzing a parent's intent to abandon, § 43-292(1) requires us to direct our inquiry to the 6 months immediately preceding the filing of the petition. See *In re Interest of Crystal C., supra* (defendant did not abandon his child despite being absent for approximately 5 months).

In the present case, the crucial 6-month period runs from February to August 2005. When Christopher spoke with Nietfeld, a DHHS caseworker, on May 16, Christopher inquired about visitation and custody. On June 30, he signed an affidavit acknowledging that he had adequate means and housing in which to provide for Deztiny. On August 16, the court granted Christopher supervised visitation with Deztiny.

The record also supports the juvenile court's finding that Christopher did not act with an intent to abandon Deztiny even though he failed to intervene between February 2004 and May 2005. In *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005), we held that the father's lack of contact with his minor child was directly attributable to his lack of knowledge that he was the child's father. Because "DHHS and the protection safety worker made no attempts to contact [the father] in the relevant 6-month time period," we concluded that the father's failure to connect with his child was "due to just cause and excuse and not to indifference or intentional abandonment." *Id.* at 598, 697 N.W.2d at 719.

In the present case, Christopher did not contact DHHS between the months of February 2004 and May 2005. When asked why he did not actively pursue contact with Deztiny during that time, Christopher testified that he was told the visitation agency would contact him. He testified that when no one did so, he left messages at DHHS but his calls went unreturned. Nietfeld testified that it was possible DHHS had received, but failed to respond to, Christopher's messages. She stated that she did not think DHHS had a procedure in regard to telephone messages. She testified that although those with DHHS "try to return phone calls to the best of our ability," she did not think there is "actually a policy." The record also indicates that no one informed Christopher that Deztiny's case had been transferred

to Nietfeld, nor did anyone provide Christopher with any information of how to contact Nietfeld. Similar to the situation in *In re Interest of Dylan Z., supra*, in the present case, Christopher's lack of contact was based on his lack of knowledge. As such, because DHHS failed to contact Christopher, his lack of action does not indicate indifference or intentional abandonment.

Furthermore, the record shows that DHHS did not provide Christopher with the customary information on how to intervene. Contrary to standard DHHS practice, Bigham engaged Christopher in only one conversation concerning intervention, and Nietfeld did not provide followup information. We will not excuse a parent's unnecessary or unreasonable delay in intervening; however, Christopher's failure to intervene, when he was provided with substandard information, does not constitute abandonment.

Finally, Christopher's providing child support between February and August 2005 shows he did not intend to abandon Deztiny. Although Christopher has a history of irregular child support payments, the record indicates that during the 6 months immediately preceding the filing of the petition, Christopher exceeded his child support obligation of $50 per month and paid $372.48.

The State argues that Christopher's implementation of an automatic withdrawal payment process for child support constitutes a token effort that "should not change the fact that he abandoned [Deztiny]." Brief for appellant at 23. We disagree. Christopher's availing himself to an efficient and effective procedure such as this does not constitute a token effort, nor does it somehow negatively impact his act of supporting his daughter. See *In re Interest of Z.D.D. and N.J.D.*, 230 Neb. 236, 430 N.W.2d 552 (1988).

We conclude that the State failed to show clear and convincing evidence that Christopher intended to abandon Deztiny in the 6 months preceding August 18, 2005. Christopher actively sought custody and paid child support during the crucial 6 months. Additionally, his failure to immediately seek intervention was due to just cause. As such, we affirm the juvenile court's finding that Christopher's parental rights should not be terminated pursuant to § 43-292(1).

(b) Neglect Under § 43-292(2)

The State argues that Christopher neglected Deztiny because he failed to provide continual parental care and because he had a history of criminal convictions. We find that the juvenile court did not err in failing to terminate Christopher's parental rights under § 43-292(2).

Under § 43-292(2), the court may terminate the rights between a parent and juvenile when the court finds such action to be in the best interests of the juvenile and when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile necessary parental care and protection. The Nebraska Supreme Court has held that a parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

Christopher's history of criminal conduct does not rise to the level of neglect, because Andrea cared for Deztiny during Christopher's incarceration and because there was no evidence that the convictions adversely affected Deztiny. In *In re Interest of Kalie W., supra*, the court sentenced the father to a jail term of 5 to 8 years. After examining how the incarceration affected the father's ability to provide for his child, the court concluded that the incarceration constituted neglect, because the father was unable to provide for his child's needs.

Unlike the factual background of *In re Interest of Kalie W.*, in the present case, Christopher served only 4 months in jail, and during that time, Andrea provided adequate care for Deztiny. Additionally, since 2000, no criminal or child neglect charges have been filed against Christopher. At the time of the 2006 termination hearing, Christopher had lived with his fiance and her children in the household for 6 years without any reported problems. We conclude that Christopher's criminal history does not constitute neglect.

Additionally, Christopher has not refused to provide parental care and has improved his parenting skills. This court has held that "the law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child." *In*

re Interest of Crystal C., 12 Neb. App. 458, 465, 676 N.W.2d 378, 384 (2004).

In the present case, Christopher has shown continual care for Deztiny. Christopher testified that he was present for her birth, baptism, and confirmation. After his relationship with Andrea ended, he cared for Deztiny when Andrea temporarily left her with him. In 2001, he sought court-ordered visitation. In 2002, he was ordered to pay child support, and he began paying his obligation in 2003. Although at the time of the 2006 termination hearing Christopher had an arrears balance of $394.06 plus interest, he had paid a total of $1,822.03 and was continuing to pay child support. In 2004, Christopher contacted DHHS upon learning of the removal of Deztiny from Andrea's custody, and on that same day, Christopher provided the requisite paperwork to DHHS. He attended the February 2004 hearing and informed the judge he intended to intervene. He attempted to contact DHHS between 2004 and 2005, and after he spoke with DHHS caseworker Nietfeld in May 2005, he immediately began the process for obtaining visitation. Since May 2005, Christopher has obtained supervised visitation, has regularly visited and provided Deztiny with age-appropriate games, and has missed only four visits.

Christopher's history does not establish a pattern of abuse, nor does the record show that Christopher refused to provide parental care. We affirm the juvenile court's finding that Christopher did not neglect Deztiny pursuant to § 43-292(2).

(c) Best Interests

The State asserts that terminating Christopher's parental rights would be in Deztiny's best interests. Although the State failed to prove that Deztiny comes within the meaning of § 43-292(1) or (2), it did successfully prove she came within the meaning of § 43-292(7). We must now turn to whether terminating Christopher's parental rights is in Deztiny's best interests.

Under § 43-292, in order to terminate a parent's natural rights to the custody of his or her child, the State first must prove by clear and convincing evidence that at least 1 of the 10 subsections in that statute applies. Next, the State must prove by clear and convincing evidence that termination of parental rights would be

in the child's best interests. See *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991). As we stated in *In re Interest of Crystal C.*, 12 Neb. App. at 465, 676 N.W.2d at 384, "we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child."

Termination of Christopher's parental rights is not in Deztiny's best interests. First, Christopher is working to improve his parenting skills. At the time of the 2006 termination hearing, he was enrolled in parenting classes and had completed 2 weeks of the program. His fiance testified that she and Christopher have "a co-parenting arrangement" and that she has no concerns at all in regard to him parenting her children. She described Christopher's parenting as "very patient, very loving," "very connected with the children," and "hands on." She testified that Christopher is a Cub Scout leader, assists with the children's homework, and is involved in "all of their activities."

Second, Christopher is working to improve his relationship with Deztiny. Since his contact with DHHS in May 2005, he has regularly visited Deztiny. Additionally, Christopher is currently paying child support.

Third, Christopher is working to integrate Deztiny into his and his fiance's family. Christopher's fiance testified that Deztiny "fits right in" with her children. Her twin boys and Deztiny are the same age and have come to "know each other very well over the years." She testified that they "consider themselves brothers and sisters." Deztiny and Christopher's fiance's children are in religious education classes together and see each other every week.

A parent's fundamental liberty interest in their children is subject only to the public's paramount concern in protecting that child's rights. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). In the present case, we find no paramount concern that outweighs Christopher's fundamental interest in parenting. We affirm the juvenile court's finding that terminating Christopher's parental rights is not in Deztiny's best interests.

(d) Reasonable Efforts Under § 43-283.01

[1] The State asserts that the juvenile court erred in requiring reasonable efforts to reunify and preserve the family, because

Christopher "abandoned" Deztiny. Pursuant to § 43-283.01(4)(a), reasonable efforts to preserve and reunify the family *are not necessary* if a court of competent jurisdiction has determined that the parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. Because we have already concluded in our discussion above that Christopher did not abandon Deztiny, we find the State's final assertion of error to be without merit.

V. CONCLUSION

We conclude that the juvenile court did not err in failing to terminate Christopher's parental rights under § 43-292(1) and (2), because the State failed to prove that Christopher abandoned or neglected Deztiny. We conclude that the juvenile court did not err in finding that termination of Christopher's parental rights is not in Deztiny's best interests or in determining that the State failed to prove that reasonable efforts were not necessary.

AFFIRMED.

LYLE A. FORGEY, APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

724 N.W.2d 828

Filed August 29, 2006. No. A-04-1088.

This opinion has been ordered permanently published by order of the Court of Appeals dated October 12, 2006.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate

court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

5. **Statutes.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
6. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
7. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
8. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The time limitation in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) is not essential to the main objective of the administrative license revocation statutes, which objective is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road.
9. ____: ____: ____: ____: ____. The time limitation in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) ensures order and promptness in administrative license revocation proceedings, and the failure to strictly abide by the 10-day time limit does not interfere with the principal purpose of the administrative license revocation statutes.
10. ____: ____: ____: ____: ____. The 10-day time limit set forth in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) is directory rather than mandatory, and thus, a violation of such time limit does not invalidate administrative license revocation proceedings.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Court of Appeals Judge, Retired. Affirmed.

Rodney J. Palmer, of Palmer & Flynn, P.C., for appellant.

Jon Bruning, Attorney General, Laura L. Neesen, and Milissa Johnson-Wiles for appellee.

INBODY, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Lyle A. Forgey appeals from the judgment of the district court for Brown County affirming a 1-year driver's license revocation imposed by the Department of Motor Vehicles (Department). Based on the reasons that follow, we affirm.

BACKGROUND

On December 20, 2003, at approximately 1 a.m., Brown County Deputy Sheriff Sean Carson was on duty and started to follow a vehicle after he clocked the vehicle by radar traveling 51 miles per hour in a 65-mile-per-hour zone. As Carson

followed the vehicle for several miles on a highway, he observed the vehicle weaving in the traffic lane. Carson stopped the vehicle, which was operated by Forgey. Carson asked Forgey to exit his vehicle and to sit in the passenger's seat of Carson's patrol unit. Once Forgey was inside the unit, Carson detected an odor of alcohol coming from Forgey's person. Carson asked Forgey if he had drunk any alcoholic beverages that night, and Forgey advised that he "had a couple." Carson administered field sobriety tests and asked Forgey to take a preliminary breath test, which Forgey refused to do. Upon his refusal, Carson arrested Forgey for driving under the influence and took him to the Brown County sheriff's office. At the sheriff's office, a postarrest chemical advisement was read to Forgey and he refused to submit to any chemical tests. Carson testified that he recorded Forgey's refusal on a "Notice/Sworn Report/Temporary License" (sworn report) form, completed the form, and signed it in the presence of a notary. The Department received the sworn report on December 31, 2003.

Forgey filed a petition for administrative hearing with the Department, requesting a hearing to contest the revocation of his driver's license. On February 27, 2004, an administrative license revocation (ALR) hearing was held by telephone before a hearing officer for the Department. Carson testified for the Department, describing the events leading to and subsequent to Forgey's arrest, as previously set forth. The Department also offered the sworn report prepared by Carson, and it was received into evidence over Forgey's objection. Forgey testified in his own behalf and also called as a witness the dispatcher from the sheriff's office who was on duty the night Forgey was arrested.

On March 4, 2004, the hearing officer issued an order finding that Carson had probable cause to believe Forgey was operating a motor vehicle under the influence of alcohol and that Forgey had refused to submit to a chemical test. On March 5, the director of the Department formally adopted the order of the hearing officer and Forgey's license was revoked for a period of 1 year. See Neb. Rev. Stat. § 60-498.02 (Supp. 2003). Forgey appealed to the district court for Brown County, which affirmed the Department's order of revocation. Forgey now appeals to this court.

ASSIGNMENTS OF ERROR

Forgey assigns that the district court erred in (1) finding that the 10-day time limit for filing the sworn report found in Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) is directory rather than mandatory and (2) failing to find that § 60-498.01(6)(c)(i) violates his right to due process by excluding Fourth Amendment issues from the ALR proceedings.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[4] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005); *Central States Tire Recycling of Neb. v. State*, 268 Neb. 712, 687 N.W.2d 681 (2004).

ANALYSIS

Forgey first argues that the sworn report prepared by Carson was invalid because it was received 1 day late by the Department. Forgey was arrested on December 20, 2003, and the Department received the sworn report on December 31, 11 days after his arrest. Section 60-498.01(2) provides that "[t]he arresting peace officer *shall within ten days* forward to the director a sworn report . . . ." (Emphasis supplied.) Forgey argues that the 10-day time limit set forth in § 60-498.01(2) is mandatory, rather than directory as the district court concluded. Thus, he contends that

because the time limit was violated, the ALR proceedings should have been dismissed.

[5-7] There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *In re Interest of E.M.*, 13 Neb. App. 287, 691 N.W.2d 550 (2005); *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001). As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Id.* Nonetheless, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Id.* The Nebraska Supreme Court has addressed mandatory versus directory legislation in relation to time periods defined in statutes, although not in the context of ALR proceedings, and it has found on many occasions that time limitation language in statutes is directory rather than mandatory, despite the use of the word "shall." See, *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990); *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987); *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977).

One test relied on by the Nebraska Supreme Court to determine whether a statutory provision containing the word "shall" is mandatory or directory is as follows:

> " 'If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.' "

State v. $1,947, 255 Neb. at 297, 583 N.W.2d at 616-17, quoting *Matter of Sopoci*, 467 N.W.2d 799 (Iowa 1991).

In *Randall v. Department of Motor Vehicles, supra*, this court addressed whether a time limitation in a regulation governing

continuances of an ALR hearing was directory or mandatory. Specifically, the regulation at issue, 247 Neb. Admin. Code, ch. 1, § 010.04 (1998), stated: " 'Continuances granted on the Director's own motion shall in no event continue the hearing beyond forty-five (45) days from the date of arrest.' " 10 Neb. App. at 473, 632 N.W.2d at 803. Relying on the test used by the Nebraska Supreme Court in *State v. $1,947, supra*, set forth above, the *Randall* court concluded that the time limitation in the regulation was not "essential to the main objective" of the ALR statutes. The court recognized: " '[T]he purpose of ALR is to protect the public from the health and safety hazards of drunk driving by quickly getting [driving while under the influence] offenders off the road. At the same time, the ALR statutes also further a purpose of deterring other Nebraskans from driving drunk." *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 477, 632 N.W.2d 799, 806 (2001), quoting *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996). The *Randall* court concluded that the time limitation in the regulation was not essential to the purpose of the ALR statutes, but, rather, that the time limitation ensured order and promptness in ALR proceedings. The court stated: "The failure to strictly abide by the time limitation in [the regulation] does not interfere with the fundamental purpose of the ALR statutes. The main goal of removing drunk drivers off the roads can still be attained when hearings are held past the 45-day time limitation." 10 Neb. App. at 478, 632 N.W.2d at 806. The court further stated that any violation of the regulation which occurred did not invalidate the ALR proceedings unless the motorist could show that he was prejudiced by the delay in the ALR hearing, and the motorist did not argue that he was prejudiced.

In addition, the *Randall* court relied on *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), in which the Nebraska Supreme Court held that a legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory. The *Randall* court noted that the Nebraska Administrative Code did not contain any sanctions for noncompliance with the 45-day limitation under the regulation. The *Randall* court concluded that the regulation at issue was directory

rather than mandatory and that any violation of such time limit did not invalidate the ALR proceedings.

[8,9] In the instant case, we conclude that the time limitation in § 60-498.01(2) is not "essential to the main objective" of the ALR statutes, which objective, as previously stated, is to protect the public from the health and safety hazards of drunk driving by quickly getting offenders off the road. As in *Randall v. Department of Motor Vehicles, supra*, the time limitation in the present case ensures order and promptness in ALR proceedings and the failure to strictly abide by the 10-day time limit does not interfere with the principal purpose of the ALR statutes. Further, Forgey does not allege that he was prejudiced by the late filing and there is no indication in the record that he suffered any prejudice as a result of the untimely filing. The sworn report was filed late by only 1 day and did not result in a delayed hearing or in any other consequence adverse to Forgey. Further, it is apparent that the time limitation in § 60-498.01(2) should be considered directory and not mandatory, because there is no sanction attached to an officer's failure to file the sworn report with the Department within 10 days.

[10] We conclude that the 10-day time limit set forth in § 60-498.01(2) is directory rather than mandatory and that thus, the violation of such time limit did not invalidate Forgey's ALR proceedings. Forgey's first assignment of error is without merit.

Forgey next assigns that the district court erred in failing to find that § 60-498.01(6)(c)(i) violates his right to due process under the 14th Amendment by excluding 4th Amendment issues from the ALR proceedings. Section 60-498.01(6)(c)(i) limits the issues under dispute at an ALR hearing in the case of a refusal to submit to a chemical test to the following:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 . . . ; and
>
> (B) Did the person refuse to submit to or fail to complete a chemical test after being requested to do so by the peace officer[.]

As a result of an amendment to § 60-498.01 which became operative on October 1, 2003, the statute no longer requires the State to establish the validity of the arrest.

Forgey contends that it is a due process violation to not permit a motorist who refuses to submit to a chemical test to challenge the validity of the arrest on Fourth Amendment grounds at the ALR hearing. The Nebraska Supreme Court in *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005), addressed the same issue that Forgey presents. In *Chase*, the motorist was arrested for driving under the influence and refused to submit to a chemical test. Following an ALR hearing, the motorist's license was revoked for 1 year. The motorist appealed to the district court, which reversed the revocation based upon its determination that the motorist's right to due process was violated because the ALR statutes did not permit her to directly or indirectly challenge the validity of her arrest. The Department appealed, assigning that the district court erred in finding § 60-498.01 unconstitutional as it applies to cases where the motorist refuses to submit to a chemical test.

The *Chase* court reversed the judgment of the district court and remanded the cause for further proceedings. The *Chase* court held that the absence of a statutory procedure to challenge the validity of the traffic stop on Fourth Amendment grounds in an ALR proceeding does not constitute a denial of due process as applied to motorists who refuse to submit to a chemical test of alcohol concentration. The court further concluded that the administrative hearing and judicial review provisions of § 60-498.01 provide motorists with meaningful notice and an opportunity to be heard and, thus, fully comport with due process.

Based on the holding in *Chase v. Neth, supra*, Forgey's right to due process was not violated by § 60-498.01, which excluded him from challenging the validity of his arrest, and the applicable ALR statutes satisfied his right to due process. Accordingly, Forgey's second assignment of error is without merit.

CONCLUSION

For the reasons set forth above, the judgment of the district court affirming the order of revocation by the Department is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TAMI L. KEHM, APPELLANT.

724 N.W.2d 88

Filed November 21, 2006. No. A-06-123.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Police Officers and Sheriffs.** While officers must use the least intrusive methods reasonably available to rapidly dispel or verify their suspicions during an investigatory stop, they are not held to this standard prior to conducting an investigatory stop.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
5. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
6. **Police Officers and Sheriffs.** To determine whether a law enforcement officer had reasonable suspicion, a court must look at the totality of the circumstances.
7. **Investigative Stops.** A series of acts that appear innocent, when viewed separately, may warrant further investigation when viewed together.
8. **Investigative Stops: Time.** The length of an investigative stop must be no greater than is necessary to effectuate the purpose of the stop.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Eric J. Williams, York County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Tami L. Kehm appeals from a conviction and sentence for possession of methamphetamine. The district court for York County

denied Kehm's motion to suppress and subsequently found her guilty after a bench trial. Because we find that the arresting officer had a reasonable suspicion to detain Kehm after the purpose of the traffic stop was completed and the length of the detention was reasonable, we affirm.

BACKGROUND

In an information filed on December 6, 2004, the State charged Kehm with possession of methamphetamine with intent to distribute, deliver, or dispense, in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2004). After Kehm pleaded not guilty, she filed a motion to suppress the evidence seized at the time of her detention and subsequent arrest. At the hearing conducted by the district court on April 12, 2005, only one witness, Officer Eric Jones, the arresting officer, testified. On July 12, the district court denied the motion, setting forth detailed findings of fact, which we quote at length as follows:

> Jones of the Nebraska State Patrol . . . has extensive training and experience in drug investigations. His experience includes a number of arrests of suspects in possession of controlled substances, including methamphetamine. On November 1, 2004, at approximately 11:45 p.m., while working as a Nebraska State Patrol road trooper, Jones stopped at [a truckstop] at the York I-80 interchange. Jones saw a vehicle which attracted his attention because of the area in which it was parked. The location of the vehicle was noteworthy to Jones because the vehicle had Hall County plates and seemed out of place in the area in which it was parked that late at night. . . . Jones then did a radio check on the registration of the vehicle and was advised that it was registered to . . . Kehm. This information was important to Jones because he had information that Kehm had been arrested previously for possession of a controlled substance. The identity of the registered owner also rang a bell in [Jones'] mind because Jones had arrested for possession of methamphetamine in Hall County, Nebraska, a person driving another vehicle registered to . . . Kehm approximately eleven months earlier.

Jones also received a physical description of . . . Kehm from the Nebraska State Patrol dispatcher and learned that she did not have a current Nebraska motor vehicle operator's license. . . .

Jones spotted an individual inside the [truckstop] building who matched the physical description of . . . Kehm. As he walked to the . . . building entrance, Jones walked by the [vehicle registered to Kehm] and made no investigation or examination of the [vehicle] even though he thought [it] was suspicious. Jones entered [the] building and continued watching this person. Jones watched [this person] leave the . . . building, enter the [vehicle] registered to . . . Kehm and drive away. . . . Jones had also left the building, re-entered his patrol vehicle, and followed the Kehm vehicle. Jones then conducted a traffic stop on the [vehicle] by activating his emergency lights. Kehm pulled over to the shoulder and stopped her vehicle on the I-80 eastbound entrance ramp. The vehicle stop occurred at approximately 11:55 p.m. Jones approached Kehm. Kehm asked Jones what she did wrong. Jones explained that he stopped Kehm because she was driving on an expired operator's license. Kehm acknowledged that she was driving on an expired operator's license. Jones had . . . Kehm get out of her vehicle and enter the patrol vehicle.

During the contact with Kehm in his vehicle, Jones smelled a chemical odor which, through his past experience, he associated with drug use. Jones had smelled this odor on prior occasions and had smelled a similar odor when examining confiscated methamphetamine. Jones asked Kehm about her destination that night. Kehm answered that she was on her way to visit her brother in Omaha, Nebraska. This meant that she would not have arrived at her brother's residence for at least another 1 ½, and more likely, another 2 hours or longer. During this conversation, Kehm told Jones that she was self-employed doing painting, cleaning, and odds and ends. Jones believed that during his conversation with Kehm she was talking faster than normal. Jones associated faster than normal speech with nervousness.

Initially, the Nebraska State Patrol dispatcher told Jones that Kehm had been arrested for possession of methamphetamine. In a later telephone conversation during the period Jones detained Kehm, another state patrol officer told Jones that Kehm was suspected of trafficking in methamphetamine or transporting methamphetamine for others, but that she had not been arrested for meth trafficking or possession. No factual basis or foundation for these conflicting statements was given nor did Jones request any factual information or foundation to support either of these statements.

At approximately 12:02 a.m., Jones completed the traffic stop and issued . . . Kehm a citation for no operator's license and returned her personal property to her. Kehm wished Jones a good night and was beginning to exit the patrol unit when Jones asked Kehm if she had ever been arrested for anything. Kehm stated she had been arrested previously for failure to appear and domestic violence. Jones asked . . . Kehm if she had ever been arrested for drugs and . . . Kehm said no. Jones again asked . . . Kehm if she had been arrested for anything like that and she again said no. Jones then asked . . . Kehm if she had any marijuana, methamphetamine or paraphernalia in [her vehicle]. Kehm said no to each question. . . .

Combining his [sic] observed, perceived, and inferred factors in his analysis at the scene, coupled with the fact that Jones was aware of previous criminal activity at the [truckstop], he asked Kehm's permission to search Kehm's vehicle. Kehm declined permission to search. On that, Jones advised . . . Kehm that he was going to have a drug detecting dog dispatched to the scene to examine . . . Kehm's automobile. The dog and handler were located in Grand Island, Nebraska, which necessitated a delay before the dog and handler arrived. Jones explained to Kehm the reason for the delay, indicating that there was no longer a drug detecting dog in York County.

The time period from the completion of the initial reason for the stop of . . . Kehm's vehicle for driving without a license until the drug detecting dog arrived was approximately 52 minutes. During th[ose] 52 minutes, Jones and

> Kehm engaged in some conversation. Jones permitted Kehm to retrieve get [sic] from her [vehicle] the drink she purchased from the [truckstop] and smoke outside the patrol unit.
>
> At approximately 12:54 a.m., Trooper Korte and Maximus, Korte's canine partner, arrived. The canine was not requested to do a sniff of Kehm's person and did not do so. The canine did not alert to any odor coming from . . . Kehm. Trooper Korte and Maximus conducted a sniff of the area around [Kehm's vehicle] at approximately 1:01 a.m. Trooper Korte notified Jones that Maximus alerted to the odor of drugs emanating from [Kehm's vehicle]. At approximately 1:05 a.m. Jones and Trooper Korte began a search of the vehicle, and, at approximately 1:15 a.m., Trooper Korte found crystal methamphetamine in various containers inside the [vehicle]. Kehm was then formally arrested.

The district court recognized that the decision by Jones to conduct an investigatory detention required "only reasonable suspicion based on articulable facts" and determined:

> After the reason for the initial stop was concluded, Jones had a right to broaden his inquiry based on: [Kehm's] more rapid than normal speech pattern; her claim that she was driving to Omaha to meet her brother at a truly unusual hour, which, true or not, remained a truly unusual hour; the chemical odor emanating from [Kehm's] person; the fact that [Kehm] either had been arrested for possession of methamphetamine or was suspected of being involved in drug trafficking; the fact that [Kehm's] vehicle was parked in an unusual location at a place where significant drug activity had previously taken place; and, the fact that another person had been arrested by the same trooper in another of [Kehm's] vehicles while in possession of a controlled substance. . . . Jones, considering the totality of the circumstances, had accumulated more than sufficient articulable facts upon which to base his post-citation detention decision.

The district court also articulated an alternative basis for denying the motion, reasoning that because Jones could have made a custodial arrest, rather than issuing a citation, for the offense

of operating a motor vehicle without an operator's license, the search could be sustained as one made incident to an arrest.

A bench trial was held on October 12, 2005. On December 13, the court entered a verdict and order finding Kehm guilty of possession of a controlled substance, a lesser-included offense of the original charge. On January 23, 2006, the court sentenced Kehm to 20 months' to 3 years' imprisonment. Kehm timely appeals.

ASSIGNMENTS OF ERROR

Under a general assignment that the district court erred in denying the motion to suppress, Kehm specifically assigns that the court erred in (1) failing to rule that the methods employed to investigate her offense of driving on an expired license were not the least intrusive available, (2) ruling that Jones had reasonable suspicion to detain her while awaiting a dog to conduct a sniff of the vehicle, (3) failing to rule that her continued detention while awaiting a drug dog was unreasonable, and (4) ruling that there was an alternative ground to deny her motion to suppress.

STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

ANALYSIS

Least Intrusive Means.

Kehm first contends that the district court erred in failing to rule that the methods employed by Jones to investigate Kehm's offense of driving on an expired license were not the least intrusive available. Kehm begins this argument by correctly reciting the rule that one type of police-citizen encounter is an investigatory stop, where the officer uses the least intrusive methods reasonably available to rapidly dispel or verify his suspicions. See *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995). Kehm then argues, "Here, because Jones could have more easily

and less intrusively investigated [Kehm's] expired license offense inside the [truckstop], or in the parking lot, his decision to wait until she drove away so he could conduct a traffic stop was improper, unreasonable, and contrary to the Fourth Amendment." Brief for appellant at 16-17. Kehm also argues that Jones could have conducted his investigation in a less intrusive manner by allowing Kehm to remain in her vehicle during the traffic stop, rather than requiring her to sit in his patrol car.

[2] We find both arguments unpersuasive. While officers must use the least intrusive methods reasonably available to rapidly dispel or verify their suspicions during an investigatory stop, see *State v. Chronister, supra*, they are not held to this standard prior to conducting an investigatory stop. In the instant case, because the investigation prior to the traffic stop did not include any detention or investigatory stop, Jones had no duty to use the least intrusive means available. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005) (no detention or seizure when police officer requested registration check of vehicle). Jones did not act inappropriately by waiting for Kehm to commit a traffic violation before initiating contact with her.

We also find nothing unreasonable in Jones' request that Kehm sit in his patrol car during the stop. Once stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Voichahoske, supra*. The investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id.* Jones acted within the scope of the circumstances when he requested that Kehm sit in his patrol car. We reject this assignment of error.

Reasonable Suspicion for Continued Detention.

We also find no merit to Kehm's second argument, that Jones did not have reasonable suspicion to detain her after he issued her a citation. Upon our review of the trial court's record, we conclude that the findings of historical fact are not clearly wrong. We proceed with our de novo review of reasonable suspicion.

[3,4] Jones initially stopped Kehm because she was driving with an expired license. A traffic violation, no matter how minor,

creates probable cause to stop the driver of a vehicle. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). The original purpose of the traffic stop was completed when Jones issued Kehm a citation for driving with an expired license. In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *Id.*

[5,6] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id.* Reasonable suspicion must be determined on a case-by-case basis. *Id.* To determine whether Jones had reasonable suspicion, we must look at the totality of the circumstances. See *id.*

When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *Id.* In the instant case, several factors considered collectively lead us to conclude that Jones had reasonable suspicion to believe that Kehm was engaged in criminal activity.

First, Jones testified that he became suspicious when he noticed Kehm's car parked in an unusual location in the truckstop's parking lot late at night. Kehm's car attracted his attention because he had never before seen it at that truckstop and because it had Hall County license plates but was parked in an area of the parking lot where typically only local vehicles would be found. He testified that typically when persons with out-of-state or out-of-county vehicles are doing business at the truckstop, they park close to the building rather than in the middle of the parking lot, where Kehm's car was parked. Jones testified that he was aware of typical parking patterns there because for the past 4 years, whenever he was on duty he had routinely stopped there for a break between 11:30 p.m. and midnight. He also testified that he was "aware . . . through intelligence that large amounts of drugs are deposited or transferred at [that] truck stop" and that he also was aware through personal experience that criminal activity had taken place at that location in the past.

Jones also testified that approximately 11 months earlier, he had arrested another individual for possession of methamphetamine who had been driving a vehicle registered to Kehm. When he was informed that the vehicle in the instant case belonged to Kehm, it aroused further suspicion. Although the individual in the earlier incident ultimately was not prosecuted for possession of methamphetamine, Jones testified that in his experience, people involved with drugs tend to associate together.

Jones also testified that he was suspicious of the midnight hour at which Kehm was purportedly traveling to Omaha to visit her brother. As the district court noted, Kehm still had a significant distance to travel, which would have resulted in her arrival at an even more unusual hour. In *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000), we noted that although unusual or suspicious travel plans may give rise to reasonable suspicion, such a determination is fact based, and where a reasonable explanation for the travel exists, courts have not relied upon this factor as support for reasonable suspicion. Despite the fact that Kehm offered an explanation for why she was traveling at a late hour, the district court concluded that regardless of whether the explanation was true or not, the time at which Kehm was traveling was still suspicious. We find no clear error in this factual determination.

Other factors that made Jones suspicious were the fact that Kehm was self-employed and the chemical smell that emanated from Kehm's person while she sat in Jones' patrol car. Jones testified that through his experience, he had learned a large number of the people he arrested for drugs were either self-employed or between jobs. And while Jones conceded the possibility that the odor he noticed could have been from something other than methamphetamine, he testified that he had smelled a similar odor on several occasions where large amounts of methamphetamine and cocaine were found. See *U.S. v. Pollington*, 98 F.3d 341 (8th Cir. 1996) (smell of laundry detergent, which officer knew was commonly used to mask smell of narcotics, contributed to finding of reasonable suspicion).

Finally, Jones testified, based upon his personal experience, that Kehm was speaking faster than most people speak during routine traffic stops and seemed overly nervous. Relying upon

authority from another jurisdiction applying de novo review to a video recording, Kehm urges us on appeal to review this finding of fact de novo on the record. However, that argument is inconsistent with our clear error standard of review for findings of historical fact by the trial court, see *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006), and we reject Kehm's invitation to deviate from the controlling precedent.

We determine that the trial court did not commit clear error when it concluded that Kehm was speaking fast and seemed nervous. Although of limited usefulness, nervousness exhibited by a motorist during a traffic stop may be considered along with other factors in determining whether the officer has reasonable suspicion to expand the scope of the detention. *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). We recognize the district court's finding that Jones was an experienced officer whose experience included making a number of arrests for possession of drugs. While we conclude that none of the above factors alone is sufficient to find that Jones had a reasonable, articulable suspicion that criminal activity was afoot, we consider all of them in our de novo review.

We will not consider Jones' reliance upon allegations that Kehm transported methamphetamine or was arrested for possession of methamphetamine. While we recognize that an individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual, see *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003), the information must be reliable before we consider it in our analysis.

We disregard Jones' initial reliance upon information that Kehm had previously been arrested for possession of methamphetamine because this information was erroneous. See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005) (information transmitted from dispatcher to police officer did not provide reasonable suspicion for stop where information was false due to dispatcher's mistake). We also disregard any reliance Jones placed

upon information that Kehm was suspected of trafficking methamphetamine. In *State v. Lee, supra*, the Nebraska Supreme Court disregarded evidence showing that officers received information that the area where they initially noticed the offender was used for drug transactions. The *Lee* court did not consider this information in its reasonable suspicion analysis, because it consisted of "little more than conclusory assertions" and nothing in the record indicated where the information came from, whether the source of the information was reliable, and whether the arresting officers had the information at the time they detained the offender. 265 Neb. at 670, 658 N.W.2d at 678. We do not consider similar information in the instant case because the source of the information was proved to be unreliable and no facts were given to support the conclusory assertion.

Based upon the record, the factors that are appropriately within the "totality of the circumstances" for consideration in our de novo review are as follows: (1) Kehm's vehicle was parked in an unusual location at a place where significant drug activity had previously taken place, (2) 11 months earlier Jones had arrested another individual for possession of methamphetamine driving a vehicle registered to Kehm, (3) the chemical odor emanating from Kehm, (4) the unusual hour when Kehm was purportedly traveling to visit her brother, (5) Kehm was self-employed, and (6) Kehm's nervousness, although we give this factor limited weight.

[7] We recognize that a series of acts that appear innocent, when viewed separately, may warrant further investigation when viewed together. *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994). The acts in the instant case, considered separately, may appear innocent. However, when considered together, they are consistent with acts of one who is engaged in illegal activity. Upon our de novo review, we determine that Jones had reasonable suspicion to suspect that Kehm was engaged in transporting illegal drugs.

Reasonableness of Continued Detention.

Kehm contends in her third assignment of error that her continued detention while awaiting the arrival of a drug detecting dog was unreasonable. We disagree. To evaluate the reasonableness of Kehm's detention, we must consider both the length

of the continued detention and the investigative methods employed, see *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006), which we address in turn.

[8] The length of an investigative stop must be no greater than is necessary to effectuate the purpose of the stop. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). The U.S. Supreme Court held that an investigative stop that lasted 90 minutes, where the police did not diligently pursue the investigation, was not reasonable, but declined to establish a strict time limitation on what is reasonable. *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). Likewise, this court has held that "'rigid time limitation[s]' or '"bright line"' rules are not determinative of [the] legality [of investigative stops]." *State v. Chronister*, 3 Neb. App. 281, 288, 526 N.W.2d 98, 104 (1995), quoting *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

In State v. *Soukharith, supra*, the Nebraska Supreme Court found that an investigatory stop lasting 34 to 45 minutes was reasonable. While *Soukharith* is helpful to our analysis, because the detention in *Soukharith* was shorter than the detention in the instant case we look to cases from other jurisdictions to determine how other courts have treated detentions as long as or longer than the detention in this case. Our research reveals that investigatory stops lasting 50 minutes or longer have been upheld in several federal appellate decisions. See, e.g., *U.S. v. White*, 42 F.3d 457 (8th Cir. 1994) (80-minute detention reasonable); *U.S. v. Bloomfield, supra* (60-minute detention reasonable); *U.S. v. Hardy*, 855 F.2d 753 (11th Cir. 1988) (50-minute detention reasonable).

To evaluate whether the investigative methods employed during the detention were reasonable, we consider several factors, including law enforcement purposes served by the detention, the diligence with which the police pursued the investigation, and the scope and intrusiveness of the detention. See *State v. Soukharith, supra*. The U.S. Court of Appeals for the 11th Circuit analyzed very similar factors in *U.S. v. Hardy, supra*. In *Hardy*, the police detained an individual after a routine traffic stop for approximately 50 minutes while awaiting the arrival of

a drug detecting dog. While the *Hardy* court expressed "some unease on encountering a *Terry* stop lasting as long as fifty minutes," because the "other aspects to the stop demonstrat[ed] that the police acted with propriety . . . and [because of] the expedition with which the police arranged for a narcotics dog, the doubts raised by the length of the detention are not sufficient for us to find that the stop violated the fourth amendment." 855 F.2d at 761. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The "other aspects to the stop" in *Hardy* included the intrusiveness of the canine sniff, the diligence with which the police conducted the stop, and the scope and intensity of the intrusion. The court held that a canine sniff is the kind of brief, minimally intrusive investigation technique that may justify a *Terry* stop. *U.S. v. Hardy, supra*. See, also, *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). The court determined that the police search was diligent because the arresting officer called for a drug detecting dog immediately upon deciding a canine sniff was warranted and the canine officer immediately left for the scene upon being called. The court then concluded that the scope and intensity of the intrusion were reasonable because the offenders were not removed to an office or police station, the arresting officer did not question the offenders while awaiting the drug dog, and the offenders were not placed in the back of the patrol car during the wait, but were allowed to wait in their own car. *U.S. v. Hardy, supra*.

In the instant case, it took approximately 52 minutes for the canine unit to arrive after Jones requested the unit's assistance. However, the officers acted diligently to conduct the canine sniff in a reasonable amount of time. Jones called for the canine unit approximately 8 minutes after he stopped Kehm, and the canine officer left for the scene within minutes of receiving the call.

The scope and intrusiveness of the detention were reasonable. While waiting for the dog to arrive, Kehm sat in the front seat of Jones' patrol car and Jones allowed Kehm to go back to her vehicle to retrieve and finish her drink and also allowed her to smoke a cigarette. Jones did not interrogate Kehm throughout the detention, but instead engaged in conversation unrelated to

the events. When the drug dog arrived, it conducted an exterior sniff of Kehm's vehicle. We conclude that the detention of Kehm was reasonable in both time and scope.

District Court's Alternate Basis.

In light of our conclusion that Jones had reasonable suspicion to detain Kehm and the detention was reasonable, we do not address Kehm's argument that the district court erred in articulating an alternative basis to deny Kehm's motion to suppress, as it is unnecessary to the disposition of this case. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

CONCLUSION

We determine that the district court did not err in denying Kehm's motion to suppress. We conclude that Jones had reasonable suspicion to detain Kehm and that the detention was reasonable. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN J. WILSON, ALSO KNOWN AS ALFRED J. WILLIAMS, APPELLANT.

724 N.W.2d 99

Filed November 21, 2006. No. A-06-154.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.
4. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, the judgment is the sentence.

6. **Convictions: Sentences: Final Orders.** The trial court must pronounce sentence before a criminal conviction is a final judgment.
7. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
8. **Final Orders: Speedy Trial: Appeal and Error.** The denial of a motion to discharge based upon statutory speedy trial grounds is a final, appealable order, because it is an order affecting a substantial right made during a special proceeding.
9. **Final Orders: Appeal and Error.** An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal.
10. **Actions: Words and Phrases.** A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.
11. ____: ____. Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding."
12. ____: ____. An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not.
13. ____: ____. A special proceeding may be said to include every statutory remedy which is not in itself an action.
14. **Constitutional Law: Speedy Trial: Statutes: Immunity.** The constitutional right to a speedy trial is not a statutory remedy and does not authorize a special application to the court to enforce it.
15. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
16. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
17. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Appeal dismissed.

Michael J. Decker, of Decker Law Offices, for appellant.

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

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Prior to trial, the district court for Douglas County denied the motion of Allen J. Wilson, also known as Alfred J. Williams,

seeking discharge based upon an alleged violation of his statutory and constitutional rights to a speedy trial. After being convicted by a jury but prior to sentencing, Wilson filed this appeal from the court's order overruling his motion for discharge, alleging only that he was denied his constitutional right to a speedy trial. Because we conclude that Wilson's appeal was interlocutory, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

On February 12, 1999, the affidavit of an Omaha police officer set forth grounds for issuance of an arrest warrant for Wilson. According to the affidavit, a man identified as James E. Williams and an accomplice forced their way into Thomas Johnson's residence on February 3, 1998, and robbed Johnson and Tanyel Smith. Williams was later arrested and incarcerated for the crimes. A police officer interviewed Williams on February 3, 1999, at which time Williams identified his accomplice as his uncle, "Alfred Williams" (Wilson). According to Williams, Wilson had been arrested in California, transferred to Nebraska, and paroled out of the Lincoln Correctional Center. The affiant spoke with the supervisor of discharged inmate records at the Department of Correctional Services in Lincoln, asking the supervisor to check on an "Alfred Williams" who would have been released in 1997 or 1998 on a charge from California. The supervisor found a party matching the description under the name "Allen J. Wilson" and sent the affiant a release photograph of Wilson. The affiant showed the photograph to Williams, and Williams stated that the photograph depicted his uncle, "Alfred Williams," who had assisted Williams in the 1998 robbery. On February 12, 1999, the county court for Douglas County issued a warrant for Wilson's arrest, and the State filed in the county court four one-count complaints based on the above-described acts. The complaints charged Wilson with two counts of robbery and two counts of use of a deadly weapon to commit a felony.

On June 9, 2005, Wilson made his first appearance in county court. On July 15, the county court held a preliminary hearing, and the matter was bound over to the district court. On July 19, the State filed an information charging Wilson with two counts of robbery and two counts of use of a deadly weapon to commit a felony, all counts arising out of acts committed on February 3,

1998, against Johnson and Smith. On December 30, 2005, the State filed an amended information charging Wilson with two counts of robbery, six counts of use of a deadly weapon to commit a felony, and four counts of false imprisonment in the first degree, as well as with being a habitual criminal. Pursuant to Wilson's motion to quash, the court subsequently struck from the amended information two counts of false imprisonment in the first degree and four counts of use of a deadly weapon to commit a felony.

On January 20, 2006, Wilson filed a motion for discharge. The motion alleged that the failure to prosecute the matter within 6 months of filing the original action in the county court and within 6 months of the filing of the information denied him his statutory right to a speedy trial and that the failure to prosecute the matter for 7 years denied him his federal and state constitutional rights to a speedy trial.

During the hearing on Wilson's motion for discharge, the court inquired whether there was any information regarding Wilson's whereabouts post-February 3, 1998. The State responded that at the time the warrant was drafted, the State had information indicating Wilson might have left for California, that officers checked with "the jurisdiction in California" but were unable to locate Wilson, and that on June 7, 2005, Wilson was arrested in Omaha on unrelated charges. Wilson's counsel conceded that the statutory speedy trial time had not run, based on the time the information was filed in district court.

With respect to the constitutional speedy trial right, Wilson's counsel argued that Wilson's defense would suffer prejudice by the delay, because "if and when alibi witnesses are called, we believe the State is going to attack the witnesses's credibility based on the length of time it's been since the incident occurred and remembering back as far as when . . . Williams was in California, et cetera." The State asserted that the officers performed a diligent search for Wilson, that the warrant remained active until Wilson was arrested in the Douglas County area, and that the time for a speedy trial did not begin to run until the information was filed on July 19, 2005.

The court ruled that the statutory speedy trial right had not been violated and that Wilson had not been prejudiced by the

delay. In an order filed January 25, 2006, the court overruled the motion for discharge. However, Wilson did not perfect an appeal before a jury trial commenced. An order filed February 2 stated that a jury unanimously found Wilson guilty of two counts of robbery, two counts of use of a deadly weapon to commit a felony, and two counts of false imprisonment in the first degree. The court adjudged Wilson guilty pursuant to the jury's verdict and, prior to sentencing, scheduled a hearing on whether Wilson should be determined to be a habitual criminal. On February 6, after the trial and before sentencing, Wilson filed his notice of appeal and poverty affidavit.

ASSIGNMENT OF ERROR

Wilson alleges, restated, that the district court was clearly wrong in finding that he was not denied his constitutional right to a speedy trial.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

ANALYSIS

[2,3] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). For an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken. *Id.*

[4-6] A judgment entered during the pendency of a criminal cause is final only when no further action is required to completely dispose of the cause pending. *Id.* In a criminal case, the judgment is the sentence. *Id.* The trial court must pronounce sentence before a criminal conviction is a final judgment. *Id.* In this case, a final judgment has not been entered, because Wilson filed his notice of appeal after being convicted but prior to sentencing. If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted

in the same case to secure advisory opinions to govern further actions of the trial court. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

[7] Jurisdiction in this court depends on whether Wilson's appeal—filed within 30 days of the entry of the order denying his motion for discharge—was taken from a final order. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. See, *State v. Meese, supra*; *State v. Jacques, supra.* The order denying Wilson's motion for discharge did not determine the action and prevent a judgment, nor was it made on summary application after a judgment was rendered. We examine whether the order was made during a special proceeding and affected a substantial right.

[8-10] Wilson claimed in his motion for discharge that he had been denied his statutory and constitutional rights to a speedy trial, and the district court overruled the motion. The Nebraska Supreme Court has held that the denial of a motion to discharge based upon statutory speedy trial grounds is a final, appealable order, because it is an order affecting a substantial right made during a special proceeding. See, *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Jacques, supra.* An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal. *State v. Loyd, supra.* Thus, the overruling of a motion alleging the denial of a speedy trial based upon constitutional grounds pendent to a nonfrivolous statutory claim may be reviewed upon appeal from that order. However, Wilson's counsel conceded during the hearing on the motion for discharge that the statutory right to a speedy trial had not been violated, and this appeal is based solely on an alleged denial of Wilson's right to a speedy trial guaranteed by U.S. Const. amend. VI. We determine that Wilson's concession renders his statutory speedy trial claim legally frivolous. See *Cole*

v. Blum, 262 Neb. 1058, 637 N.W.2d 606 (2002) (frivolous legal position is one wholly without merit, that is, without rational argument based on law or on evidence). The issue in this case is whether the denial of the motion for discharge, based upon a constitutional right and in the absence of a nonfrivolous statutory claim, is a final, appealable order or is interlocutory.

In *United States v. MacDonald*, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978), the U.S. Supreme Court held that a defendant may not, before trial, appeal from an order denying a motion to dismiss on constitutional speedy trial grounds. The Court stated that "[t]he resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case" and that such claims "are best considered only after the relevant facts have been developed at trial." 435 U.S. at 858. The Court reasoned that "[t]he essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed." 435 U.S. at 860. In discussing the four factors enunciated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which factors are to be weighed in determining whether a deprivation of the Sixth Amendment right to a speedy trial has occurred, the *MacDonald* Court stated: "If the factors outlined in *Barker v. Wingo, supra*, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered." 435 U.S. at 861.

Special Proceeding.

[11,12] Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding." *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). A special proceeding is, by definition, not part of an action. *Id.* An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *Id.*

[13,14] In *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), the Nebraska Supreme Court reasoned that a ruling on a motion for discharge was made during a special proceeding

because Neb. Rev. Stat. § 29-1207 (Reissue 1995) conferred a right to a speedy trial and Neb. Rev. Stat. § 29-1208 (Reissue 1995) authorized a special application to a court to enforce the right. A special proceeding may be said to include every statutory remedy which is not in itself an action. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). However, the constitutional right to a speedy trial is not a statutory remedy and does not authorize a special application to the court to enforce it. We conclude that a pretrial ruling based on a constitutional right to a speedy trial, unaccompanied by a nonfrivolous claim based upon the statutory right to speedy trial, is not an order made during a special proceeding.

Substantial Right.

[15,16] A substantial right is an essential legal right, not a mere technical right. *State v. Vela, supra.* A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* A substantial right can be affected by an order if the right is irrevocably lost by operation of the order, while a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. *Id.*

In *State v. Gibbs*, 253 Neb. at 245, 570 N.W.2d at 330, the court stated that a ruling "based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated" affected a substantial right because "the rights conferred on an accused criminal by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." As discussed above, there is no nonfrivolous statutory speedy trial claim at issue in the instant case. In *State v. Jacques, supra*, the Nebraska Supreme Court determined that the denial of a motion to discharge affected a substantial right because it effectively denied a defendant's speedy trial rights. However, as the U.S. Supreme Court stated in *United States v. MacDonald*, 435 U.S. 850, 861, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978):

> Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a

> "right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial.

Further, the right to a speedy trial is different from other constitutional rights in that deprivation of the right may work to the accused's advantage and does not per se prejudice the accused's ability to defend himself or herself. See *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[17] The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which courts must approach each case on an ad hoc basis, utilizing the factors set forth in *Barker v. Wingo, supra*. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). On the other hand, to obtain absolute discharge under the statutory right enforced by § 29-1208, a defendant must show that he or she was not brought to trial before the running of the time for trial, as extended by excluded periods. A defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with § 29-1207(2). *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). Thus, speedy trial claims based on statutory grounds are more amenable to resolution prior to trial than are those claims based on constitutional grounds.

Because Congress was dissatisfied with the test to determine if an accused's speedy trial rights have been violated, Congress passed the Speedy Trial Act of 1974. 22A C.J.S. *Criminal Law* § 591 (1989). Certain states, including Nebraska, have speedy trial statutes which pertain to an accused's speedy trial rights and give substance to, and implement, the constitutional protection. *Id.* at § 599. The decisions recognizing the right to an interlocutory appeal from a denial of the statutory right to a speedy trial implement the legislative intent demonstrated in the adoption of the separate statutory right. However, the U.S. Supreme Court has expressly held that no interlocutory appeal lies from a denial

of relief based upon the constitutional rights to speedy trial. See *United States v. MacDonald, supra*. Similarly, the Nebraska Supreme Court has never recognized a right to interlocutory appeal solely concerning the constitutional right to speedy trial. We conclude that the constitutional right to a speedy trial can be effectively vindicated in an appeal after judgment. Wilson's claim that he was denied a speedy trial would not be diminished, and any prejudice resulting from an erroneous denial of his motion for discharge could be remedied by an appeal from the judgment which would become final after sentencing.

CONCLUSION

We conclude that Wilson's appeal, based on the alleged denial of only his constitutional right to a speedy trial, was not taken from either a final judgment or a final, appealable order. Accordingly, we are without jurisdiction to act and must dismiss the appeal.

APPEAL DISMISSED.

PATRICK RONALD RUSSELL, APPELLANT, V. HAROLD CLARKE ET AL., APPELLEES.

724 N.W.2d 840

Filed December 5, 2006. No. A-04-1319.

1. **Mandamus.** A grant or denial of mandamus is within the trial court's discretion.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Pleadings: Judgments: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Pleadings: Words and Phrases.** Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses.
6. **Pleadings: Summary Judgment.** A motion for summary judgment is not a pleading.
7. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
8. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom

the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

9. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
10. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
11. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2004), and must seek substantive alteration of the judgment.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Affirmed.

Patrick Ronald Russell, pro se.

Jon Bruning, Attorney General, and Maureen Hannon for appellees.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Patrick Ronald Russell appeals from the judgment of the district court for Johnson County, Nebraska, as amended in response to the appellees' motion to alter or amend judgment, effectively denying Russell relief upon his petition for writ of mandamus seeking to compel the appellees to provide public records. We determine that (1) a motion for summary judgment is permissible in a mandamus action, (2) the appellees produced evidence sufficient to disprove an element of mandamus and Russell failed to adduce contrary evidence, (3) the Nebraska Department of Correctional Services (DCS) had no obligation to transport Russell to the office where a record he sought was located, and (4) granting the motion to alter or amend judgment

to correctly reflect the original evidence was not an abuse of discretion. We therefore affirm.

BACKGROUND

Russell is an inmate in the custody of DCS and is presently incarcerated within the Tecumseh State Correctional Institution (TSCI). Russell submitted requests based upon Neb. Rev. Stat. §§ 84-712 to 84-712.09 (Reissue 1999 & Cum. Supp. 2002) (the public records statutes). Russell addressed the requests to the appellees in this action, namely Harold Clarke, then director of DCS; Mary Carmichael, the contract monitor at TSCI; and Jerry Bryan, a unit manager at TSCI.

Russell divided his requests into two categories, one seeking "[r]ecord[s]" and the other seeking "[i]nformation." (Emphasis omitted.) Russell's requests for records sought:

> (1) Medically Prescribed Bland Diet Menu currently being used by Aramark at [TSCI].
>
> (2) Any and all contracts in exist[e]nce between [DCS] and Aramark Corporation, for the Food Service being provided at [TSCI].
>
> (3) Any and all audit reports conducted on the Food Service provided by Aramark comp[il]ed by either [DCS] or Aramark.
>
> (4) Any and all recipes being used to prepare the food provided in the medically prescribed bland diet tray.
>
> (5) Any and all licen[s]es on Aramark showing [it is] licensed to provide food service.
>
> (6) Any and all food handler certificates and licen[s]es on all employees of Aramark and on all inmates working in the food service area.

Russell also sought information as follows:

> (1) Complete listing of the first and last names of all Aramark employees working at the Food Service Department within [TSCI].
>
> (2) Complete name and address of Aramark General Manager who is responsible for the staff at [TSCI].
>
> (3) Name and address of the Chief Exec[u]tive Officer . . . of Aramark.
>
> (4) Name and address of Aramark's general legal counsel.

(5) Name and address of Aramark employee responsible to receive court service for this area.

(6) Name and address of the current dietician for [DCS].

(7) Address and position for Ron Fisher.

An attorney for the appellees initially responded to Russell's requests, asserting that the appellees were unable to provide copies of the requested public records within 4 business days and providing Russell with a specific date by which further response would be made. Approximately 3 days later, the attorney submitted the appellees' final response, which we summarize:

As to Russell's first records request, the appellees would provide copies of five pages of bland diet menus, which constituted all of the relevant menus, upon payment of the cost of copying at 10 cents per page. The items requested in Russell's second records request included a contract contained in three three-ring binders and estimated to be between 1,200 and 1,500 pages in length. The appellees offered to provide the full contract at 10 cents per page or to provide specific parts of the contract if Russell desired to limit his request. The response claimed that Russell's third, fourth, and fifth records requests did not describe any public record belonging to DCS. Regarding Russell's sixth records request, the response stated that inmates do not have food handler licenses or certificates and that Russell's request for licenses of Aramark employees did not describe any public record belonging to DCS.

As to Russell's requests for information, the response claimed that each request did not describe a public record belonging to DCS. The response to the seventh request did, in addition, identify the position, workplace facility, and address of Ron Fisher.

On March 3, 2004, Russell commenced this action in the district court, seeking a writ of mandamus. On April 29, the appellees filed an answer admitting the content of Russell's requests and alleging the content of the responses submitted by the attorney for DCS on behalf of the appellees.

Prior to the filing of the answer on behalf of the appellees, the district court had taken no action on Russell's petition for writ of mandamus. On August 9, 2004, Russell filed a written motion for an evidentiary hearing. By order entered on September 2, the court scheduled such a hearing for October 25. On October 4, the

appellees filed a motion for summary judgment, which was also scheduled for hearing on October 25. The appellees also filed a motion to continue the evidentiary hearing until after a disposition of the motion for summary judgment. On October 25, the court sustained the motion for continuance of the evidentiary hearing pending ruling on the motion for summary judgment and received documentary evidence on the summary judgment motion. We summarize that evidence in the analysis section of this opinion.

By order entered on October 28, 2004, the district court granted the appellees' motion for summary judgment in part and also ordered issuance of a peremptory writ of mandamus to Clarke as to the first six of Russell's requests for information. The court found that there was no genuine issue as to any material fact and granted relief against both Russell and the appellees. The court determined that Russell's first request for records was satisfied by the appellees' response. The court did not expressly rule on Russell's second request for records, but implicitly determined that the appellees' response also satisfied that request. The court determined that there was no evidence that any records specified by Russell's third, fourth, fifth, and sixth requests for records existed as public records. The court granted summary judgment in favor of the appellees with respect to those items. With respect to Russell's first six requests for information, the court determined that the appellees possessed the information and that the information was a public record within the meaning of § 84-712.01 and accordingly granted Russell's request for a peremptory writ of mandamus as to those items. Russell's petition did not address his seventh request for information, and we do not address it further in this opinion.

On November 3, 2004, the appellees timely filed a motion to alter or amend the judgment, asserting that Russell had not filed a motion for summary judgment and arguing that the court erred in granting affirmative relief against the appellees in the absence of such motion. The appellees' motion also argued that the Nebraska statutes do not require state agencies to answer general questions which seek information that has never been put into document form, especially where the information concerns general information about a private corporation.

On November 15, 2004, the district court conducted a hearing on the appellees' motion to alter or amend judgment. Both Russell and counsel for the appellees appeared by telephone. No additional evidence was offered or received at this hearing, which consisted only of discussion between the court, Russell, and counsel for the appellees. By order entered on November 22, the court granted the appellees' motion with respect to Russell's third, fourth, fifth, and sixth requests for information. With respect to the third, fourth, and fifth requests, the court found no evidence contradicting the appellees' evidence that the information is not contained in any public record. The court also found that the appellees had supplied Russell with the information in his first request for information, that Russell had obtained the information sought in his second request for information as demonstrated by his successful service of a subpoena on Aramark's general manager, and that the evidence showed that there is no current dietician for DCS, whose name and address were the subject of Russell's sixth request for information. Accordingly, the court determined that "no further action on behalf of the [appellees] is required." The court's order stated that the appellees' motion to alter or amend judgment was granted and that the earlier order was amended "to only require that the information in the first request for information be provided."

Russell timely appeals.

ASSIGNMENTS OF ERROR

Russell assigns, restated, that (1) the district court erred in (a) entertaining the appellees' motion for summary judgment and (b) finding that some of the documents sought were not public records and (2) the district court abused its discretion in (a) granting the motion to alter or amend judgment where no evidence was provided to show that the information sought was not a part of the contract and (b) not ordering the production of the contract sought "which is still being denied" to Russell.

Russell also assigns, but does not argue, error in the district court's granting a continuance of the trial of the mandamus action for the purpose of hearing the motion for summary judgment, in its granting motions to quash subpoenas for relevant trial witnesses, and in its denying Russell out-of-pocket costs for the action. Errors that are assigned but not argued will not be

addressed by an appellate court. See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). We will not further address the errors which Russell has assigned but not argued.

STANDARD OF REVIEW

[1] A grant or denial of mandamus is within the trial court's discretion. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

[4] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. See *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

ANALYSIS

Propriety of Summary Judgment.

Russell argues that because Neb. Rev. Stat. § 25-2164 (Reissue 1995) provides that "[n]o other pleading or written allegation is allowed than the writ and answer," summary judgment is unauthorized in a mandamus proceeding. However, this argument ignores other language in the same statute, which provides:

> These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action.

§ 25-2164.

[5,6] Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). A motion for summary judgment

is not a pleading. *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998). It is fundamental that the primary purpose of a summary judgment procedure is to pierce the allegations made in the pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

The only case cited by Russell in support of this proposition is *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 105 N.W.2d 721 (1960). However, that case does not support Russell's argument; rather, it addressed whether the trial court improperly entertained a motion to make more definite and certain and, upon overruling that motion, improperly granted the respondent additional time to answer. The Nebraska Supreme Court found no abuse of discretion in the trial court's procedure, stating that the ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus. In *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990), the Nebraska Supreme Court affirmed an order of the district court granting the defendants' motion for summary judgment in an action for mandamus. While the court did not specifically address the propriety of summary judgment in a mandamus action, the court's opinion suggests that it is appropriate. Moreover, the language of the statute upon which Russell relies contemplates "further proceedings . . . in the same manner as in a civil action." § 25-2164. Clearly, the summary judgment procedure is applicable to a civil action. See Neb. Rev. Stat. § 25-1330 (Cum. Supp. 2004). We reject Russell's argument that the summary judgment procedure cannot be used in an action for writ of mandamus.

[7] Russell also argues that the district court abused its discretion in not allowing him to "argue against the motion" for summary judgment and that "it was understood from what the court stated that all that [the] court was considering was the motion to strike, and not the motion for summary judgement." Brief for appellant at 8. However, Russell does not assign these matters as error. Errors argued but not assigned will not be considered on appeal. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

Evidence on Summary Judgment.

[8] Russell contends that the trial court erred in granting summary judgment for the appellees because "all of the documents and information sought were in [the] appellees['] custody." Brief for appellant at 4-5. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

[9] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[10] Before turning to the evidence in the instant case, we note that mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006). In order to establish a prima facie case for summary judgment, the appellees were required to produce enough evidence to disprove one or more of the elements of mandamus if the evidence were uncontroverted at trial.

In the instant case, we focus upon the second element, i.e., the existence of a clear duty on the part of the appellees to perform the act. In this action based upon the public records statutes, the appellees were clearly required to allow Russell to examine and

make or obtain copies of public records on the premises of the custodian of the records during the hours the custodian's office may be kept open for the ordinary transaction of business. See § 84-712. The primary issues, however, were whether the records existed and whether they constituted records of DCS. This obviously depends upon the definition of a "public record," which includes "all records and documents, regardless of physical form, of or belonging to this state . . . or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing." § 84-712.01(1).

At the hearing on the appellees' motion for summary judgment, the appellees' evidence included affidavits from all three appellees. The affidavit of Clarke stated that as director of DCS, he was responsible for the total administration of DCS; that DCS employed Jan Lehmkuhl as contract administrator; and that she was delegated the duty to maintain the physical contracts entered into by DCS. The affidavit further states that the contract was physically maintained at the DCS central office in Lincoln, Nebraska, and consisted of three binders. The affidavit of Bryan, a unit manager at TSCI, stated that Bryan had never been responsible for maintaining any part of the contract between Aramark and DCS and that he had never been responsible for maintaining any of the information or records requested by Russell.

The affidavit of Carmichael stated that she was employed as the contract manager for DCS and that as part of her employment, she had what she described as a " 'working copy' " of the contract. The affidavit stated that the " 'working copy' " was for reference and was not an official or complete document and that a member of the public requesting to see a copy of the contract between DCS and Aramark would be directed to contact Lehmkuhl at the DCS central office. Carmichael also stated in the affidavit that Aramark follows the DCS master menu and must follow guidelines established by the dietician, but uses its own recipes to prepare the actual meals. She further stated that the recipes do not belong to DCS. She added that DCS has access to a list of Aramark employees, but the list is maintained by Aramark and often changes, and that DCS does not maintain a list of its own. Carmichael further noted that she had never

received a request from Russell designating which portions of the contract he sought to have copied, that she had only received money sufficient to cover a single set of copies of the bland diet, and that she had provided Russell with the copies of the bland diet.

An affidavit of Lehmkuhl stated that she was employed as the materiel administrator for DCS, that she maintained the only complete and official copy of the contract between DCS and Aramark for food services at TSCI, and that the contract was kept in three binders at the purchasing office in the DCS central office in Lincoln. Her affidavit maintained that the contract stated the "bland diets exists [sic]" but that the contract did not specifically address bland diets. The affidavit added that the contract did not "require DCS to prepare reports entitled 'audit reports' of the food service offered by Aramark" and that DCS had not been "audited by the State Auditor since the Aramark contract came into effect." Lehmkuhl's affidavit also stated that DCS had no reports "dealing [with] bland diets." The affidavit further stated that the State of Nebraska did not require food handler permits or licenses within the correctional setting. Lehmkuhl asserted in the affidavit that she had never received any request from Russell for copies of the contract, a portion of the contract, or any other public record.

In response to the appellees' evidence, the evidence submitted by Russell consisted of a copy of his initial request to Clarke; a copy of a "kite" showing the transmittal by mail of the request to Clarke; a copy of the original request to Carmichael; a copy of a "kite" to Carmichael including Carmichael's response, in which she referred to the memorandum from the appellees' legal counsel formally responding to the records request; a copy of the original request to Bryan; a copy of the initial response of the appellees' legal counsel advising that additional time was required to respond to Russell's request; a copy of the subsequent formal response by appellees' legal counsel; a copy of a "kite" transmitting an institutional check for 50 cents for the cost of copying the bland diet menu and including a response of Bryan showing that copies had already been made; and a copy of the appellees' answers to Russell's requests for admissions. None of the admissions made pursuant to the requests contradicts the evidence adduced by the appellees.

The evidence adduced by the appellees established a prima facie case that there were no public records maintained by DCS other than those of which copies were provided or of which the appellees offered to provide copies upon payment of the reasonable expense of copying. Russell failed to adduce evidence to the contrary, and we find that the ultimate decision of the district court, after consideration of the appellees' motion to alter or amend judgment, correctly determined, as a matter of law, that there was no genuine issue or dispute of fact and that the appellees were entitled to judgment as a matter of law.

Failure to Order Production of Contract.

As part of his argument that he was entitled to public records, Russell argues that Carmichael "refused to provide access to review or the requested photocopies" of the contract with Aramark. Brief for appellant at 6. The substantive formal response by the appellees' legal counsel clearly offers to provide a copy of the contract upon payment of the expense of copying or to copy specific portions designated by Russell as to subject matter. The evidence clearly establishes that no request for a copy of the full contract accompanied by payment was ever received. The evidence also shows that Russell never made a subsequent request to designate a particular portion or portions by subject matter. While Russell appears to argue that he should have been allowed to travel to the location of the contract, he cites no authority for this claim. Russell is a prisoner in custody of DCS at Tecumseh, Nebraska. Section 84-712(1) authorizes "examination [at] the respective offices" of DCS. In the instant case, the evidence is undisputed that the location of the contract is DCS' offices in Lincoln, Nebraska. Russell cites no authority for the proposition that DCS is required to transport Russell to the offices in Lincoln for the purpose of examining that public record. Russell also complains that "as the [DCS] Contract Monitor [Carmichael] sho[u]ld have a complete copy of all contracts, which does not appear to be the case." Brief for appellant at 7. Thus, in Russell's brief to this court, he acknowledges that Carmichael did not have the contract which Russell sought to examine. We find no error in the ruling of the district court on this matter.

Motion to Alter or Amend Judgment.

Although Russell argues that he was denied the right to be heard upon the appellees' motion to alter or amend judgment, the record reflects that he was present for the telephonic hearing. While during the hearing Russell did not argue regarding the specific merits of the motion, the record does show that Russell spoke up and participated in the discussions with the court in the first portion of the hearing regarding scheduling of hearings on other motions. Later in the hearing, Russell remained silent while the district court and the appellees' counsel engaged in a discussion regarding the merits of the motion. We have carefully examined the record and find no suggestion that Russell attempted to make any such argument or that the district court or anyone else prevented him from doing so. We find no merit in this argument.

[11] Russell also argues that "there was no evidence provided to the court to justify . . . altering or amending the judgement." Brief for appellant at 8-9. He argues that the information sought was "apart [sic] of the contract and this is why the contract has not been provided and was not ordered produced by the court." *Id.* at 9. While there was no new evidence adduced at the hearing on the motion to alter or amend judgment, through the arguments of their counsel the appellees succeeded in persuading the district court that the court's original view of the evidence was in part incorrect. In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2004), and must seek substantive alteration of the judgment. *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). In the instant case, the appellees' motion was filed within 10 days after the entry of the initial judgment and clearly sought substantive alteration of that judgment. Contrary to Russell's argument, the trial court had the authority to consider the appellees' motion, and we find no abuse of discretion in the court's ruling.

CONCLUSION

A motion for summary judgment is a proper procedural device in an action for a writ of mandamus. The appellees produced

evidence sufficient to disprove the element of mandamus of the existence of a clear duty on the part of the appellees to perform the act, and Russell failed to adduce contrary evidence, thereby entitling the appellees to summary judgment. DCS had no obligation to transport Russell to the office where a particular record was located. The district court did not abuse its discretion in granting the appellees' motion to alter or amend judgment, where the effect of the action was to correctly reflect the original evidence. We affirm the judgment of the district court.

AFFIRMED.

KIM REED, INDIVIDUALLY AND AS PERSONAL ADMINISTRATOR OF THE ESTATE OF ROBIN ABRAHAM, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

724 N.W.2d 834

Filed December 5, 2006. No. A-05-206.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages.** Pursuant to Neb. Rev. Stat. § 13-911(1) (Reissue 1997), in case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
4. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** A passenger is not an innocent third party under Neb. Rev. Stat. § 13-911 (Reissue 1997) if the passenger either (1) has promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel or (2) is sought to be apprehended in the fleeing vehicle.

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

John H. Kellogg, Jr., of Kellogg & Palzer, P.C., for appellant.

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

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

Kim Reed, individually and as personal administrator of the estate of Robin Abraham, appeals from the decision of the district court for Douglas County which dismissed her wrongful death claim against the City of Omaha (the City). This appeal involves a case in which a police pursuit resulted in a traffic accident wherein two passengers were killed and whether one of them, Robin Abraham, was an "innocent third party," thus entitling her estate to recover under Neb. Rev. Stat. § 13-911 (Reissue 1997). We affirm the trial court's decision that Abraham was not an innocent third party.

FACTUAL BACKGROUND

At approximately 4 a.m. on December 8, 2002, in Omaha, Nebraska, Abraham was a back seat passenger in a stolen Lincoln Town Car (Lincoln) driven by Jacob Witt, although it does not appear that Abraham knew the Lincoln was stolen. Also in the Lincoln were Tiffany Bruce, in the front passenger seat, and Amanda Jura, also in the back seat. Abraham, Witt, Bruce, and Jura left a party at a private residence and took the Lincoln to "get more dope." Abraham and Jura were introduced to Witt approximately a half hour before leaving with him in the Lincoln. While in the Lincoln, they drove past a police cruiser driven by Omaha police officer Thomas Deignan. Officer Deignan began to follow the Lincoln, but he did not turn on the cruiser's lights or sirens. Officer Deignan admitted that no traffic violations were committed, but he thought it was strange that young people would be out in an expensive car at 4 o'clock in the morning. Officer Deignan called the police dispatcher to check the Lincoln's license plates, and the dispatcher informed Officer Deignan that the Lincoln was reported stolen. The Lincoln "started to take off," and Officer Deignan declared "pursuit" and turned on the cruiser's lights and sirens. Officer Deignan also radioed for other officers to help in the pursuit. During the pursuit, the Lincoln missed a curve, went over an embankment, and crashed into a tree. Abraham and Jura

died as a result of their injuries. Additional facts will be set forth as necessary in our analysis section.

PROCEDURAL BACKGROUND

Reed filed a complaint on February 19, 2004. The parties stipulated that Reed satisfied the requirements of the Political Subdivisions Tort Claims Act. Reed's complaint alleged that on December 8, 2002, Abraham was a passenger in a 2001 Lincoln driven by Witt; that Witt was attempting to evade vehicular pursuit by one of the City's law enforcement officers; that as a direct result of Witt's attempt to avoid vehicular pursuit, he lost control of the Lincoln and struck a tree, causing Abraham severe personal injuries and ultimately her death and resulting in damages, both special and general; and that the City is liable under § 13-911, the strict liability statute for injuries or death to innocent third parties caused by police motor vehicle pursuits. The complaint sought judgment against the City for medical expenses incurred prior to Abraham's death; funeral expenses; Abraham's pain and suffering prior to her death; damage suffered by Reed, individually, for the loss of care, comfort, society, and companionship of Abraham; Reed's pecuniary loss; the costs of the action; and all other damages as shown by the evidence.

The City filed an answer on March 9, 2004, denying that Abraham was an innocent third party under § 13-911. The City also alleged that (1) the direct proximate cause of any damage or injury to Abraham and/or her next of kin was the active contributory negligence and/or intentional actions of Witt, over whom the City had no control, and (2) Abraham assumed the risk of sustaining any injuries she suffered by knowingly and voluntarily becoming and remaining a passenger in a stolen Lincoln driven by Witt while he was known to her to be under the influence of and impaired by a drug.

The district court granted the City's motion to bifurcate liability and damages. A trial was held on October 13 and 19, 2004, regarding the liability issue. For purposes of such trial, Reed's case was consolidated with cases brought by or on behalf of the other two passengers, although such cases are not involved in this appeal.

In an order filed January 19, 2005, the trial court found that Abraham was not an " 'innocent third part[y]' within the

contemplation of . . . § 13-911(1)." The trial court found, inter alia, that on the evening of December 7, Abraham and Jura appeared at Bruce's house, where Witt was present; that the four individuals smoked methamphetamine and marijuana and collectively decided that they were going out to buy more drugs; that they left Bruce's house in Witt's stolen Lincoln; that Officer Deignan ran a check on the Lincoln's license plates and found there were no warrants, but that the Lincoln was stolen; that Witt started to " 'take off' " and Officer Deignan began a pursuit; and that the high speed pursuit led to its terminus in a park in Omaha.

The trial court also found that Witt gave inconsistent accounts of the chase. Witt's first statement (and a letter he wrote to Bruce) made no mention of the girls' requesting him to stop, but, rather, Witt said that someone tried to give him directions not to hit a curb. Witt further stated that the girls made comments regarding the license plate check and outstanding warrants. Witt told investigators that Abraham said: "[H]urry up and get away from 'em 'cause I got a warrant, I got a warrant in Sarpy County, and I got a warrant somewhere else." Witt's later testimony, as well as Bruce's testimony, was that after the police started the pursuit, the passengers all sought to dissuade Witt from fleeing. The district court said:

> To the extent that their accounts are inconsistent, the Court concludes that Witt's custodial statement is the most credible version of these events. It was given within hours of the events themselves. It was given by a person who did not know or wasn't focusing on the civil aspects of the case. It was given to interrogators who were concentrating on the criminal side of the case. In sum, it was the most candid, reliable account of those few minutes.

The district court found:

> Abraham was the passenger who told Witt that she had an arrest warrant outstanding. She had charges pending in Douglas County for: failure to appear; driving under suspension; and leaving the scene of a property damage accident. Her statement to Witt conveyed during the time that they were being followed by the police, with knowledge that the police were "running the plates", in light of the facts

> recited above, supports an inference that Abraham provoked or advocated Witt to start or to continue his flight.

The district court held that Abraham fell within the category of individuals " 'sought to be apprehended in the fleeing vehicle' " and, thus, was not an innocent third party entitled to recovery under § 13-911(1). The district court dismissed Reed's case with prejudice.

Reed timely appeals the order of the district court.

ASSIGNMENTS OF ERROR

Reed asserts that the district court erred in (1) finding that Abraham was not an innocent third party protected under the provision of § 13-911(1); (2) finding that the evidence was sufficient to deny Abraham of innocent third party status; (3) finding that Abraham lost her innocent third party status because she was in a stolen vehicle and therefore being pursued, because there is no exception in the statute regarding third parties in stolen vehicles; and (4) interpreting the term "innocent third parties" differently from the Supreme Court's previous interpretation of the term, because the Legislature amended § 13-911 subsequent to this interpretation and did not alter in any way the definition of innocent third party.

STANDARD OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

ANALYSIS

[3,4] Reed argues that the district court erred in finding that Abraham was not an innocent third party pursuant to § 13-911(1),

which states: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." In *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002), the Nebraska Supreme Court set out to define the term "innocent third party," because such is not defined by § 13-911. The *Henery* court said:

> We conclude that by its use of the phrase "innocent third party" in § 13-911, the Legislature was concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended. "Innocent" as used in the statute describes an individual who is a "third party" under § 13-911. An "innocent third party" under § 13-911 is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.

263 Neb. at 707, 641 N.W.2d at 649. Thus, to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle. Either circumstance prevents a finding that a claimant in a police pursuit case was an innocent third party. Thus, a passenger is not an innocent third party if the passenger either (1) has promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel or (2) is sought to be apprehended in the fleeing vehicle. See *Henery v. City of Omaha, supra*.

We note that the district court in the instant case said:

> [O]ddly, the conjunctive definition [in *Henery*] of an "innocent third party" would presumably allow a person to recover damages against the City when that person had promoted, provoked, or persuaded the driver to flee, if the evidence also showed that person was not "sought to be apprehended in the fleeing vehicle."

We disagree with such reading of *Henery v. City of Omaha, supra*, because in the final analysis, irrespective of whether the *Henery* court used conjunctive or disjunctive wording, we think

it is clear and logical that the Supreme Court was articulating the two following circumstances under § 13-911 which deprive a passenger of innocent third party status: (1) if the passenger promoted, provoked, or persuaded the driver to engage in flight from law enforcement or (2) if the police sought to apprehend the passenger claimant. Any other reading of § 13-911 and *Henery v. City of Omaha, supra*, would produce an illogical result and frustrate the obvious intent of the statute that those who encourage the driver to flee or are themselves being sought by the police not be rewarded for their behavior. See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005) (in construing statute, court must look at statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on statute reasonable construction which best achieves purpose of statute, rather than construction defeating statutory purpose). We now examine the district court's finding that Abraham was not an innocent third party under the two-prong test set forth in *Henery v. City of Omaha, supra*.

Whether Abraham promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel is clearly a finding of fact to be made by the trial court and will not be disturbed on appeal unless clearly wrong. See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004). The district court found:

> Abraham was the passenger who told Witt that she had an arrest warrant outstanding. She had charges pending in Douglas County for: failure to appear; driving under suspension; and leaving the scene of a property damage accident. Her statement to Witt conveyed during the time that they were being followed by the police, with knowledge that the police were "running the plates", in light of the facts recited above, supports an inference that Abraham provoked or advocated Witt to start or to continue his flight.

As stated previously, the trial court acknowledged that Witt gave inconsistent accounts of the chase but found Witt's custodial statement to be the most credible version of events, because it was given within hours of the events themselves. During Witt's police interview on December 8, 2002, he told investigators that Abraham said: "[H]urry up and get away from 'em 'cause I got

a warrant, I got a warrant in Sarpy County, and I got a warrant somewhere else." Also admitted into evidence were a Douglas County bench warrant for Abraham for failure to appear and complaints charging Abraham with driving under suspension, leaving the scene of a property damage accident, and improper lane change—which evidence circumstantially supports the veracity of Witt's original statement to police that Abraham promoted, provoked, or persuaded Witt to flee. Therefore, with this evidence, we affirm the district court's finding that "Abraham provoked or advocated Witt to start or continue his flight," because such finding is not clearly wrong. Thus, Abraham lost her innocent third party status, and her estate is barred from recovering under § 13-911.

We note that there was considerable testimony that police officers routinely seek to apprehend all occupants of a stolen vehicle for a number of reasons—although, there was no evidence that the officers were aware that Abraham was in the Lincoln and was wanted on outstanding warrants. Because we have already found that Abraham was not an innocent third party, we need not address whether this evidence establishes that she was a person who was sought to be apprehended in the fleeing Lincoln. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court need not address issue not necessary to decision).

CONCLUSION

For the reasons discussed above, we affirm the trial court's decision.

AFFIRMED.

JOHN DAVIS, APPELLEE AND CROSS-APPELLANT, V. CRETE CARRIER CORPORATION AND TRANSPORTATION CLAIMS, INC., ITS WORKERS' COMPENSATION INSURER, APPELLANTS AND CROSS-APPELLEES.

725 N.W.2d 562

Filed December 12, 2006. No. A-05-1328.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers'

Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
5. ____: ____. In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.
6. **Workers' Compensation: Waiver: Appeal and Error.** A party appealing from an order of the Nebraska Workers' Compensation Court waives all allegations of error not assigned in its application for review.
7. **Judgments.** The meaning of a judgment is determined, as a matter of law, by its contents.
8. ____. In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used.
9. ____. If the language of a judgment is ambiguous, there is room for construction.
10. ____. In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record.
11. **Judgments: Words and Phrases.** A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings. However, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
13. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits.
14. **Workers' Compensation.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Reissue 2004) is a question of fact.
15. ____. A reasonable controversy under Neb. Rev. Stat. § 48-125 (Reissue 2004) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

16. **Workers' Compensation: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Reissue 2004), an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
17. **Workers' Compensation: Attorney Fees.** Where there is no reasonable controversy, Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes the award of attorney fees.
18. **Workers' Compensation: Attorney Fees: Interest.** An award of attorney fees is a prerequisite before interest on the compensation amount due to a claimant may be awarded under Neb. Rev. Stat. § 48-125(2) (Reissue 2004).

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Raymond P. Atwood, Jr., and Eric B. Brown, of Atwood, Holsten & Brown, P.C., L.L.O., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

John Davis filed a motion in the Nebraska Workers' Compensation Court against Crete Carrier Corporation and its workers' compensation insurer, Transportation Claims, Inc. (collectively the Appellants), seeking to assess waiting-time penalties, interest, and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). Davis alleged that the Appellants unilaterally stopped paying temporary total disability benefits which he was awarded under a February 2, 1993, award on rehearing. Davis asserted entitlement to ongoing temporary total disability benefits from October 1994, when his indemnity benefits for temporary total disability stopped, until the hearing on the motion, or at least October 2, 2003, when he filed the motion. Davis also claimed there was no reasonable controversy regarding the Appellants' liability. The trial judge denied Davis' motion. Davis appealed and the Appellants cross-appealed to a Nebraska Workers' Compensation Court three-judge review panel. The Appellants have appealed to this court from the review panel's order of reversal and remand on review, and Davis has cross-appealed. For the reasons set forth herein, we affirm in part, and in part reverse.

BACKGROUND

Davis sustained a compensable back injury on March 26, 1989, while employed by Crete Carrier Corporation. On February 2, 1993, after other proceedings not relevant to the present appeal, the compensation court entered an award on rehearing. With regard to disability, the court determined, in paragraph III of the award, as follows:

> At the time of said accident and injury [Davis] was receiving an average weekly wage of $501.52 being sufficient to entitle him to benefits of $245.00 per week for a period of 105-1/7 weeks for temporary total disability compensation and thereafter and in addition thereto the sum of $117.02 per week for 10 weeks of permanent partial disability compensation and thereafter and in addition thereto the sum of $245.00 per week from and including June 15, 1991 to and including the date of this rehearing on September 28, 1992 for total disability compensation and thereafter and in addition thereto the sum of $245.00 per week for so long in the future as [Davis] shall remain totally disabled as a result of said accident and injury. When [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury.

The court awarded certain medical and hospital expenses, including future medical and hospital services and such treatment "as may be reasonably necessary as a result of said accident and injury." In paragraph IX of the award, the court stated, "[Davis] is still entitled to vocational rehabilitation services at such time as he is able to participate in said services. If the parties are unable to eventually agree on the nature and/or extent of said vocational rehabilitation services, either party may request a hearing on this issue." In paragraph XII of the award, the court stated, "When [Davis'] total disability ceases if thereafter the parties cannot agree on the extent of [Davis'] disability, if any, then a further hearing may be had herein on the application of either party."

In November 1993, the compensation court entered an order, stating that "[p]ursuant to the stipulation of [Davis] and [the Appellants], received November 18, 1993, [the Appellants are]

hereby ordered to pay to [Davis] temporary disability compensation while [Davis] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan of which the stipulation is a part." The order is dated November 23, 1993, but is file stamped November 18. The record shows that Davis participated in a training program at a motorcycle mechanics' institute in Phoenix, Arizona, from December 13, 1993, through October 28, 1994.

The Appellants began paying Davis permanent partial disability benefits on October 29, 1994. On December 29, the Appellants stopped all disability payments to Davis after they had paid 300 weeks of benefits.

On October 2, 2003, Davis filed a motion seeking an order to assess waiting-time penalties, interest, and attorney fees pursuant to § 48-125. Davis alleged that on February 2, 1993, he received a running award of temporary total disability benefits, and that in 1994, the Appellants unilaterally stopped paying such benefits to Davis. Davis alleged that the Appellants were in arrears and liable to him for such delinquent benefits from the date of termination of payment to the date of the hearing on his motion. Davis further alleged that there was no reasonable controversy regarding the Appellants' liability to him and that the Appellants were thus also liable to him for waiting time, interest, and attorney fees for all delinquent payments due. Davis asked the court to sustain his motion, determine the delinquencies of the Appellants, and order the Appellants to pay waiting-time penalties, interest, and attorney fees.

The Appellants filed a motion for summary judgment on August 31, 2004. The Appellants alleged that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. The Appellants alleged that they paid to Davis the benefits ordered by the court on February 2 and November 23, 1993, and that the November 23 order superseded or modified the February 2 award on rehearing. The Appellants also asserted that Davis' claim for further benefits was barred by the statute of limitations set forth in Neb. Rev. Stat. § 48-137 (Reissue 2004), the law-of-the-case doctrine, the doctrine of res judicata, the doctrine of issue preclusion, the doctrine of laches, and the doctrine of unclean hands. The

Appellants asserted that the compensation court had jurisdiction pursuant to Neb. Rev. Stat. § 48-161 (Reissue 2004) to decide any issue ancillary to the resolution of Davis' right to compensation benefits, including the issues raised by the Appellants in their motion for summary judgment.

Following an evidentiary hearing, the compensation court entered an order overruling the Appellants' motion for summary judgment on September 29, 2004. The court concluded that the 2-year statute of limitations does not apply to a case where a petition has been filed and an award entered. The court found that the doctrines of issue preclusion, res judicata, and the law of the case did not act to bar Davis' claim. The court observed that it was not a court of equity and had no equitable powers, thus concluding that it was unable to apply the equitable doctrines of laches and unclean hands. Finally, with regard to whether there was a reasonable controversy concerning Davis' right to relief, the court found that it must make a factual determination.

The compensation court heard Davis' motion for waiting-time penalties, interest, and attorney fees on September 30, 2004. In addition to receiving various exhibits offered by the parties, the court heard testimony from Davis. Davis testified that he received certain benefits from the Appellants due to a work-related injury he sustained in 1989 and that those benefits ceased around the end of November 1994. Davis testified that from the end of November 1994 until September 2003, he neither received nor requested any further benefits from the Appellants. Davis testified that he did not contact any representative of the Appellants during that time because he was told by his attorney in approximately 1993 or 1994 that he had "X number of weeks of benefits and that would be it." When he stopped receiving indemnity checks, Davis assumed, based on what his attorney had told him, that that was "the end of the number of weeks that [he was] entitled to" receive.

Davis testified that he sought employment in the field of motorcycle mechanics after completing his vocational rehabilitation training but was unable to locate employment with a motorcycle dealership. The record shows that after December 1994, Davis was employed as a taxi driver by, or leased a vehicle to,

various cab companies for certain periods between approximately 1995 and 2000. Under the lease agreements, Davis had other individuals available to drive the cabs and only drove occasionally himself because of his back injury. At the time of the hearing on Davis' motion, Davis was not employed or operating under any type of lease agreement with any cab company. Davis testified that he lost money in his endeavors as a cab-driver/lessor, eventually filing for bankruptcy in September 2000. Davis testified that he did not disclose all of the information regarding the cab company leases in certain interrogatories from the Appellants because he thought the questions were asking whether he was actually employed by someone.

One exhibit received by the court was a letter, dated November 23, 1993, from Dr. William Fulcher, one of Davis' treating physicians, to a rehabilitation services professional. In the letter, Dr. Fulcher stated that Davis had reached maximum medical improvement and had a 25-percent medical impairment rating of the body as a whole.

The compensation court entered an order on May 5, 2005, overruling Davis' motion. The court outlined Davis' claim and found the evidence uncontradicted that the Appellants stopped all payments to Davis on December 29, 1994, after having paid 300 weeks of benefits. The court observed that Davis' position assumed a running obligation on the part of the Appellants to make those payments, making the following findings in that regard:

> 1. On February 2, 1993, an Award on Rehearing was entered which provided that [Davis] was entitled to receive weekly benefits through the date of rehearing (September 28, 1992) for a total of 182 and 4/7 weeks. For 10 weeks, in the middle part of this 182 and 4/7 week period, [Davis] was found to be permanently partially disabled. For the remainder of the time the reviewing panel found, in Paragraph II of the Award on Rehearing, that [Davis] was temporarily partially disabled. It is significant that the last part of Paragraph II stated that [Davis] was temporarily totally disabled "to the date of this rehearing on September 28, 1992, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time." . . .

2. References to "total disability" or "totally disabled" in later portions of the Award on Rehearing, when viewed in the entire context of the document, are references to the periods of temporary total disability as discussed in Paragraph 1, above. As a result, when [Davis] reached maximum medical improvement as established by Dr. Fulcher on November 23, 1993, [Davis] was no longer "temporarily totally disabled", but became permanently disabled. The extent and nature of the permanent disability would, of course, be an issue to be decided in the future by the Nebraska Workers' Compensation Court, if necessary. That was the reason for the language by the review panel which allowed for further hearing on the application of either party. This finding was further buttressed by the review panel[']s finding that "[w]hen [Davis'] total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury." The order entered on November 18, 1993, pursuant to stipulation by the parties, did nothing to change the analysis set forth above except for continuing temporary disability payments until [Davis] finished the agreed upon and Court ordered vocational retraining.

3. [Davis] argues that in the cases of Sheldon-Zimbelman v. Bryan Mem. Hosp., 258 Neb. 568, 604 N.W.2d 396 (2000) and Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998), it is required that the [Appellants] file an application to modify the Award on Rehearing before terminating benefits. However, both those cases dealt with awards of permanent disability, not temporary disability as found in Paragraph II of the Award on Rehearing[,] and do not apply to the circumstances of this case. Such a result would leave this Court subjected to hundreds, if not thousands, of potential modification actions which would need to be filed before various plaintiffs attained maximum medical improvement in order to change the benefit amounts on the date of maximum medical improvement. Such an interpretation is simply not a feasible interpretation of Sheldon-[Z]imbelman and Starks,

supra[,] and has never been applied by this Court for running awards of temporary total disability. When a running award of temporary total disability is entered, a hearing is not necessary unless the parties disagree about the extent and nature of any permanent partial disability. When the subsequent hearing takes place, if requested, the decision retroactively applies back to the point in time when the plaintiff was no longer temporarily totally disabled.

4. Neb. Rev. Stat. § [48-121(2)] establishes that, unless an injured employee is permanently and totally disabled, the employee's entitlement to benefits for partial disability is limited to a total of 300 weeks, less any weeks of total disability indemnification received. Under this statutory regime, the [Appellants] fulfilled their statutory obligation under the language of the Award on Rehearing as interpreted above. It is clear from the evidence that, when [Davis] attained maximum medical improvement on November 23, 1993, he was not permanently and totally disabled. In fact, he was able to successfully complete his vocational retraining program, and although it does not appear that he was financially successful with some of his business endeavors, he worked for many years prior to his filing of the present motion which is at issue in this case. It is the finding of this Court that such work involved "suitable gainful employment" as those words are meant to be interpreted pursuant to Neb. Rev. Stat. § 48-162.01. [Davis] is entitled to no additional benefits from the [Appellants]. That is evidently what he and counsel thought for the good many years that passed from the date of last payment to the date of filing of the pending motion.

With regard to Davis' claim for waiting-time penalties and attorney fees, the compensation court determined there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnification benefits to Davis after 300 weeks' payments were made. The court stated that even if it was assumed for the purpose of argument that those added payments were owed to Davis, there was certainly a reasonable controversy with respect to that obligation. The court stated that it was aware of no case law addressing factual circumstances

similar to those of the present case, stating further, "It is, at best, only an open legal question with respect to whether or not added payments were owed. However, as set forth above, no such obligation existed." The court again stated its findings as set forth in the ruling on the Appellants' motion for summary judgment with regard to the various affirmative defenses asserted by the Appellants. The court overruled Davis' motion in its entirety.

Davis filed an application for review on May 18, 2005, asserting that the compensation court erred in making certain factual and legal findings. The record before us includes the briefs filed by the parties before the review panel and shows that the Appellants assigned and argued certain errors on cross-appeal.

The three-judge review panel of the compensation court entered an order of reversal and remand on September 30, 2005. The review panel stated:

> The [Appellants] maintain that they are only required to pay 300 weeks of benefits and that the effective method to terminate a running award of benefits pursuant to Neb. Rev. Stat. § 48-141 has been satisfied by the stipulation and order of the parties entered November 23, 1993 . . . . The [Appellants] argue this order and stipulation satisf[y] the requirement of an "agreement of the parties with the approval of the Nebraska Workers' Compensation Court" pursuant to § 48-141 to terminate a running award of benefits.
>
> Interpretation of a stipulation and an order is a question of law. The review panel finds that the stipulation of the parties . . . and the Order of the Workers' Compensation Court [do] not act as an "agreement of the parties" to terminate benefits for a running award pursuant to § 48-141. Rather the stipulation and order [go] to paragraph IX of the award on rehearing dated February 2, 1993, . . . which allows [Davis] to receive indemnity benefits while undergoing vocational rehabilitation.
>
> The law in Nebraska is that a workers' compensation award remains in full force and effect, as originally entered[,] until the award is modified pursuant to the procedures set forth in § 48-141. The correct procedure to modify an award is set forth in the cases of ITT Hartford v.

Rodriguez, 249 Neb. 445, 543 N.W.2d 740 (1996); Starks v. Cornhusker Packing Co., 254 Neb. 30, 573 N.W.2d 757 (1998) and Hagelstein v. Swift-Eckrich Div. of ConAgra, 261 Neb. 305, 622 N.W.2d 663 (2001). Those cases hold that there must be a hearing to terminate benefits. Benefits may not be summarily terminated as was done in this case.

A review of the record by the review panel shows that to date no party has filed a motion to modify the award on rehearing of February 2, 1993, nor is there an agreement by the parties with Court approval pursuant to § 48-141 assessing and determining [Davis'] loss of earning capacity. Those procedures must be undertaken pursuant to § 48-141 and the above case law before benefits can be terminated. Benefits cannot be retroactively terminated prior to the date of the filing of the petition to modify. See Starks, *supra*.

The review panel finds that the trial court misstated the law in the state of Nebraska to be that an application to modify is not required when terminating temporary disability benefits. The review panel finds that whether a party is terminating "temporary total disability benefits" or "permanent total disability benefits," it is a distinction without a difference. The correct statement of the law specifically requiring a modification application to terminate payment of benefits under an award is set forth in Sheldon-Zimbelman v. Bryan Mem. Hosp., 258 Neb. 568, 604 N.W.2d 396 (2000) and Starks, *supra*. The review panel finds that the trial court was incorrect in its application of the law concerning modification proceedings of a running award and that the matter should be reversed and remanded to the trial court for a determination as to the amount due [Davis] for enforcement of the award on rehearing dated February 2, 1993 for outstanding indemnity benefits, and for a determination as to penalties, if any, due and owing.

With regard to the Appellants' cross-appeal, the review panel found that the trial court was correct in its interpretation of the law concerning the issue of the statute of limitations in this case. Citing *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001), the review panel stated that once a petition has been filed within the appropriate period of time, no further statute of

limitations issue can arise during the pendency of the action. The review panel awarded Davis a $500 attorney fee together with interest as allowed by law for defending against the cross-appeal.

The Appellants subsequently perfected their appeal to this court, and Davis has cross-appealed.

ASSIGNMENTS OF ERROR

The Appellants assert, consolidated and restated, that the review panel erred in (1) reversing the trial court's order overruling Davis' motion to assess waiting-time penalties, interest, and attorney fees and (2) failing to apply the 2-year statute of limitations.

On cross-appeal, Davis asserts, consolidated and restated, that the review panel erred in (1) failing to find that no reasonable controversy existed and to remand with directions to determine the amount of waiting-time penalties due under § 48-125, (2) failing to award Davis attorney fees and interest for proceedings before the review panel and to remand with directions to award attorney fees and interest for proceedings before the trial court, and (3) failing to address and reverse certain findings made by the trial court and assigned as error to the review panel by Davis.

STANDARD OF REVIEW

[1-4] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* Statutory interpretation presents a question of law. *Id.* With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

Errors Preserved for Appeal.

We first address Davis' argument that the Appellants have preserved only the statute of limitations issue for appeal to this court because additional issues raised by the Appellants on appeal to this court were not raised by the Appellants in their cross-appeal to the review panel.

[5,6] It is true that in reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal. *Dietz v. Yellow Freight Sys.*, 269 Neb. 990, 697 N.W.2d 693 (2005). It is also true that a party appealing from an order of the Nebraska Workers' Compensation Court waives all allegations of error not assigned in its application for review. *Id.* The issue of the trial court's ruling on Davis' motion for waiting-time penalties, attorney fees, and interest, while not raised by the Appellants in their cross-appeal to the review panel, was clearly raised by Davis in his application for review and was considered by the review panel. Because the issue of the trial court's ruling on Davis' motion was raised before and ruled on by the review panel, the Appellants are entitled to raise on appeal to this court the review panel's reversal of the trial court's ruling. See *id.* Davis' arguments to the contrary are without merit.

Necessity of Application to Modify.

The Appellants assert that the review panel erred in reversing the trial court's order overruling Davis' motion to assess waiting-time penalties, interest, and attorney fees. The Appellants argue that they acted in compliance with the February and November 1993 orders when they paid temporary total disability benefits to Davis during his vocational rehabilitation plan and then converted their payments to permanent partial disability benefits after Davis successfully completed his retraining. In other words, the Appellants assert that the review panel was incorrect in finding that an application to modify the award was necessary to terminate Davis' prior award of temporary total disability benefits.

We conclude that the November 1993 order reflected an agreement of the parties concerning the duration of Davis' temporary total disability award, and we therefore reverse the ruling of the review panel.

Neb. Rev. Stat. § 48-141 (Reissue 2004) provides, in relevant part:

> [T]he amount of any agreement or [workers' compensation] award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . .

There is no assertion in the present case that an application to modify was ever filed by any of the parties. As a result, the issue presented is whether the November 1993 order satisfied § 48-141 (Cum. Supp. 1992) as an agreement of the parties with the approval of the compensation court concerning Davis' temporary total disability benefits, as the trial court concluded, or whether the November 1993 order dealt solely with vocational rehabilitation, as the review panel concluded.

[7-11] Resolution of this issue requires us to determine the meaning of the November 1993 order. The meaning of a judgment is determined, as a matter of law, by its contents. See *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used. *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996). If the language of a judgment is ambiguous, there is room for construction. *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995). In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record. *Id.* A judgment is ambiguous if a word, phrase, or provision has at least two reasonable but conflicting meanings. See, *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999); *Kerndt v. Ronan, supra.* However, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the

conclusion that the instrument is ambiguous. *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000). We find it necessary to review the entire record to determine the meaning of the November 1993 order.

It is important to note that in the present case, Davis' award of temporary disability benefits in the February 1993 order was an award of temporary total disability benefits. That order provided that Davis was entitled to temporary total disability benefits "for so long in the future as [Davis] shall remain totally disabled as a result of [this] accident and injury." In November 1993, the parties filed a vocational rehabilitation plan that included a stipulation. The stipulation specifically provided that Davis and the Appellants "do agree to the above [vocational rehabilitation] plan and hereby stipulate to the entry of an Order requiring the payment of temporary disability compensation to [Davis] *while [he] is undergoing the vocational rehabilitation plan*." (Emphasis supplied.) "Pursuant to [this] stipulation," the trial court entered an order which provided only that the Appellants were "hereby ordered to pay to [Davis] temporary [total] disability compensation *while [he] is undergoing vocational rehabilitation and maintaining satisfactory progress in the plan*." (Emphasis supplied.)

The effect of the November 1993 order, and the underlying stipulation of the parties, was solely to modify the duration of Davis' temporary total disability award. Under the terms of the February 1993 order, Davis was entitled to receive temporary total disability benefits and was entitled to receive vocational rehabilitation, and no further court order was necessary to accomplish either, so long as the parties were able to reach an agreement. The parties did reach an agreement, and the November order did not provide Davis any additional rights or benefits not already provided in the February order. Had the November order never been entered, Davis would still have been entitled to temporary total disability benefits and vocational rehabilitation. The only effect of the November order is that the trial court specifically changed the duration of Davis' temporary total disability award from "for so long in the future as [Davis] shall remain totally disabled" to "while [Davis] is undergoing vocational rehabilitation."

The present case differs from cases such as *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996), precisely because of the language of the trial court's November 1993 order and the underlying stipulation of the parties. In *ITT Hartford*, the employee received an award of temporary total disability benefits " 'for so long in the future as [the employee] shall remain temporarily totally disabled as a result of [the] accident.' " 249 Neb. at 446, 543 N.W.2d at 741. The employee's treating physician later informed the employer that the employee had reached maximum medical improvement, whereon the employer stopped paying temporary total disability benefits and began making permanent partial disability payments. The Nebraska Supreme Court ultimately held that the original award had never been modified by the compensation court pursuant to § 48-141 (Reissue 1993) and that the original award remained in full force and effect. The Supreme Court also held that the employer was not free to unilaterally determine, based on information received from the physician, that the employee was no longer temporarily totally disabled.

In the present case, we find as a matter of law that the November 1993 order modified the duration of the prior award of temporary total disability benefits. We conclude that the review panel erred in reversing the trial court's conclusion that a specific application to modify was not necessary in this case, because § 48-141 (Cum. Supp. 1992) specifically provided that a periodic award may be modified by agreement of the parties approved by the court and because the November 1993 order and underlying stipulation satisfied the statute. As such, we reverse the review panel's determination that this issue be remanded to the trial court for a determination as to the amount due Davis for enforcement of the award and for a determination as to penalties due and owing.

Application of Statute of Limitations.

[12] The Appellants assert that the review panel erred in failing to apply the 2-year statute of limitations in § 48-137 to bar Davis' enforcement motion for penalties, interest, and attorney fees. Given the result reached above, we need not consider this assignment of error. An appellate court is not obligated to

engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

Failure to Award Waiting-Time Penalties.

[13-16] In his cross-appeal to this court, Davis asserts that the review panel erred in failing to find that no reasonable controversy existed and to remand with directions to determine the amount of waiting-time penalties due under § 48-125. Section 48-125 authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819. Whether a reasonable controversy exists under § 48-125 is a question of fact. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

The trial court in this case determined that there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnification benefits to Davis after 300 weeks' payments were made. This finding was assigned as error by Davis in his application for review. The review panel did

not explicitly address the trial court's finding of a reasonable controversy, but it did reverse the order overruling Davis' motion and remand the matter to the trial court to determine the amount of benefits due and owing for indemnity as a result of the award on rehearing and to determine the amount of penalties, if any, due and owing pursuant to § 48-125. We have reversed this determination by the review panel. Accordingly, we find no error in the review panel's failure to find that no reasonable controversy exists, and we find that the trial court was correct in finding that there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnity benefits.

Failure to Award Attorney Fees and Interest.

Davis asserts that the review panel erred in failing to award Davis attorney fees and interest for proceedings before the review panel and to remand with directions to award attorney fees and interest for proceedings before the trial court.

We first observe that the review panel did award an attorney fee of $500 for Davis' defense against the Appellants' cross-appeal to the review panel. Davis argues, however, that the review panel should have also awarded him an attorney fee for his successful appeal of the trial court's denial of his motion, not just for his defense against the cross-appeal. With regard to an employee's appeal to the review panel, § 48-125(1) provides, in relevant part:

> If the employee files an application for a review before the compensation court from an order of a judge of the compensation court denying an award and obtains an award or if the employee files an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review, and the Court of Appeals or Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Court of Appeals or Supreme Court.

The present case does not involve a situation where an "employee file[d] an application for a review before the compensation court from an order of a judge of the compensation court denying an award and obtain[ed] an award." See *id.* Nor does the present case involve a situation where an "employee file[d] an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due [was] disputed and obtain[ed] an increase in the amount of such award." See *id.* Instead, Davis brought the present motion as a proceeding for enforcement of the award obtained by Davis in February 1993. Davis has not obtained a new award of benefits by virtue of the present motion. In fact, we have determined, as a matter of law, that the November 1993 order modified the duration of the prior award of temporary total disability benefits. It cannot be said that Davis has "obtained an award" or "obtained an increase" in an award. Accordingly, Davis was not entitled to an attorney fee for his appeal of the trial court's denial of his motion.

[17,18] With regard to Davis' assertion that the review panel erred in failing to award him attorney fees at the trial court level (or to direct the trial judge to do so on remand), we observe that where there is no reasonable controversy, § 48-125 authorizes the award of attorney fees. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). We further observe that an award of attorney fees is a prerequisite before interest on the compensation amount due to a claimant may be awarded under § 48-125(2). *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001). We have already determined that the trial court was correct in finding that there was a reasonable controversy with respect to the Appellants' obligation to pay additional indemnity benefits. Because there was a reasonable controversy, Davis was entitled to neither an award of attorney fees nor interest at the trial court level.

Failure to Address Assigned Errors About Evidentiary Matters.

Finally, Davis asserts that the review panel erred in failing to address and reverse certain findings made by the trial court and assigned as error to the review panel by Davis. The findings assailed by Davis include the trial court's finding that Davis

reached maximum medical improvement on November 23, 1993. Essentially, Davis argues that the trial court received certain evidence and made certain findings amounting to a modification of the award on rehearing, when, in fact, the proceeding before the trial court was not one for modification. Davis argues that the review panel should have reversed the specific findings of the trial court that amounted to a modification of the award on rehearing and found that the trial court's receipt of the evidence relating to modification issues was in error.

The findings and evidence which Davis attacks were not relevant or considered by this court in reaching our conclusion that the November 1993 order modified the duration of the prior award of temporary total disability benefits. Accordingly, we need not address this assignment of error further on appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

CONCLUSION

For the foregoing reasons, the determination of the review panel is hereby affirmed in part and in part reversed as set forth above.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
JODY LYNN WIEMER, APPELLANT.

725 N.W.2d 416

Filed December 12, 2006. No. A-06-367.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.
3. **Pleas: Words and Phrases.** The terms "no contest" and "nolo contendere" have the same meaning, with no difference in their connotation, and both terms are regularly used to convey the same concept.
4. **Pleas.** For practical purposes, a plea of nolo contendere is a plea of guilty, or the functional or substantive equivalent of such a plea. In other words, a plea of nolo contendere has the same effect as a plea of guilty with regard to the case in which it is entered.

5. ____. To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
6. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
7. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
8. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Alan G. Stoler, of Law Office of Alan G. Stoler, P.C., L.L.O., for appellant.

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

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Jody Lynn Wiemer appeals from the sentence imposed, pursuant to a plea of no contest, for theft by unlawful taking. Because the district court's colloquy in the proceeding did not require Wiemer to make admissions beyond her no contest plea, we reject her claim that the plea was not voluntarily, intelligently, and knowingly made. We also find no abuse of discretion in the sentence imposed. Accordingly, we affirm.

BACKGROUND

While employed as a clerical worker for Batterton Waterproofing from January 2003 through October 2004, Wiemer unlawfully diverted approximately $23,558. The State commenced a prosecution for theft by unlawful taking, a Class III felony, in the district court for York County. On January 9, 2006, Wiemer entered a plea of no contest. In the course of the proceedings regarding that plea, the trial court inquired:

> Now that plea admits that you were in York County, Nebraska, during the period on or about February 4th, 2003, to on or about October 1st of 2004. That you took or exercised control of movable property of another, that you intended to deprive the owner of that property thereof, and the other person involved — the owner is Batterton Waterproofing, all according to one scheme or course of conduct, and that the property involved had a value of more than $1,500. Now you're admitting all of that's true for purposes of allowing me to find you guilty without a trial but not for any other purpose. Do you understand that?

Wiemer responded affirmatively.

After an extensive colloquy, the district court accepted Wiemer's plea of no contest and adjudged Wiemer guilty as charged. The court ordered a presentence investigation. After a later sentencing hearing, the court sentenced Wiemer to 5 to 8 years' imprisonment with credit for 1 day served and ordered her to pay the costs of prosecution. Other facts relating to the sentence imposed by the court below will be set forth in the analysis section where appropriate.

Wiemer timely appeals.

ASSIGNMENTS OF ERROR

Wiemer asserts that her plea was not voluntarily, intelligently, and knowingly made. Wiemer also claims that the district court abused its discretion in imposing an excessive sentence.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

[2] When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

ANALYSIS

No Contest Plea.

Although Wiemer generally assigned that her plea was not made voluntarily, intelligently, and knowingly, her argument is more narrowly focused. She implicitly concedes that the trial court performed all of the functions required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and subsequent cases. Indeed, she contends that the trial court went too far and "required [her] to admit to the incriminating facts before accepting the no contest plea." Brief for appellant at 8. She argues that requiring a defendant to admit to a factual basis affirmatively on the record defeats the purpose of a no contest plea and that as a result, the plea was not voluntarily, intelligently, and knowingly made. Wiemer relies on *State v. Irish, supra*, as an accurate statement of the law concerning what a record must show to support a finding that a plea of no contest has been entered freely, intelligently, voluntarily, and understandingly. She provides no other authority for the proposition that the district court's inquiry in the instant case actually required her to admit to incriminating facts.

The State responds that when read in the context of the entire plea hearing, the district court, in the passage attacked by Wiemer, was simply ensuring both that Wiemer knowingly and intelligently understood the charge against her and that she voluntarily assented to it. We agree.

[3,4] As we have said before, the terms "no contest" and "nolo contendere" have the same meaning, with no difference in their connotation, and both terms are regularly used to convey the same concept. *State v. Obst*, 12 Neb. App. 189, 669 N.W.2d 688 (2003). For practical purposes, a plea of nolo contendere is a plea of guilty, or the functional or substantive equivalent of such a plea. In other words, a plea of nolo contendere has the same effect as a plea of guilty with regard to the case in which it is entered. *Id.* The difference between a plea of nolo contendere and a plea of guilty appears simply to be that while the

latter is a confession or admission of guilt binding the accused in other proceedings, the former has no effect beyond the particular case. *Id.*

[5] A guilty plea is valid only if the record affirmatively shows that a defendant understands that by pleading guilty, the defendant waives the right to confront witnesses against him or her, the right to a jury trial, and the privilege against self-incrimination, or otherwise affirmatively shows an express waiver of said rights. Thus, to support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing, including, in the absence of an express waiver of such rights by the defendant, whether the defendant understands that by pleading guilty, the defendant waives his or her privilege against self-incrimination, right to confront witnesses, and right to a jury trial. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

In the case before us, the question was framed not as to specific facts, but, rather, addressing the elements of the crime using only words essentially equivalent to the language of the statute creating the offense. The district court carefully explained to Wiemer that her no contest plea was admitting the allegations "for purposes of allowing [the court] to find [Wiemer] guilty without a trial *but not for any other purpose*." (Emphasis supplied.) When read in context, it is clear that the district court was simply examining Wiemer to ensure that she understood the charge against her and understood the effect of the plea of no contest.

Our view of the court's question is also supported by the fact that later in the plea colloquy, the court requested a factual basis from the prosecutor. The prosecutor responded with a lengthy exposition of the specific facts concerning the offense. Although the court offered both Wiemer and her counsel the opportunity

to comment on the factual basis provided by the prosecutor, they declined, and the court did not insist upon any comment from Wiemer regarding the specific facts. This bolsters our view that the question upon which Wiemer focuses on appeal was not intended to provide the factual basis for the plea.

We reject Wiemer's argument that her affirmative response to the court's question constituted an admission to any specific facts beyond her understanding both of the nature of the charge against her and of the effect of the plea of no contest.

Excessive Sentence.

In regard to Wiemer's assignment that the sentence imposed was excessive, she argues that the district court failed to make specific findings regarding the statutory sentencing factors and abused its discretion in imposing a sentence of imprisonment rather than probation. In the alternative, Wiemer argues that the court abused its discretion concerning the length of the sentence.

[6] Wiemer fails to cite, nor have we found, any authority for the proposition that a sentencing court is required to make specific findings in determining the sentence to be imposed. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). We find Wiemer's argument on this issue to lack merit.

[7,8] We next turn to Wiemer's arguments that she should have been sentenced to probation or that the length of her sentence of imprisonment was too long. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an

abuse of discretion. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

While Wiemer implicitly concedes that her sentence was within the statutory limits, she nonetheless argues that it was excessive, relying upon information from the presentence report. The report showed that Wiemer was a 36-year-old single mother caring for a 15-year-old child, that she had been receiving ongoing counseling, that she had been prescribed various medications and had been diagnosed as suffering from dissociative amnesia and major depression, that she had gained new employers who wanted her to continue in their employ, that she had been twice divorced, that she had obtained a diploma through the GED program, that both her parents had recently died, that she was in a stable relationship with a man whom she hoped to marry in the near future, and that she had previously been convicted of misdemeanor fraud, for which she paid a fine, and had been convicted of misdemeanor theft, for which she satisfactorily completed probation.

In response, the State focuses on Wiemer's previous conviction for theft by deception and notes that she was only a few months into her probationary period when she began to steal from the victim in the instant case. The State also argues that the crime in the instant case substantially affected the victim by resulting in a considerable drop in the company's credit rating, numerous late fees, and significant charges on the company's credit cards. The State also notes that Wiemer's actions have caused her former employer's personnel to reduce the area served by the company and to spend many months working evenings and weekends to find and rectify Wiemer's errors and that her actions have placed the ultimate existence of the company in jeopardy.

Wiemer's elaborate scheme required considerable effort to hide the transactions, contradicting Wiemer's claim that her thought processes were "significantly [a]ffected by her mental health condition." Brief for appellant at 11. The record demonstrates that the district court considered the full range of factors required by the controlling law. We find no abuse of discretion in the district court's refusal to utilize a sentence of probation or in the length of the imprisonment imposed.

CONCLUSION

We find that in the proceedings to determine whether to accept Wiemer's plea of no contest, the trial court's question regarding Wiemer's understanding of the nature of the crime and the effect of the plea did not require Wiemer to make an admission contrary to the nature of such a plea. We find no abuse of discretion in the imposition of imprisonment rather than probation or in the length of imprisonment imposed. We therefore affirm the judgment of the district court.

AFFIRMED.

R & S INVESTMENTS, A PARTNERSHIP, APPELLANT, V. AUTO AUCTIONS, LTD., A NEBRASKA CORPORATION, APPELLEE.

725 N.W.2d 871

Filed December 19, 2006. No. A-04-1098.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Easements.** The owner of a servient estate and the owner of a dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands.
5. ____. An owner whose land is burdened with a right-of-way, unless he or she has expressly agreed to the contrary, may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way. The use of the servient owner must be reasonable and not such as will injure, impair, or obstruct the enjoyment of the way by the grantee or subject him or her to extra labor and expense in keeping it in repair, and the owner of the way may restrict such use by the owner of the servient tenement as is inconsistent with the enjoyment of the easement.
6. **Easements: Conveyances.** The extent of an easement created by a specific grant is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances.

7. ____: ____. The possessor of land subject to an easement created by a conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.
8. **Easements: Words and Phrases.** An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner. The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself.
9. **Easements.** A servient owner of land subject to an easement may make such use of it as he or she sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose.
10. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
11. **Equity: Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
12. **Equity: Costs.** In equity actions, taxation of costs rests in the discretion of the trial court.
13. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.

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

Terry K. Barber for appellant.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

R & S Investments (R&S) holds an easement on the property of Auto Auctions, Ltd., for the use of two sanitary sewer lagoons and all necessary piping and connections to the lagoons. After acquiring the property on which R&S' easement lies, Auto Auctions relocated the easement by filling one of the original lagoons with dirt, constructing a new lagoon for use by both property owners, and providing R&S with the necessary connections to the new lagoon. R&S filed suit against Auto Auctions and Phil B. Durst, the president of Auto Auctions, in the district

court for Lancaster County, Nebraska, seeking a declaration of the parties' rights with respect to the easement, restoration of the original lagoon to its condition prior to being filled with dirt, and an injunction enjoining the defendants from interfering with R&S' use of the easement. George R. Day and Barbara D. Day, predecessors in interest to both R&S and Auto Auctions, were later named as third-party defendants. During trial, Durst was dismissed as an individual defendant. The district court entered judgment in favor of R&S, but it found that R&S was not entitled to the relief it sought. The court found R&S was entitled to have the relocated easement set forth in a new conveyance from Auto Auctions and ordered Auto Auctions to execute such new conveyance. The court subsequently dismissed the third-party complaint. For the reasons set forth herein, we affirm.

BACKGROUND

R&S and Auto Auctions are the owners of certain adjacent tracts of real property located in Lancaster County. Both tracts were originally owned by the Days. The property was then partitioned by the Days and sold. The Days sold the tract currently owned by R&S (Lot 32) to Skelly Oil Company in 1966. R&S acquired title to Lot 32 in 1983. The Days sold the other tract (Lot 31) to Auto Auctions in 2001.

At the time of their conveyance of Lot 32 to Skelly Oil, the Days executed an agreement granting an easement across Lot 31 to Skelly Oil "for a sanitary sewer lagoon and all necessary piping and connections thereto and [agreeing] to construct said lagoon for [Skelly Oil]." The agreement provided:

> 1. [The Days agree] to construct a sanitary sewer lagoon system on property owned by [the Days], said lagoon to be located no more than 500 feet from the south or east property lines of the parcel . . . conveyed to [Skelly Oil].
>
> 2. [The Days agree] that [Skelly Oil], its agents or employees, or any persons or entities under contract with it may enter onto said premises for the maintenance of said lagoon and for the purpose of constructing all portions thereof not agreed to be constructed by [the Days].
>
> 3. [Skelly Oil] agrees to provide its own piping from said lagoon to be constructed by [the Days] to the property line of [Skelly Oil].

> 4. [The Days agree] that said sanitary sewer lagoon to be constructed by [the Days] shall be constructed and built in accordance with the plans and specifications prepared and approved by [Skelly Oil] and presented to [the Days] for said purpose. [The Days agree] to begin said construction within ten (10) days after said plans and specifications are so presented by [Skelly Oil].
>
> 5. [The Days agree] to grant a permanent easement no less than 15 feet in width across [the Days'] property for the location, installation, maintenance and repair of the necessary pipes and fittings from [Skelly Oil's] property . . . to the location of said sanitary sewer lagoon, as well as an easement covering the property owned by [the Days] where said lagoon is located, authorizing [Skelly Oil's] continued use of said property for the maintenance and operation of a sanitary sewer lagoon.
>
> [6]. The legal description of the property to be covered by said easements shall be prepared by [Skelly Oil] at its sole expense.

The lagoon, consisting of two separate cells, was constructed per the agreement between the Days and Skelly Oil sometime in the late 1960's and was in use by R&S at the time of Auto Auctions' purchase of Lot 31.

In October 2001, counsel for the Days corresponded with R&S, indicating the pending purchase of Lot 31 by Auto Auctions and the Days' intent to close the lagoon based upon alleged concerns of the Nebraska Department of Environmental Quality (DEQ). The sale of Lot 31 to Auto Auctions took place in November 2001. A condition of the purchase agreement between the Days and Auto Auctions was that the Days were to relocate the lagoon and remove the easement from Lot 31 at the Days' expense. Although the Days did not remove the old lagoon or the easement, Auto Auctions proceeded with the purchase of Lot 31.

The south cell of the old lagoon was filled in with dirt in approximately March 2002. In April, a sewerline was installed running from the old lagoon to the new lagoon. During its construction, the new line was plugged and the sewage from Lot 32 continued to flow into the north cell of the old lagoon. Later in

2002, the plug was removed from the new sewerline, at which time the sanitary waste from Lot 32 began flowing to the new lagoon. The construction of the new lagoon and sewerline was completed at the expense of Auto Auctions. The new lagoon is located approximately 900 to 1,000 feet from the nearest corner of Lot 32.

R&S filed the present action against Auto Auctions and Durst on June 6, 2002. R&S alleged that the defendants, knowing that R&S had an easement expressly granted by deed, had interfered with R&S' use of such easement by filling part of the old sanitary sewage lagoon with dirt, reducing the capacity of the lagoon, and hindering R&S from full enjoyment of the lagoon as originally constructed. R&S sought an order declaring its rights as owner of the dominant estate to an easement for use of, access to, and maintenance of the lagoon which existed at the time R&S acquired title to the dominant estate and declaring Auto Auctions' land servient to R&S' estate. R&S also sought an order requiring the defendants to restore the lagoon to its condition prior to the time the defendants began filling the lagoon with dirt. Additionally, R&S sought an order enjoining the defendants from interfering with R&S' enjoyment of the easement for access to and use and maintenance of the old lagoon. R&S also asked for reimbursement of costs and such other relief as the court deemed just.

At some point prior to trial, the Days were named as third-party defendants in the case. The matter was bifurcated, and trial was held before the district court on December 9 and 10, 2003, with respect to the petition filed by R&S.

Evidence was presented at trial concerning the use and maintenance of the old lagoon and the construction and capacity of the new lagoon. Evidence was also presented concerning a meeting between Durst, the president of Auto Auctions, and a partner in R&S to discuss the old lagoon. The record shows that Durst proposed the construction of a new lagoon on Lot 31 for the disposal of waste from both Lots 31 and 32. The evidence is conflicting as to whether the partner in R&S "voiced no opposition or objection to this plan." There is nothing in the record to suggest that the disposal of waste from Lot 32 was interrupted in any way by the construction of the new lagoon or that, as of

the time of trial, the new lagoon had proved in any way to be inadequate for the disposal of waste from either lot.

The district court heard testimony from Jeremy Williams, an employee of Design Associates, the firm employed by Auto Auctions to design and construct the new lagoon. Williams testified that typically a lagoon is designed for a maximum "life" of 20 years, after which time liquid would need to be pumped from the lagoon and the sludge disposed of before continued use. Williams testified that considerations in designing the new lagoon included the flow rate of water coming into the lagoon from the contributing source or sources, as well as rates of precipitation, seepage of water from the bottom of the lagoon, and evaporation. Williams testified that there are restrictions on the allowable rate of seepage because of the danger of ground water contamination. Williams testified that one-eighth of an inch per day is the "maximum speed" allowed at which wastewater can leave a lagoon.

Williams testified that in the original calculations by Design Associates, a zero seepage rate was used because Design Associates did not receive clarification from the DEQ as to the particular seepage rate that the DEQ would require on the project. The original calculation also contemplated a waterflow rate into the new lagoon of 825 gallons per day and considered that the new lagoon would be used only by Auto Auctions. The rate of 825 gallons per day was derived from water bills for the previous business facility located on Lot 31, using an average rate over approximately 6 months. The calculations also contemplated that the new facility on Lot 31 would double its business in the first 5 years and maintain that level of business for the remaining 15 years of the life of the new lagoon. The calculations resulted in a design calling for a new lagoon of over 26,000 square feet.

Williams testified that plans were resubmitted for the new lagoon in order to accommodate input of wastewater from both Lots 31 and 32. The new calculations assumed a seepage rate of one-sixteenth of an inch per day, halfway between the "two extremes that are allowed." Design Associates contemplated waterflow from Lot 32 of 600 gallons per day, which figure was derived from a flowmeter installed on the well for Lot 32 over a period of about 2 to 3 months. Williams testified that due to the

different seepage rate used, the new calculations encompassing wastewater input from both properties yielded a required lagoon size of approximately 23,000 square feet. Nonetheless, the new lagoon was constructed based on the dimensions originally calculated of over 26,000 square feet. Williams testified that the design of the new lagoon was specifically intended to meet all of the requirements for both properties and, as he understood it, had sufficient capacity to meet those requirements. Williams testified that because the size of the lagoon as constructed was greater than required by the new calculations, the new lagoon might have sufficient capacity to accommodate input of an additional 400 gallons of water per day from Lot 32, still assuming a seepage rate of one-sixteenth of an inch per day, but that the question of whether the new lagoon would accommodate such additional input from Lot 32 would be "fairly close."

Curtis Christiansen, an employee of the DEQ, was involved in reviewing the plans for the new lagoon submitted by Design Associates and in investigating the condition of the old lagoon. Christiansen said that the DEQ had several concerns about the proper construction and operation of the old lagoon, including whether it had "proper separation between ground water and the bottom of the lagoon." Christiansen was asked to answer a hypothetical question concerning a two-cell lagoon, constructed approximately 40 years ago, with maintenance problems throughout its life; with weeds, trees, and other vegetation growing on the sides and bottom of the lagoon; and with one cell being unused for a substantial period of time. Christiansen testified that such a lagoon would likely no longer function properly under the rules and regulations of the DEQ.

The individual who laid the new pipeline to connect Lot 32 to the new lagoon was also involved in closing the old lagoon. He testified that before the south cell of the old lagoon was filled in, he ensured that the sewage from Lot 32 would divert to the north cell. He cleaned out the "channel" so water would flow into the north lagoon and used a skid loader to clean the weeds from the bottom of the north cell.

The district court entered judgment in favor of R&S on R&S' petition on May 14, 2004. In ruling on the matter, the court found the approach and reasoning of the Supreme Court of Colorado

in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), persuasive and appropriate to use in the present case and found that the Restatement (Third) of Property: Servitudes § 4.8(3) (2000) should apply. The court found:

> [C]hanges [Auto Auctions] made in relocating the lagoon were reasonable and done to permit normal use and development of its property. All expenses associated with relocating the lagoon and connecting [R&S] to it were born by [Auto Auctions] and . . . the relocation did not lessen the utility of the easement, increase [R&S'] burden's [sic] with respect to its use and enjoyment or frustrate the purpose for which the easement was created.
>
> [R&S] is not entitled to the relief it seeks. At most it is entitled to have the relocated easement set forth in a new conveyance from [Auto Auctions]. The document conveying the relocated easement should set forth the rights and responsibilities of the parties respecting the relocated easement consistent with the Restatement. In my judgement an easement as described by [Auto Auctions] in its Offer to Compromise would be appropriate and [Auto Auctions] is ordered to execute said easement.
>
> Because I am ordering some relief I believe I need to enter judgement for [R&S]. It is customary to tax costs to the party against whom a judgement has been entered. In this case, however, I believe it appropriate that the costs of this action be taxed to [R&S]. This is a lawsuit that never had to be brought. The relief I am granting is no more than what [Auto Auctions] told [R&S] it proposed to do in August of 2001 and [that] to which [R&S], at the time, voiced no objection. Restoring the pre-existing lagoons to the same condition they were in just before they were relocated is, in all probability, an impossibility given current DEQ requirements. Even if that were not the case, [R&S'] insistence that [Auto Auctions] do so, when there is no evidence it had been harmed in any way by the relocation of the lagoon[,] was, in my judgement, completely unreasonable.

The court stated that any further relief requested by R&S from Auto Auctions or by Auto Auctions from R&S not specifically

granted by the court's order was denied. The court gave Auto Auctions 30 days to file a motion to set the third-party petition for trial before the petition would be dismissed.

The district court entered an order on September 7, 2004, dismissing the third-party petition. R&S subsequently perfected its appeal to this court.

ASSIGNMENTS OF ERROR

R&S asserts, consolidated and restated, that the district court erred in (1) making certain findings of fact, (2) determining the proper remedy in this case, and (3) taxing costs to R&S.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[2,3] An action for injunction sounds in equity. *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

ANALYSIS

Findings of Fact.

R&S asserts that the district court erred in making certain findings of fact. Specifically, R&S asserts that the court erred in finding that (1) the original lagoon was inadequate, (2) R&S voiced no opposition to Auto Auctions' plans to construct a new lagoon, (3) R&S suffered no damage due to Auto Auctions' actions, (4) Auto Auctions' actions resulted in reasonable changes in the easement, and (5) restoration of the original lagoon was impossible. To the extent that the district court made these findings of fact based upon conflicting evidence, we give weight to

the fact that the court observed the witnesses and accepted one version of the facts over another. See *Rauscher v. City of Lincoln, supra*. In general, these findings are consistent with our own de novo review of the record, and we decline to disturb these factual findings on appeal.

Remedy.

R&S asserts that the district court erred in determining the proper remedy in this case. More specifically, R&S asserts that the court erred in finding that the proper remedy was the conveyance of a new easement rather than the injunctive relief requested.

R&S directs our attention to the Restatement (Third) of Property: Servitudes § 8.3(1) at 492-93 (2000), which provides as follows:

> A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public.

The district court in this case found that R&S was entitled to have the relocated easement set forth in a new conveyance from Auto Auctions and ordered Auto Auctions to execute such a conveyance. In reaching this conclusion, the court found the approach and reasoning of the Supreme Court of Colorado in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), persuasive and appropriate to use in the present case. In *Roaring Fork Club, L.P.*, the Colorado court adopted the Restatement, *supra*, § 4.8(3), as the correct statement of controlling legal principle for purposes of analyzing a case involving a ditch easement relocation or alteration.

The Restatement, *supra*, § 4.8(3) at 559, provides:

> Unless expressly denied by the terms of an easement . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the

> servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

A comment to this section further discusses the servient owner's right to change the location or dimensions of an easement and provides in relevant part:

> This rule applies unless expressly negated by the easement instrument. If the purchaser of an easement wishes to retain control over any change in location, the instrument should be drafted to accomplish that result.
>
> This rule is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder. It complements the rule that the easement holder may increase use of the easement to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate. [Citation omitted.] This rule is not reciprocal. It permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the easement to relocate the easement. The reasons for the rule are that it will increase overall utility because it will increase the value of the servient estate without diminishing the value of the dominant estate and it will encourage the use of easements and lower their price by decreasing the risk the easements will unduly restrict future development of the servient estate. In addition, permitting the servient owner to change the location under the enumerated circumstances provides a fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate.

Restatement (Third) of Property: Servitudes § 4.8 comment *f.* at 563 (2000).

[4-9] Nebraska case law provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights

to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands. *Kovanda v. Vavra*, 10 Neb. App. 486, 633 N.W.2d 576 (2001). This court has found that an owner whose land is burdened with a right-of-way, unless he or she has expressly agreed to the contrary, may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way. *Id.* Nebraska case law provides further that the use of the servient owner must be reasonable and not such as will injure, impair, or obstruct the enjoyment of the way by the grantee or subject him or her to extra labor and expense in keeping it in repair, and the owner of the way may restrict such use by the owner of the servient tenement as is inconsistent with the enjoyment of the easement. *Id.* The extent of an easement created by a specific grant is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances. *Id.* The possessor of land subject to an easement created by a conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance. *Id.* An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner. The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself. *Id.* A servient owner of land subject to an easement may make such use of it as he or she sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose. *Id.*

[10,11] The rule set forth in § 4.8 of the Restatement, *supra*, is not inconsistent with these principles of Nebraska law. An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006). Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Id.* An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt

administration as the remedy in equity. *Id.* Given the nature of the easement in question and the uncertain continued viability of the old lagoon, we conclude that the district court did not err in applying the Restatement (Third) of Property: Servitudes § 4.8 (2000) in resolving this case, rather than granting the injunctive relief requested by R&S.

The easement in the present case was conveyed to Skelly Oil by the Days in 1966. The conveyance document provides that the easement was for a sanitary sewer lagoon and all necessary piping and connections thereto. Although the conveyance provides that the Days were to construct a lagoon on their property "to be located no more than 500 feet from the south or east property lines of the parcel," the right to move the location of the easement is not expressly denied by the terms of the document. There is nothing in the conveyance document specifying that the grantee, Skelly Oil, wished to retain control over any change in location of the easement. We agree with the district court's assessment that the changes Auto Auctions made in relocating the lagoon were reasonable, especially given the environmental concerns. The record shows that the changes were made at Auto Auctions' expense and were done in the interest of normal development of the servient estate. There is nothing in the record to show that the changes significantly lessen the utility of the easement, increase the burdens on R&S in its use and enjoyment of the easement, or frustrate the purpose for which the easement was created. See Restatement, *supra*, § 4.8(3). The original easement was granted in order to provide R&S' predecessor the use and enjoyment of a sanitary sewer lagoon and all the necessary piping and connections thereto located on what is now Auto Auctions' property. The remedy fashioned by the district court ensures that R&S still has an easement for the use and enjoyment of a sanitary sewer lagoon on Auto Auctions' property with all the necessary connections. While the new lagoon is farther away from R&S' property than the old lagoon, R&S has not shown that the new lagoon is inadequate to meet its needs. The record also shows that continued viability of the old lagoon was in question. We conclude that the district court did not err in ordering the conveyance of a relocated easement or in failing to grant the relief requested by R&S.

Taxation of Costs.

[12,13] R&S asserts that the district court erred in taxing costs of the action to R&S. Neb. Rev. Stat. § 25-1708 (Reissue 1995) provides that "[w]here it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property." Neb. Rev. Stat. § 25-1711 (Reissue 1995) provides, in relevant part, that "[i]n other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." In equity actions, taxation of costs rests in the discretion of the trial court. *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980); *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585 (1954). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). The present action, of course, is an equity action, and we find no abuse of discretion in the district court's taxation of the costs of this action to R&S.

CONCLUSION

We decline to disturb the factual findings of the district court. The district court did not err in ordering the conveyance of a relocated easement or in failing to grant the relief requested by R&S. The district court did not abuse its discretion in taxing costs to R&S.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
HARRY J. MASTNE, APPELLANT.

725 N.W.2d 862

Filed December 19, 2006. No. A-05-911.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

2. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Sentences.** Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
6. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
7. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
8. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
9. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
11. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
12. **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.
13. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
14. **Statutes: Intent: Appeal and Error.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.
15. **Statutes.** It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there.
16. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.

Appeal from the District Court for Dakota County: ROBERT V. BURKHARD, District Judge, Retired. Sentences affirmed in part and in part vacated, and cause remanded with directions.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, Susan J. Gustafson, and Chris Seifert, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

INBODY, Chief Judge.

INTRODUCTION

Harry J. Mastne appeals from the order of the district court for Dakota County, Nebraska, ordering him to register as a sex offender for the remainder of his life and sentencing him to 12 to 20 years' imprisonment. For the reasons set forth herein, we affirm Mastne's sentences in part, and in part vacate the sentences and remand the cause with directions.

STATEMENT OF FACTS

On October 12, 2004, Mastne was charged by information with five counts of sexual assault of a child. In the information, the State alleged that between the dates of April 1 and July 26, 2004, Mastne subjected five children 14 years of age or younger to sexual contact.

Pursuant to a plea agreement, Mastne pled guilty to four of the five counts of sexual assault of a child and the State agreed to dismiss the fifth count. The State provided the following factual basis:

> [Mastne] confessed that he had sexually molested his foster daughter, J. M., by fondling her clitoris and buttocks. He claimed that this had happened a couple of times in June of 2004 while she was awake. He also . . . admitted to molesting J. M. in this manner two to three times within the month of July 2004.
>
> [Mastne] admitted that he had sexually molested the girls with the initials A. L. and M. L., his relatives, by also fondling their clitoris and buttocks and also their back and chest. He claimed he did this to A. L. and M. L. the weekend of July 23rd through 25th, 2004, while they were sleeping on the couch in the upstairs living room of his home. He also admitted that he molested A. L. and M. L.

> in this manner the weekend before in July 2004 and estimated that he had molested A. L. and M. L. a total of two to three times in the month of July 2004.
>
> Your Honor, during the interview [Mastne] then denied molesting any other victims. Deputy [Jeremy] Bermel then confronted [Mastne] with information that two other children — daycare children with the initials H. E. and H. E., who had been provided daycare in the Mastne home, had also been victimized by Mastne. And after being confronted with that information [Mastne] then confessed that he had also molested H. E., . . . born March 16th, 1993, and also H. E. born May 31st, 1995, by also fondling each girl[']s clitoris and buttocks in May and April of 2004 while they were each sleeping on the floor or in a chair in his home. He admitted that he did this to H. E. and H. E. at least two to three times in April and May of 2004.

The district court accepted Mastne's guilty pleas and found him guilty on four counts of sexual assault of a child. The State and Mastne made a joint motion for evaluation of Mastne by the Diagnostic and Evaluation Center of the Department of Correctional Services, and the district court so ordered.

A sentencing hearing was held on June 28, 2005. At the hearing, the district court judge noted the following:

> As everybody is aware, these victims were quite young. [One of the victims] was 12, [another victim] was 8, [another victim] was 6, [and another victim] was 9. Apparently [one of the victims'] mother is not seeking restitution, but is certainly concerned about the long-term effects on [her daughter].
>
> We've got [two of the victims who] have both been involved in counseling since these incidents. It was in the [presentence investigation report that one of the victims] has been wetting the bed and has nightmares. [One of the victims] wakes up sometimes at night crying.
>
> And the file also indicated [Mastne], I believe, admitted . . . inappropriate sexual contact with the victims probably on about 10 occasions each. Without going into too much details, he touched the private parts of . . . all four girls, as far as that goes, rubbed the vagina of [three of the victims]

> and it's sickening to repeat these things but this is what happened unfortunately.
>
> There's also something in the file from . . . a mental health therapist working with [two of the victims]. Apparently they had had about 11 different placements since their birth. And, as I say, they were only 8 and 6 years old, been in about 11 different places before this came up. Apparently been a lot of chaos and things like that. But with [their current] family they survived, thrived, and apparently began to heal. And they were adopted by their foster parents, then their grandfather harmed them and they knew that he shouldn't have been doing things like that. Somebody they had trusted. Apparently [one of the victims] has been somewhat shut down and [another victim] started having nightmares and separation anxiety.
>
> As regards the report from the Lincoln Regional Center indicates [Mastne] is a moderate risk [to] engage in future offenses relating to sexual misbehavior. It appears he has engaged in a more extensive pattern of sexual misconduct than he would actually admit. And he does not meet the criteria, according to the Lincoln Regional Center, to be classified as a . . . sexually violent offender.
>
> But — and one thing in [Mastne's] favor is his record. I think there are a couple of traffic matters and that was about the extent of it. But these are serious crimes. Any felony is a serious crime. These are Class IIIA [felonies] where the maximum is . . . five years.
>
> . . . .
>
> Also, looking through the statute, this — this offense is considered to be . . . an aggravated one since there was some penetration, however slight, and this is based on attachments to the report of May 4, 2005, from the diagnostic and evaluation center. I believe by finding the offense to be an aggravated offense [Mastne] is required to register under the sex offender registration act basically . . . for the rest of his life.

On each count of sexual assault of a child, Mastne was sentenced to 3 to 5 years' imprisonment, with the sentences to be

served consecutively. He was given credit for 337 days already served. Mastne has timely appealed to this court.

ASSIGNMENTS OF ERROR

Mastne alleges that the district court abused its discretion in imposing excessive prison sentences upon him and in finding that he was convicted of a registrable offense involving penetration and thus requiring him to register as a sex offender for the rest of his life.

STANDARD OF REVIEW

[1,2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[3,4] Statutory interpretation presents a question of law. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Id.*

ANALYSIS

Mastne first alleges that the district court abused its discretion when it imposed excessive prison sentences upon him. Mastne pled guilty to and was convicted of four counts of sexual assault of a child, a Class IIIA felony. Class IIIA felonies are punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Mastne was sentenced to 3 to 5 years' imprisonment on each count, with credit given for 337 days already served. The sentences were ordered to run consecutively. Therefore, Mastne's aggregate sentence was 12 to 20 years' imprisonment.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger, supra.* An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[5,6] Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *Id.*

In Mastne's brief, he asserts: "The record herein demonstrates that the sentencing judge injected his bias into the sentencing determination and made findings apart from the information, plea and factual basis." Brief for appellant at 9. He claims that "the sentence imposed ignored the positive steps taken by [Mastne] in rehabilitating himself and the genuine remorse he feels in regard to his crimes." *Id.* Mastne also suggests that "[u]nder these circumstances a reasonable person would believe that the sentencing judge substituted his personal bias and prejudices in place of the statutory guidance for determining an appropriate and just sentence" and that "[i]gnoring competent evidence and relying on allegations outside the information, plea and factual basis demonstrates an animus, bias and prejudice against [Mastne]." *Id.* at 11.

At Mastne's sentencing hearing, the district court judge noted the following:

> As everybody is aware, these victims were quite young. [One of the victims] was 12, [another victim] was 8, [another victim] was 6, [and another victim] was 9. Apparently [one of the victims'] mother is not seeking restitution, but is certainly concerned about the long-term effects on [her daughter].
>
> We've got [two of the victims who] have both been involved in counseling since these incidents. It was in the [presentence investigation report that one of the victims] has been wetting the bed and has nightmares. [One of the victims] wakes up sometimes at night crying.

> And the file also indicated [Mastne], I believe, admitted . . . inappropriate sexual contact with the victims probably on about 10 occasions each. Without going into too much details, he touched the private parts of . . . all four girls, as far as that goes, rubbed the vagina of [three of the victims] and it's sickening to repeat these things but this is what happened unfortunately.
>
> There's also something in the file from . . . a mental health therapist working with [two of the victims]. Apparently they had had about 11 different placements since their birth. And, as I say, they were only 8 and 6 years old, been in about 11 different places before this came up. Apparently been a lot of chaos and things like that. But with [their current] family they survived, thrived, and apparently began to heal. And they were adopted by their foster parents, then their grandfather harmed them and they knew that he shouldn't have been doing things like that. Somebody they had trusted. Apparently [one of the victims] has been somewhat shut down and [another victim] started having nightmares and separation anxiety.
>
> As regards the report from the Lincoln Regional Center indicates [Mastne] is a moderate risk [to] engage in future offenses relating to sexual misbehavior. It appears he has engaged in a more extensive pattern of sexual misconduct than he would actually admit. And he does not meet the criteria, according to the Lincoln Regional Center, to be classified as a . . . sexually violent offender.
>
> But — and one thing in [Mastne's] favor is his record. I think there are a couple of traffic matters and that was about the extent of it. But these are serious crimes. Any felony is a serious crime. These are Class IIIA [felonies] where the maximum is . . . five years.

[7,8] A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of

reasonableness, even though no actual bias or prejudice was shown. *Id.*

In the instant case, we find that no reasonable person who knew the circumstances of the case would question the district court judge's impartiality under an objective standard of reasonableness. The district court judge merely noted that the acts committed by Mastne were "sickening to repeat." This can hardly be considered proof of judicial bias, particularly when Mastne's own attorney conceded at the sentencing hearing that "[t]his is a horrendous, horrible crime" and that "these were monstrous acts. There's no doubt they were monstrous acts." The district court clearly did not abuse its discretion when it made its comments prior to sentencing.

Mastne also alleges that the district court abused its discretion when it considered allegations not admitted in his guilty pleas and when it "relied on a spurious reference to a child victim's belief that [Mastne] had 'been inside her body' despite the child advocate's disclaimer that the child was 'not sure how she knows he did that.' " Brief for appellant at 11. Mastne claims: "Misapprehension of the facts and circumstances of a case is evidence that a sentencing judge abused his discretion." *Id.* at 10.

[9,10] The information that Mastne is referring to is in a report contained in the presentence report. It does not appear that the district court misapprehended the facts or circumstances of the instant case; it merely relied on information contained in the presentence report. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* Mastne's prison sentences were clearly within the statutory limits prescribed for the crimes he committed. Simply put, the district court did not abuse its discretion when it imposed its prison sentences upon Mastne. This assignment of error lacks merit.

Mastne also alleges that the district court abused its discretion when it ordered him to register as a sex offender for the

remainder of his life. In so ordering, the district court noted the following:

> Also, looking through the statute, this — this offense is considered to be . . . an aggravated one since there was some penetration, however slight, and this is based on attachments to the report of May 4, 2005, from the diagnostic and evaluation center. I believe by finding the offense to be an aggravated offense [Mastne] is required to register under the sex offender registration act basically . . . for the rest of his life.

Neb. Rev. Stat. § 29-4005 (Cum. Supp. 2004) provides in relevant part:

> (2) A person sentenced for a registrable offense under section 29-4003 shall be required to register under the act for the rest of his or her life if such registrable offense is an aggravated offense or the person has a prior conviction for a registrable offense. The sentencing court shall make that fact part of the sentencing order.
>
> . . . .
>
> (4) For purposes of this section:
>
> (a) Aggravated offense means any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years.

[11,12] Statutory interpretation presents a question of law. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Id.* In the absence of ambiguity, courts must give effect to the statutes as they are written. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id.* Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

[13-15] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither

is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *Id.* In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). Likewise, it is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there. *Id.*

Section 29-4005(2) provides:

> A person sentenced for a registrable offense under section 29-4003 shall be required to register under the act for the rest of his or her life if such registrable offense is an aggravated offense or the person has a prior conviction for a registrable offense. The sentencing court shall make that fact part of the sentencing order.

Further, an aggravated offense is defined by the Legislature as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years." § 29-4005(4)(a). By comparison, § 29-4005(3)(a) provides:

> When sentencing a person for a registrable offense under section 29-4003, a court may also determine if the person is a sexually violent predator. When making its determination the court shall consider information contained in the presentence report and the recommendation of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

[16] The intent of the Legislature is expressed by omission as well as by inclusion. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003). It is clear from the language used by the Legislature in § 29-4005(3)(a) that in order for an offender to be deemed a "sexually violent predator," the sentencing court must make that determination. By omitting such language from the text of § 29-4003(2), the Legislature made it equally clear that it did not intend for the sentencing court to make a factual finding or determination regarding whether or not an offense is "an

aggravated offense." Rather, it intended for the statutory definition of the crime for which an offender is convicted, or the existence of an offender's prior conviction, to provide whether or not an offense is to be deemed "an aggravated offense." Therefore, we find that the district court erred when it made its own determination that Mastne's crimes constituted aggravated offenses, instead of examining the statutory definitions for the crimes he committed.

In the instant case, Mastne pled guilty to four counts of sexual assault of a child. Neb. Rev. Stat. § 28-320.01(1) (Cum. Supp. 2004) provides the statutory definition of this crime as follows: "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." The crimes for which Mastne pled guilty do not include the element of penetration. Therefore, it was error for the district court to conclude that Mastne's crimes constituted aggravated offenses and to order him to register as a sex offender for the remainder of his life, pursuant to § 29-4005(2).

Section 29-4005(1) provides:

> Except as provided in subsections (2) and (3) of this section, any person to whom the Sex Offender Registration Act applies shall be required to register during any period of supervised release, probation, or parole and shall continue to comply with the act for a period of ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent. The ten-year registration requirement shall not apply to any person while he or she is incarcerated in a jail, a penal or correctional facility, or any other public or private institution. The ten-year registration requirement does not include any time period when any person who is required to register under the act knowingly or willfully fails to comply with such registration requirement.

We find that the portion of Mastne's sentences ordering him to register as a sex offender for the remainder of his life, pursuant to § 29-4005(2), must be vacated. The cause is remanded to the district court, and that court is directed to order Mastne to register as a sex offender pursuant to § 29-4005(1).

CONCLUSION

We find that the district court did not abuse its discretion when it imposed its prison sentences upon Mastne. However, the court did err when it found that Mastne was guilty of aggravated offenses and when it ordered him to register as a sex offender for the remainder of his life. Therefore, that portion of Mastne's sentences is vacated, and the cause is remanded with directions to sentence Mastne to register as a sex offender pursuant to § 29-4005(1).

SENTENCES AFFIRMED IN PART AND IN PART VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

CARLSON, Judge, concurs.

RITA ANN JOHNSON, APPELLANT, V.
MICHAEL RAY JOHNSON, APPELLEE.

726 N.W.2d 194

Filed December 19, 2006. No. A-06-337.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Modification of Decree: Final Orders: Appeal and Error.** When an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Appeal dismissed.

Kent A. Schroeder, of Ross, Schroeder & George, for appellant.

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Rita Ann Johnson appeals from an order of the district court for Phelps County, Nebraska, which modified the decree dissolving her marriage to Michael Ray Johnson by changing custody of the parties' child from Rita to Michael. Rita asserts the district court abused its discretion in finding that a material change of circumstances had occurred and that the best interests of the child required modification of custody. Because the order appealed from reserved the issue of child support for future determination, the order was not final, and accordingly, we must dismiss this appeal for lack of jurisdiction.

PROCEDURAL BACKGROUND

On March 30, 2004, a decree of dissolution was entered which, among other things, awarded Rita the custody of the parties' child, born January 10, 2003, and specified visitation to Michael. On August 5, 2004, Michael filed an application to modify the decree, and on July 5, 2005, he filed an amended complaint for modification. Trial was held on October 19 and December 16. On March 14, 2006, an order was filed sustaining Michael's amended complaint and placing permanent custody of the parties' child with Michael, effective April 1.

The March 14, 2006, order, at paragraph 3, required Rita to pay child support effective April 1 and ordered the parties "to submit a stipulated child support calculation or schedule a hearing on the same." On March 24, Rita filed a notice of appeal of the March 14 order. On March 31, an order was filed which placed the parties' child in the temporary custody of Rita during

the period of appeal, declined to enter a child support obligation for Rita at such time, and ordered that during the period of appeal, Michael continue to pay his child support previously ordered. The March 31 order further stated that paragraph 3 of the March 14 order is amended as follows: "The Court will enter an appropriate child support Order when this Order on custody becomes final."

On April 12, 2006, the district court apparently held a hearing on Michael's motion to set child support, although these proceedings are not contained in our record. On April 24, an order was entered finding that the March 14 order should be amended to include an amount for child support. The April 24 order provided that Rita should pay child support in the amount of $277 per month, effective April 1. Also on April 24, an additional order was entered which suspended Rita's child support obligation pending the decision on appeal.

Michael filed a motion for summary dismissal of the appeal in this court, asserting that Rita's appeal was premature because the March 14, 2006, order was not a final order for purposes of appeal. We overruled the motion without prejudice for further consideration of the question of whether the March 14 order is a final, appealable order and what effect, if any, the subsequent orders had.

ASSIGNMENTS OF ERROR

Rita asserts the district court abused its discretion in finding that a material change in circumstances had occurred and that the best interests of the child required modification of custody.

STANDARD OF REVIEW

[1,2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002).

ANALYSIS

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

It is necessary for us to determine whether the March 14, 2006, order, from which Rita appeals, is a final, appealable order. In *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001), this court held that a court's order modifying custody but retaining jurisdiction for a determination of child support does not constitute a final order for purposes of appeal. In *Paulsen*, we recognized the longstanding principle that when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990).

[5] In *Paulsen*, the father filed an application for modification of a divorce decree, specifically requesting that the trial court award him custody, child support, and attorney fees. This court determined that the order was not final because it had not determined all the issues submitted to the court, namely child support. Likewise, in *Huffman*, 236 Neb. at 106, 459 N.W.2d at 220, the Supreme Court held:

> [W]hen an application is filed to modify a decree in a marital dissolution action, and the modification application pertains to more than one issue involving children affected by the dissolution decree, a court's resolution of one issue raised by the modification application, but retention or reservation of jurisdiction for disposition of another issue or

> other issues raised by the modification application, does not constitute a final judgment, order, or decree for the purpose of an appeal.

See, also, *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Hamm v. Champion Manuf. Homes*, 11 Neb. App. 183, 645 N.W.2d 571 (2002) (where court expressly reserved ruling on certain aspects of relief requested, order is not final).

In the present case, unlike in *Paulsen* or *Huffman*, there was no request for child support in Michael's initial application or amended complaint. The prayer for relief in Michael's amended complaint to modify decree requested that the court

> enter an order modifying the Decree of Dissolution and awarding [Michael] the care, custody and control of the parties' minor child, or, in the alternative, if custody is not change[d], changing the visitation to more appropriately address the parties' current circumstances and the needs of the child, for attorney fees, and for such other and different relief as the Court deems just and equitable.

Rita asserts that all of the issues that were submitted to the court on Michael's amended complaint were determined by the court in the March 14, 2006, order—namely, modification of custody, visitation, and attorney fees—thus making it a final order for purposes of appeal. We cannot agree. While the prayer in Michael's amended complaint did not make a specific request for child support, a child support determination is an inherent part of a custody modification action. Michael's amended complaint also prayed for other equitable relief, and child support is equitable relief, which can be awarded by the court under Neb. Rev. Stat. § 42-364 (Reissue 2004). See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005) (prayer for general equitable relief is to be construed liberally, and will often justify granting relief in addition to that contained in specific prayer, provided it fairly conforms to case made by petition and evidence). We note that there was some evidence adduced in the present case regarding the parties' current incomes.

Because child support is equitable relief inherent in a child custody modification action, coupled with the fact that the court specifically ordered child support to be calculated following the order, we conclude that the March 14, 2006, order was not a final, appealable order and that the notice of appeal filed on March 24 was therefore premature. To carve out the exception as urged by Rita—that the issue of child support was not submitted to the court—would wreak havoc in the arena of final order jurisprudence, particularly in this area of child custody and support. We decline to distinguish *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001), in this manner.

CONCLUSION

Because the order of March 14, 2006, reserved the issue of child support for future determination, the order was not final, and accordingly, we must dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

JANET J. GRANGE, APPELLANT, V.
THOMAS W. GRANGE, APPELLEE.

725 N.W.2d 853

Filed December 19, 2006. No. A-06-502.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.
3. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
5. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
6. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient

evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

7. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
8. **Divorce: Modification of Decree: Minors.** A decree of divorce, insofar as minor children are concerned, is never final in the sense that it cannot be changed, but is subject to review at any time in the light of changing conditions.
9. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
10. **Modification of Decree: Child Support: Res Judicata.** In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Steven M. Delaney and Laura R. Hegge, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

Janet J. Grange appeals from a summary judgment entered on the motion of Thomas W. Grange, which judgment dismissed Janet's 2005 complaint for modification of decree seeking additional parenting time and reduction of child support. Viewed in the light most favorable to Janet, the evidence shows that although she had completed her surgical residency at the time of an earlier modification, her work schedule was later reduced and became more predictable, and that after the last modification, Thomas had realized additional income from his interest in a retail optical shop. Because Thomas failed to prove that there had been no material change of circumstances, we reverse the judgment and remand the cause for further proceedings.

BACKGROUND

In 1999, Janet and Thomas agreed upon a parenting plan. The plan recognized that both were fit and proper persons to have

custody of the three then-minor children. The parties agreed that "it [was] in the best interests of the minor children that [Janet] and [Thomas] be awarded joint legal custody" and that "primary residential care" would "rest" in Thomas, "with parenting time and parental rights adhering to [Janet] as specified." The parties agreed to cooperate "so as, in a maximum degree, to advance the children's health, emotional, and physical well-being and to give and afford the children the affection of both parents and a sense of security." The parties agreed to visitation on alternating major holidays, on certain other special days and events, and for vacation times. The agreement further specified that Janet "shall have weekly parenting time with the minor children on one evening a week and alternating weekends. The specific times for the weekly visitations should be arranged by the parties, taking into consideration the activities of the three minor children and the work schedules of each parent."

By a decree entered on June 25, 1999, the district court dissolved the parties' marriage, determined that "the parties [were] fit and proper persons to be awarded the joint legal custody of the three minor children, with primary residential care in [Thomas], subject to [Janet's] rights of reasonable and liberal parental access or visitation as set forth in the parties' Parenting Plan," and ordered Janet to pay child support. The decree noted that Janet "[was] a resident in training to be a surgeon and that upon completion of her training[,] the child support obligation shall be reviewed." To that end, the parties agreed to exchange tax returns annually until the "last" minor child reached the age of majority.

The decree incorporated a child support calculation, based upon the joint custody worksheet, requiring Janet to pay $433 per month as support. The worksheet was premised upon Janet's gross monthly income of $2,540 and Thomas' gross monthly income of $7,590.

On August 13, 2001, Thomas filed an application to modify the decree, alleging that Janet had "completed her resident in training and ha[d] gone into private practice, thus raising her income level." Initially, Janet filed only a responsive pleading in the nature of a general denial. She later filed a cross-application to modify the decree, seeking to obtain custody of the oldest child (who has now attained the age of majority) and to adjust

the support obligations. Although none of the subsequent orders affirmatively granted Janet's requested change of custody concerning the oldest child, we infer from the child support established that the change took place.

By an order entered on August 15, 2002, the district court established child support retroactive to September 1, 2001, in the amount of $513 for three children, $1,085 for two children, and $1,407 for one child. That order also purported to award Janet $2,000 for the services of "his" attorney.

The child support calculations attached to the August 15, 2002, modification order show a split custody calculation for three children and also attach a basic custody calculation for two children. The basic custody calculation shows Janet's gross monthly income as $10,000, Thomas' gross monthly income as $8,788, and, after various appropriate deductions, the total monthly support for two children as $2,035 and for one child as $1,407. Based upon Janet's 53.24 percent share of the parties' monthly net income, the worksheet calculates her share of the total support for two children to be $1,083.43. However, the calculation fails to apply her percentage share of monthly income to the total monthly support amount for one child, thereby in effect requiring Janet to pay 100 percent of the total monthly support for one child.

By an order nunc pro tunc entered on August 20, 2002, the court recognized a scrivener's error in the earlier order and amended the last paragraph to award attorney fees to Thomas rather than to Janet. Further, the order nunc pro tunc amended the earlier order to expressly state that Janet was the person required to pay child support. However, the order nunc pro tunc did not address the error in calculating child support discussed above.

On August 23, 2002, Thomas filed a motion for "clarification" of the August 15 order. Because the motion for clarification refers to the mistaken award of attorney fees to Janet, we infer that at the time of filing Thomas' motion for clarification, he was unaware of the district court's August 20 order nunc pro tunc. Thomas' motion further asserted that "the calculation that the Court uses is for a split custody calculation which should not be used until April 1, 2002[,] when the oldest child went to live

with [Janet]" and that "the figures used by the Court are turned around as they relate to one, two, and three children."

By a supplemental order entered on December 18, 2002, which was prepared and submitted by Thomas' attorney and "approved as to form and content" by Janet's attorney, the court established child support to be paid by Janet at the rate of $513 for three children, $1,085 for two children, and $1,407 for one child. Attached to the order were calculations showing the total monthly support amounts of $2,429 for three children, $2,035 for two children, and $1,407 for one child. The calculation then applied Janet's rounded percentage of 54 percent to each of those amounts, resulting in her monthly support share being $1,287 for three children, $1,078 for two children, and $745 for one child. The attachment then set forth a rudimentary split custody calculation, arriving at Janet's net monthly obligation of $508 for three children and calculating back support for 7 months apparently ending with the month of March 2002 at $1,287 per month for three children and for 5 months from April through August 2002 at $508 per month. The total of these amounts is further reduced by sums apparently paid under the decree. The supplemental order ultimately required Janet to pay a judgment of $3,720 representing back child support, which amount was payable in monthly installments of $300.

No appeal was taken from any of these orders.

We now arrive at the proceedings leading to the instant appeal. On February 25, 2005, Janet filed a complaint for modification of the decree, styled as an application to modify. At the time of this filing, the oldest child had attained the age of majority and the second child was nearly 17 years of age. Janet's application focused upon the parties' youngest child, who was then 9 years old. Janet's application set forth five factual allegations regarding a material change in circumstances. In the discovery process, Janet abandoned one of these factual assertions, and we do not address it any further.

Janet alleged that she "ha[d] completed her residency and [was] a surgeon in private practice with a standard 9:00 a.m. to 5:30 p.m. Monday through Friday work week"; that the youngest child had "repeatedly asked [Janet] to be allowed to spend

more time with [Janet]"; that despite Janet's requests for a "more equal sharing of parenting time," Thomas had refused to allow more time "than what had been set during [Janet's] residency period"; and that Thomas had "routinely used his title of primary residential parent to relegate [Janet] to the status of visiting non-custodial parent" and had not "allowed [Janet] to be able to participate and share in the parenting of the minor children."

In addition to describing the error in the original calculations, Janet alleged that since the entry of the supplemental order, "the incomes of the parties have changed, . . . which constitutes a change of circumstances requiring a modification of the child support to be paid."

Thomas filed a responsive pleading admitting certain allegations, denying others, and setting forth various affirmative defenses, including the doctrine of res judicata.

On March 10, 2006, Thomas filed a motion for summary judgment. A short time later, Thomas filed a motion to dismiss Janet's application, based upon the doctrine of unclean hands.

On March 24, 2006, the district court conducted an evidentiary hearing on both motions. The documentary evidence received generally consisted of copies of earlier documents in the proceedings, such as the property settlement agreement, the parenting plan, the decree of dissolution, the earlier application to modify, and the various orders previously entered by the court, as well as the parties' recent depositions and certain other documents. To the extent necessary, the documentary evidence will be discussed in the analysis section of this opinion.

By a summary judgment entered on April 3, 2006, the district court sustained Thomas' motion and dismissed Janet's application to modify decree. The court also determined that Thomas' motion to dismiss was moot. In granting Thomas' motion for summary judgment, the court stated:

> [Janet] bears the burden of showing a material change in circumstance before the Court will entertain an application to modify visitation or custody. This she has failed to do. She initially relies on the fact that she has completed her residency and now works a more standard work schedule. However, this is not a change of circumstance from the last time the parties were before this Court in 2002 on

> their cross-applications to modify. At that time, she had already completed her residency, but sought no change in visitation or custody with respect to the two younger children. [Janet's] further reliance on an alleged request by her daughter to spend more time with her does not constitute a material change in circumstance. Neither do [Janet's] own wishes or requests made to [Thomas] concerning more time, nor her conclusory allegation that the original arrangement is not working. [Janet's] further claim that she has been relegated to the status of a visiting non-custodial parent also does not state a material change. The fact is, she ***is*** a visiting non-custodial parent, through a custody and visitation schedule she not only agreed to, but that was drafted by her own counsel. She cites the fact that the consent decree acknowledged [she] was a resident in training and her child support obligation would be reviewed upon completion of her training. That was, in fact, accomplished by way of the previous motion to modify the decree and, consequently, custody of one child and child support for the other two were modified accordingly. Her reference to an error in the child support calculations in the previous order not only does not state a change in circumstance, but cannot be raised at all, as she did not appeal from the previous order and may not collaterally attack it at this juncture.

(Emphasis in original.)

Janet timely appeals.

ASSIGNMENTS OF ERROR

Janet asserts that the district court erred in granting Thomas' motion for summary judgment and in dismissing her application to modify decree.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006). To the extent questions of law are involved, an appellate court is obligated to reach

conclusions independent of the decisions reached by the court below. *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002).

ANALYSIS

Motion for Summary Judgment Appropriate.

In Janet's brief, she claims both to have made an extensive search of case law relating to motions for summary judgment and to have found no cases where summary judgment motions in divorce modification actions were reviewed. Thomas responds that the nature of the proceeding is irrelevant in assessing whether he was entitled to summary judgment and that Nebraska's civil procedure does not limit summary judgment practice to particular categories or topics of actions. We assume without deciding that in an appropriate case, the summary judgment procedure may be utilized in a proceeding to modify a decree of dissolution of marriage.

Only Changes Since 2002 Modification Considered.

[3,4] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). Janet argues that because the issue of parenting time with the two younger children was not raised as an issue in the 2002 modification action, she need only show a material change in circumstances from the date of the original 1999 decree. Thomas argues that the change in circumstances must have occurred since the time of the most recent modification of the decree. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006). Because of the way we view the principal question before us, we assume without deciding that we must limit our review in the instant appeal to the circumstances arising after the 2002 modification.

Summary Judgment on Visitation Issue.

[5] As we turn to the critical issues before us, we recall that summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in

dispute. *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005). After a full evidentiary hearing on a complaint for modification, a court would consider whether the party seeking modification had met his or her burden to show a material change of circumstance. See *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). At that point, Janet would have had the burden of establishing that there had been a material change in circumstances.

[6] But, in the context of summary judgment, the roles are reversed. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006). In this context, Thomas had the burden to prove that there had not been any material change in circumstances.

[7] The rules concerning summary judgments also control the way we must consider the evidence in the record. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006). We thus view the evidence most favorably to Janet and focus on whether, viewed in that light, Thomas succeeded in proving that there had been no material change of circumstances.

[8] A decree of divorce, insofar as minor children are concerned, is never final in the sense that it cannot be changed, but is subject to review at any time in the light of changing conditions. See *Matson v. Matson*, 175 Neb. 60, 120 N.W.2d 364 (1963). Thomas attributes great importance to the parties' agreement upon a parenting plan and, citing *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992), contends that a consent decree is accorded greater force than an ordinary judgment. That case concerned an effort to modify alimony, which implicates a different statute than the provision governing modification of visitation. See Neb. Rev. Stat. § 42-365 (Reissue 2004) (authorizing modification of alimony for good cause). While we agree that the fact the parties agreed upon the present visitation is an

important consideration, we do not attach as much significance to the parties' agreement as Thomas urges. We now turn to the controlling definition.

[9] A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). We bear in mind that the definition refers to "circumstances" in the plural form; thus, we disapprove of the district court's approach in considering whether each individual factor constituted a material change. Where, as in the case before us, the party seeking modification advances multiple reasons for modification, we consider all of the facts and circumstances raised by the evidence to determine whether there has been a material change.

Thomas argues that the parties were aware in 1999 that Janet's residency would end. He also argues that the change had already occurred prior to the last modification in 2002. Janet's testimony showed that not only had her residency ended, but since 2002, her work schedule had changed. She testified that her work schedule had diminished to a "9:00 to 5:30" job and denied that she had a similar work schedule in 2002. She claimed that in 2002, she was just starting her general surgery practice and needed to be available for consultations and emergency room work. She characterized her schedule in 2002 as "[u]npredictable."

The district court emphasized the completion of Janet's residency at the time of the 2002 modification but failed to focus on the change in Janet's schedule. Where the issue concerns visitation, a significant change in a party's work schedule may well constitute a material change in circumstances sufficient to reopen the extent of visitation.

Janet testified that the youngest child had requested more parenting time with Janet. Janet also testified that at the time of entry of the decree, she expected that her parenting time would be adjusted as her employment allowed. That testimony also raises an inference that in 2002, she expected that as her work schedule diminished and became predictable, her parenting time would increase. Janet also testified that Thomas had failed to accommodate her requests for more parenting time. While the

youngest child's requests for more time with Janet and Janet's testimony regarding Thomas' failure to accede to her requests for more visitation are of lesser importance, considering all of the evidence in the light most favorable to Janet, we cannot conclude that Thomas met his burden to show that there had been no material change in circumstances. We determine that the district court erred in granting summary judgment on the issue of visitation.

Summary Judgment on Support Issue.

[10] Thomas contends that the district court correctly granted summary judgment as to modification of child support, because the miscalculation at the time of the last modification does not constitute a material change in circumstances. In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed res judicata. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). The district court correctly recognized that no appeal was taken from the 2002 modification order and implicitly applied that doctrine.

There is some authority suggesting that a mistake of this type may be subject to correction under the equitable powers of the district court. See *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000). However, in the case before us, we need not consider that question, because both Thomas and the district court failed to recognize that Janet's claim for modification of the decree on the issue of child support also rests on an assertion that the incomes of the parties have changed.

As we detailed above, Janet intermingled her allegation that the 2002 order was erroneous with an assertion that the parties' incomes had changed. There is evidence in the record that Thomas had been a shareholder in a retail optical shop for only 2 years before his deposition in March 2006. Viewed in the light most favorable to Janet, this would have occurred after the last modification. He testified to his portion of the profits from the optical shop in 2004, which portion was a substantial sum. He also testified that the total distribution to him from that firm in 2005 would have been a larger amount—approximately double the amount from 2004. He testified that these distributions were

in addition to his salary from a separate firm that provided professional eye examinations.

At the very least, this evidence raises an inference that a proper calculation under the child support guidelines would result in a variation of Janet's support obligation by 10 percent or more and $25 or more, which would establish a rebuttable presumption of a material change in circumstances. See Nebraska Child Support Guidelines, paragraph Q.

On this record, we cannot agree that Thomas met his burden to prove that there had been no material change of circumstances on the issue of child support. We conclude that the district court erred in granting summary judgment on this issue.

CONCLUSION

Viewing the evidence in the light most favorable to Janet, we cannot agree that Thomas met his burden of proving that there had been no material change of circumstances since the decree was last modified in 2002. We conclude that the district court erred in granting summary judgment for Thomas and dismissing Janet's complaint for modification. We reverse the judgment of the district court and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY DEAN MYERS, APPELLANT.
726 N.W.2d 198

Filed December 26, 2006. No. A-06-114.

1. **Rules of Evidence: Other Acts: Proof.** Pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2. ____: ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith. Stated

another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.

3. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged.
4. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
5. **Sexual Assault: Minors: Intent.** Intent is an element of sexual assault of a child.
6. **Sexual Assault: Minors.** Sexual assault of a child under Neb. Rev. Stat. § 28-320.01(1) (Cum. Supp. 2004) is described as subjecting another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older.
7. **Sexual Assault: Words and Phrases.** Sexual contact is defined as the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.
8. **Rules of Evidence.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).
9. ____. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
10. **Rules of Evidence: Words and Phrases.** Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), is concerned. In the context of rule 403, such prejudice means a tendency to suggest a decision on an improper basis.
11. **Trial: Witnesses: Testimony.** Testimony that can be construed as stating that the complaining witness' testimony is true is an improper statement concerning the credibility of another witness.
12. **Trial: Witnesses: Testimony: Appeal and Error.** Testimony that goes beyond explaining a complaining witness' behavior and asserts, directly or indirectly, that the witness was in fact abused or is telling the truth goes too far, and its admission constitutes reversible error.

Appeal from the District Court for Webster County: TERRI HARDER, Judge. Affirmed.

Joseph H. Murray, P.C., L.L.O., and Lucas L. Swartzendruber, of Germer, Murray & Johnson, for appellant.

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

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jeffrey Dean Myers was convicted in the district court for Webster County of five counts of first degree sexual assault, three counts of sexual assault of a child, seven counts of manufacturing child pornography, and five counts of possession of child pornography. Myers now appeals his convictions, and he asserts on appeal that the district court erred in allowing the State to present certain testimony concerning uncharged prior bad acts and in allowing, over Myers' objection, allegedly expert testimony concerning victims of sexual assault. We find the prior bad acts testimony was properly admitted to demonstrate that Myers' sexual contact with the victims when they were under the age of 14 was both intentional and for purposes of sexual gratification. We also find the alleged expert's testimony that was objected to had proper foundation and was not an improper statement about the credibility of the child victims. As such, we affirm.

II. BACKGROUND

On September 21, 2005, Myers was charged in an amended information with six counts of first degree sexual assault, three counts of sexual assault of a child, eight counts of manufacturing child pornography, and five counts of possession of child pornography. Prior to trial, the district court severed the five counts of possession of child pornography and ordered a separate trial on those five counts.

Also prior to trial, the State filed a motion seeking an order of the district court allowing the State to adduce evidence of uncharged crimes, wrongs, or acts previously committed by Myers, pursuant to the provisions of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995). The State indicated that the proffered evidence would "show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and/or absence of

mistake or accident." Pursuant to rule 404(3), the district court held a pretrial hearing for assessing the admissibility of the proffered evidence. The district court entered an order in which the court held, inter alia, that the State would be allowed to introduce rule 404(2) evidence concerning sexual conduct between Myers and J.K. when J.K. was 16 years of age and concerning sexual conduct between Myers and R.O. when R.O. was between 11 and 16 years of age. With respect to evidence concerning R.O., the court held that the State would be allowed to introduce evidence of sexual activities between Myers and R.O., "on the basis of Modus Operandi, Identity, and Intent," and to introduce evidence of a video Myers allegedly showed to R.O. depicting Myers and a boy R.O. estimated to be 13 or 14 years of age attempting to engage in sexual intercourse, "on the basis of Intent."

The record of the two separate trials noted above in this case consists of more than 1,250 pages of hearings, testimony, and arguments; more than 40 exhibits; and a transcript of more than 350 pages. We have reviewed the entire record, but we find it unnecessary to specifically recount the details of the testimony and exhibits upon which Myers was convicted of sexually penetrating and sexually contacting two children under the age of 14, manufacturing various child pornography concerning three children under the age of 18, and possessing various other child pornography. Instead, we summarize the evidence viewed in a light most favorable to the State as follows:

The victims in this case were R.S., born June 3, 1988; G.K., born July 19, 1988; and J.K., born March 30, 1987. Myers was born June 2, 1968. In the first trial, the State presented evidence concerning Myers' sexual involvement with the children occurring between September 2002 and May 2003, including penetration, contact, and manufacturing of child pornography. In the second trial, the State presented evidence concerning Myers' possession of various images of child pornography in June 2003.

R.S. was friends with Myers' son and spent time at Myers' house "[a]bout every day," including spending the night on "[a] lot" of occasions. On a number of occasions between September 2002 and May 2003, Myers performed oral sex on R.S., received oral sex from R.S., and masturbated R.S. Myers videotaped a number of the encounters and took Polaroid photographs of R.S.

while R.S. was naked. In exchange for the sexual encounters, Myers gave R.S. a Nintendo "Game Boy Advance" video game on one occasion and cash on other occasions. R.S. specifically denied ever engaging in anal sex with Myers.

G.K. was also friends with Myers' son and spent time at Myers' house "[a] few times a week," including spending the night on occasion. On a number of occasions between December 2002 and May 2003, Myers performed oral sex on G.K., engaged in anal sex with G.K., fondled G.K. and "manipulate[d]" G.K.'s penis, and engaged in mutual masturbation with G.K. Myers videotaped "quite a few" of the encounters and took Polaroid photographs of G.K. while G.K. was naked or while sexual activity was going on. In exchange for the sexual encounters, Myers gave G.K. cash.

J.K. was friends with R.S. and met Myers through R.S. and one of Myers' foster children. In spring 2003, R.S. told J.K. he "could make some movies for some money" with Myers, and Myers told J.K. he could "jack off in front of the camera and get fifty bucks or [he could] do stuff with [Myers] or somebody else and get more money." Myers videotaped J.K. masturbating on two occasions and performed oral sex on J.K. and received oral sex from J.K. on one other occasion. In exchange for the sexual encounters, Myers gave J.K. cash.

Myers objected to R.O.'s testimony as improper rule 404(2) evidence. The district court overruled the objection, but instructed the jury that R.O.'s testimony was "being allowed . . . only for the purpose of showing modus operandi, identity, and intent." R.O. was not acquainted with R.S., G.K., or J.K. R.O. met Myers when R.O. was 11 or 12 years of age and Myers was the manager of the apartment complex in which R.O. lived. On one occasion, Myers and R.O. "measured [their] penises." On a number of occasions over the next few years, R.O. performed anal sex on Myers and Myers engaged in oral sex with R.O. On one occasion when R.O. was 12 or 13 years of age, Myers took a photograph of R.O. masturbating. In exchange for the sexual encounters, Myers gave R.O. cash and other gifts, including cigarettes and a gym membership. Additionally, Myers once showed R.O. a video of "a nude young boy trying to sit on [Myers'] penis," and on a number of occasions while R.O. was

12 or 13 years of age, Myers attempted to arrange a sexual encounter between R.O. and Myers' wife.

During trial, the State also adduced testimony from an investigator, Charles Venditte. Venditte testified that he conducted six interviews in the course of investigating the State's case against Myers, including interviews of R.S., G.K., J.K., and R.O. During cross-examination, Myers' attorney established that during various interviews conducted by Venditte and various police officers, the children had not disclosed the same details about their sexual encounters with Myers. Venditte testified that the children all indicated "they did not tell the truth to begin with" because "they were afraid." On redirect examination, the State asked Venditte, without objection, the following question: "And you were aware that [the children] weren't being completely honest with you or hadn't been honest with the first interviewers; is this correct?" Venditte answered, without objection, "That's correct." When the State inquired why Venditte had held that belief, Myers' attorney imposed an objection on the basis of foundation, which objection was overruled. Venditte then provided the following response:

> It's been my experience that when you're dealing with child victims of sex crimes, especially they're going to be very hesitant to tell you what is going on, especially if their parents are with them when they're being interviewed. And the more they're interviewed, the more trust they have in the person doing the interview, realizing that there will be help available for them, whether it be in the form of counseling or whatever type of emotional support, and that's always important for the child victim to be aware of that. But it takes more than just one session to do that. And that's the way it played out in this case.

In the first trial, the jury returned verdicts of guilty on five counts of first degree sexual assault, finding that Myers had engaged in sexual penetration with R.S. on two occasions between September 2002 and May 2003 and with G.K. on three occasions between December 2002 and May 2003, all when R.S. and G.K. were less than 16 years of age and when Myers was 19 years of age or older; three counts of sexual assault of a child, finding that Myers had engaged in sexual contact with R.S. on one

occasion between September 2002 and May 2003 and with G.K. on two occasions between December 2002 and May 2003, all when R.S. and G.K. were 14 years of age or younger and Myers was at least 19 years of age or older; and seven counts of manufacturing child pornography, including one incident involving R.S. between September 2002 and May 2003, three incidents involving G.K. between December 2002 and May 2003, and three incidents involving J.K. in May 2003, all when R.S., G.K., and J.K. were under the age of 18 and Myers was 19 years of age or older. See Neb. Rev. Stat. §§ 28-319(1)(c) (Reissue 1995), 28-320.01 (Cum. Supp. 2004), and 28-1463.03 (Reissue 1995). The jury returned verdicts of not guilty on one count of first degree sexual assault concerning R.S. and one count of manufacturing child pornography concerning R.S.

In the second trial, the jury returned verdicts of guilty on five counts of possession of child pornography. We note that Myers' assertions of error on appeal concern only testimony received during his first trial and raise no issues concerning the second trial. As such, we conclude that Myers has raised no issues on appeal concerning his convictions on these five counts of possession of child pornography.

III. ASSIGNMENTS OF ERROR

Myers asserts two errors on appeal. First, Myers asserts that the district court erred in allowing R.O.'s testimony. Second, Myers asserts that the district court erred in overruling Myers' objection during Venditte's testimony.

IV. ANALYSIS

1. Convictions Challenged

As noted above, Myers' assertions of error on appeal concern only testimony presented to the jury in the first trial, in which Myers was convicted of first degree sexual assault, sexual assault of a child, and manufacturing child pornography. Myers has raised no issues concerning the second trial, in which Myers was convicted of possession of child pornography. As such, we initially conclude that Myers' convictions and sentences imposed on the possession of child pornography charges are affirmed.

2. R.O.'s Rule 404 Testimony

Myers first challenges the district court's allowing the State to present R.O.'s testimony of uncharged prior conduct between Myers and R.O. Myers argues on appeal that the testimony was not admissible for any proper purpose under rule 404 and that the testimony was unduly prejudicial and inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). Contrary to Myers' assertions, we find that the evidence was properly admissible to show intent and that the probative value of the evidence was not outweighed by its potential for unfair prejudice.

[1,2] The basic rule concerning the admissibility of uncharged prior conduct is set forth in rule 404(2) as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith. Stated another way, rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis. *Id.* The exclusion of other crimes evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence. *Id.*

[3] However, rule 404(2) is an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). The purposes set forth in rule 404(2) are illustrative only and are not intended to be exhaustive or mutually exclusive. *Id.*

[4] Evidence that is offered for a proper purpose is often referred to as having "special relevance" or "independent relevance," which means its relevance does not depend on its

tendency to show propensity. *State v. Sanchez, supra.* The Nebraska Supreme Court has explained the analytical framework for reviewing the admissibility of other crimes evidence under rule 404(2) as follows:

> "[Nebraska's] rule 404(2) analysis considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted."

State v. Sanchez, 257 Neb. at 306, 597 N.W.2d at 373.

(a) Independent Relevance

Myers first asserts that R.O.'s testimony did not have independent relevance. In accordance with the Nebraska Supreme Court's directive in *State v. Sanchez, supra*, the record in the present case indicates that the district court specifically indicated R.O.'s testimony was being admitted to show Myers' (1) intent, (2) identity, and (3) modus operandi. Myers asserts that R.O.'s testimony did not have independent relevance for any of these purposes, because (1) intent was not an element of the sexual assault charges and R.O.'s testimony did not demonstrate Myers' intent to manufacture child pornography, (2) identity was not an issue in this case, and (3) the alleged sexual incidents between Myers and R.O. were not similar enough to the alleged sexual incidents between Myers and the victims in the present case to demonstrate a distinctive or signature modus operandi. Although the State fails to dispute Myers' assertion that intent was not an element of the sexual assault charges, we find intent is an element of sexual assault of a child and R.O.'s testimony had independent relevance to demonstrate that Myers' contact with the children in this case was intentional and for the purpose of sexual arousal or gratification. We therefore need not consider the admissibility of the testimony to show identity or modus operandi.

[5-7] Myers was charged with three counts of sexual assault of a child under § 28-320.01. Contrary to Myers' assertion on

appeal, intent is an element of sexual assault of a child. "Sexual assault of a child under § 28-320.01(1) is described as 'subject[ing] another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.' " *State v. Putz*, 266 Neb. 37, 51, 662 N.W.2d 606, 616 (2003). Neb. Rev. Stat. § 28-318(5) (Reissue 1995) defines "sexual contact" as follows:

> Sexual contact means the *intentional touching* of the victim's sexual or intimate parts or the *intentional touching* of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is *intentionally caused* by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

(Emphasis supplied.) As such, sexual contact, for purposes of sexual assault of a child under § 28-320.01, includes the defendant's intentional touching of the victim's sexual parts or clothing covering the victim's sexual parts, as well as the defendant's intentionally causing the victim to touch the defendant's sexual parts or clothing covering the defendant's sexual parts.

The Nebraska Supreme Court recently recognized that intent is an element of sexual assault of a child. See *State v. Putz, supra.* In *State v. Putz, supra*, the court considered whether sexual assault of a child is a lesser-included offense of first degree sexual assault. In concluding that it is not, the court noted that unlike " 'sexual contact' " for purposes of sexual assault of a child, " 'sexual penetration' " for purposes of first degree sexual assault "includes no intent element." *Id.* at 51, 662 N.W.2d at 616. This difference in the elements of the two crimes, inter alia, prevents sexual assault of a child from being a lesser-included offense of first degree sexual assault. *State v. Putz, supra*. Compare *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999) (intent was not element or fact of consequence where defendant charged only with first degree sexual assault).

The testimony of the child victims in this case indicated that Myers touched their sexual parts and caused them to touch his sexual parts. R.O.'s testimony—when he was less than 14 years of age and Myers was at least 19 years of age or older, Myers performed oral sex on R.O. and caused R.O. to perform oral sex on Myers—had independent relevance to establish that Myers' conduct with the child victims in this case was intentional and was for the purpose of sexual arousal or gratification. As such, the testimony was relevant for some purpose other than to prove Myers' character in order to show that he acted in conformity therewith.

(b) Rule 403

Myers next asserts that R.O.'s testimony was unfairly prejudicial and that the prejudice outweighed the testimony's probative value.

[8-10] Rule 404(2) is subject to the overriding protection of rule 403. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403; *State v. Yager, supra*. Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which rule 403 is concerned. In the context of rule 403, such prejudice means a tendency to suggest a decision on an improper basis. *State v. Yager, supra*.

In *State v. Yager, supra*, the Supreme Court assessed whether evidence of the defendant's prior uncharged sexual contact with young males was rendered inadmissible under rule 403. The questioned evidence indicated that the defendant had sexually assaulted two young boys a number of years prior to the charged incidents, in which the defendant was alleged to have sexually assaulted an 8-year-old boy. The Supreme Court held that in view of the sexual nature of the crime charged, evidence of the defendant's other sexual contacts with young males was highly probative on the issue of the defendant's sexual arousal or gratification, as well as his intent. Further, the Supreme Court held

that although the evidence was prejudicial, the prejudice was not such as to suggest a decision on an improper basis.

Similarly, in the present case, Myers was charged with sexually assaulting two young males, R.S. and G.K. R.O.'s testimony was highly probative on the issues of Myers' intent and sexual arousal or gratification related to the sexual contact with R.S. and G.K. Although the evidence was necessarily prejudicial, the prejudice was not such as to suggest a decision on an improper basis. Further, even though the incidents involving R.O. occurred a number of years prior to the charged incidents involving R.S. and G.K., such remoteness goes to the weight to be given the evidence and does not render it irrelevant or inadmissible. See *State v. Yager, supra.* As such, the evidence was not inadmissible under rule 403.

(c) Limiting Instruction

Myers does not take issue with the limiting instructions given by the district court. The record reveals that the district court gave a proper limiting instruction, both orally when R.O.'s testimony was elicited and in writing as part of the written jury instructions, specifically instructing the jury that the evidence was not being received, and could not be considered, to demonstrate Myers' character to show that he acted in conformity therewith. As such, the final part of the analytical framework was satisfied in this case.

(d) Conclusion on Rule 404(2)

We conclude that R.O.'s testimony had independent relevance to show that Myers' sexual conduct with the child victims in this case was both intentional and for the purpose of sexual arousal or gratification, necessary elements of the three counts of sexual assault of a child with which Myers was charged. Further, the probative value of the testimony was not outweighed by a danger of unfair prejudice, and the district court gave proper and sufficient limiting instructions concerning the testimony. As such, we find no merit to Myers' assignment of error concerning R.O.'s testimony.

3. VENDITTE'S TESTIMONY

Myers next challenges the district court's overruling of Myers' objection during testimony of Venditte on behalf of the State.

Myers argues that Venditte presented expert testimony that improperly commented on the credibility of the child victims in this case. We find that the only objection made by Myers was a foundation objection to one specific question asked of Venditte and that such foundation objection was properly overruled.

Venditte testified that he was a former police officer with experience investigating domestic assault cases. At the time of trial, he was an investigator for the Nebraska Attorney General's office, and he investigated the present case and interviewed, inter alia, the child victims. During Myers' cross-examination of Venditte, he acknowledged that he was aware of various discrepancies between the victims' accounts provided to him and their accounts provided to other interviewers prior to Venditte's interviews.

On redirect examination, the State asked Venditte, without objection, the following question: "And you were aware that [the children] weren't being completely honest with you or hadn't been honest with the first interviewers; is this correct?" Venditte answered, without objection, "That's correct." When the State inquired why Venditte had held that belief, Myers' attorney imposed an objection on the basis of foundation, which objection was overruled. Venditte then provided the following response:

> It's been my experience that when you're dealing with child victims of sex crimes, especially they're going to be very hesitant to tell you what is going on, especially if their parents are with them when they're being interviewed. And the more they're interviewed, the more trust they have in the person doing the interview, realizing that there will be help available for them, whether it be in the form of counseling or whatever type of emotional support, and that's always important for the child victim to be aware of that. But it takes more than just one session to do that. And that's the way it played out in this case.

Myers asserts that his objection should have been sustained and that Venditte's testimony should have been disallowed, because it constituted an improper opinion about the credibility of the witnesses. Myers points us to the Nebraska Supreme Court's opinion in *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989), and this court's opinion in *State v. Doan*, 1 Neb. App.

484, 498 N.W.2d 804 (1993), in support. We do not find either case to indicate that the specific testimony provided by Venditte was inadmissible.

[11] In *State v. Beermann, supra*, the State's expert witness, a police officer, was asked whether, in his opinion, the complaining victim had been sexually abused. The witness answered by indicating that he did believe the complaining witness had been sexually abused. The Supreme Court first held that the officer's testimony was significantly different at trial than at the preliminary hearing, prejudicing the defendant's ability to prepare a meaningful defense. Additionally, the court held that the officer's testimony could be construed as stating that the complaining witness' testimony was true and that the officer's testimony was therefore an improper statement concerning the credibility of another witness.

[12] In *State v. Doan, supra*, the State's expert witness, a counselor with a bachelor's degree in psychology, provided testimony which this court considered as Child Sexual Abuse Accommodation Syndrome (CSAAS) or rehabilitative testimony, e.g., testimony concerning whether it is unusual for a child to not be upset when first reporting abuse or unusual for a child to not immediately report it. In addition to testifying about the fact that complaining witnesses who are children often act counterintuitively when reporting abuse either by delaying reporting or by not appearing visibly upset when reporting, the counselor specifically testified that she had received " 'validation' " of the complaining witness' account of sexual abuse. 1 Neb. App. at 488, 498 N.W.2d at 807. This court recognized other jurisdictions' holdings that CSAAS testimony is admissible but that when the testimony goes beyond explaining the child's behavior and asserts, directly or indirectly, that the child was in fact abused or is telling the truth, the evidence goes too far and its admission constitutes reversible error. This court thus held that the counselor's testimony about receiving "validation" of the complaining witness' account of sexual assault was inadmissible.

In the present case, Myers did not object when Venditte was asked if he was "aware" that the child victims had not been entirely truthful during earlier interviews. The only objection came to the question about why he believed that. The testimony which

was provided over Myers' foundation objection was only that, in Venditte's experience, child victims of sexual assault are hesitant to provide details until they have developed some level of trust with the interviewer, which usually takes more than one interview. We conclude that Venditte's testimony was limited specifically to his own experience, was consistent with his testimony that he had experience interviewing child victims of abuse, and was permissible testimony about how child victims of sexual assault act when being interviewed about the details of their abuse. Venditte's testimony was not a statement that he believed the child victims had, in fact, been sexually abused by Myers and was not a statement that he believed the child victims or that he received any kind of "validation" of the child victims' allegations of sexual assault. Compare, *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989); *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993). As such, we find no merit to Myers' assignment of error concerning Venditte's testimony.

V. CONCLUSION

We find no merit to Myer's assignments of error. R.O.'s testimony about uncharged prior sexual abuse by Myers was admissible to demonstrate that Myers' contact with the child victims in this case was both intentional and for the purpose of sexual arousal or gratification, was not unfairly prejudicial, and was the subject of proper limiting instructions. Venditte's testimony that was objected to had proper foundation and was not an improper statement about the credibility of the child victims. Accordingly, we affirm Myers' convictions and sentences on five counts of first degree sexual assault, three counts of sexual assault of a child, and seven counts of manufacturing child pornography. In addition, Myers has not challenged his convictions and sentences on the five counts of possession of child pornography, which we also affirm.

AFFIRMED.

IN RE INTEREST OF HAILEY M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. TAMMY C., APPELLEE AND CROSS-APPELLANT, AND THEODORE M., INTERVENOR-APPELLANT AND CROSS-APPELLEE.

726 N.W.2d 576

Filed January 16, 2007. No. A-06-692.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Final Orders: Time: Appeal and Error.** Although dispositional orders of a juvenile court are final, appealable orders, if an order is not new, but merely a continuation of a previous order, it does not extend the time for appeal.
4. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage of a dependency proceeding, for a juvenile court to assume jurisdiction of minor children, the State must prove the allegations of the petition by a preponderance of the evidence.
5. **Parental Rights.** Parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.
6. **Criminal Law: Parental Rights.** Termination of parental rights is justified if a parent has committed murder of another child of the parent; committed voluntary manslaughter of another child of the parent; aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent; or committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.
7. **Parental Rights: Evidence: Proof.** The standard for termination of parental rights is clear and convincing evidence.
8. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
9. ____: ____. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
10. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.

11. **Juvenile Courts: Jurisdiction: Words and Phrases.** The juvenile court is a "court of competent jurisdiction" to make a determination regarding whether the exceptions under Neb. Rev. Stat. § 43-283.01(4)(b) (Reissue 2004) apply to excuse reasonable efforts to reunify.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed.

Steve Williams, of Recknor, Williams & Wertz, for intervenor-appellant.

Gary Lacey, Lancaster County Attorney, Michelle A. Paxton, Lori A. Maret, and Henry L. Wiedrich, Senior Certified Law Student, for appellee State of Nebraska.

Jason L. Scott and Mark Buckwalter, Senior Certified Law Student, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellee Tammy C.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

Theodore M. appeals from an order of the juvenile court of Lancaster County overruling his motion for visitation with his daughter Hailey M. and his request to place Hailey with relatives. Tammy C., Hailey's mother, cross-appeals from an order adjudicating Hailey to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) and terminating Tammy's parental rights to Hailey. The court also found that the State is not required to use reasonable efforts to reunify Hailey with Tammy. For the reasons set forth below, we affirm.

BACKGROUND

The record shows that Hailey was born to Theodore and Tammy on October 29, 2005, in Lincoln, Nebraska. The State removed Hailey from Tammy's care on October 30.

On November 17, 2005, the State filed a second amended petition stating that Hailey is a child as defined by § 43-247(3)(a) in that Hailey lacks proper parental care by reason of the faults or habits of Tammy. Specifically, the petition alleged that on November 28 or 29, 1996, Tammy committed felony child abuse

resulting in serious bodily injury to another one of her children, Christopher C., born August 7, 1995. The State alleged that these circumstances place Hailey at risk of harm. The State requested an order eliminating the requirement for reasonable efforts to "preserve and reunify [Hailey] with [Tammy]," alleging that Tammy committed the first or second degree murder or voluntary manslaughter of Christopher; aided or abetted, attempted, conspired, or solicited to commit the murder of Christopher; aided or abetted the voluntary manslaughter of Christopher; committed a felony assault of Christopher which resulted in serious bodily injury to Christopher; or aided or abetted such a felony assault of Christopher.

The State also sought termination of Tammy's parental rights under Neb. Rev. Stat. § 43-292(2) and (10) (Reissue 2004). Specifically, the State alleged that Tammy had substantially and continuously or repeatedly neglected and refused to give one of Hailey's siblings necessary care and protection and that, presumably on November 28 or 29, 1996, and against Christopher, Tammy committed the murder or voluntary manslaughter of another of her children; aided or abetted, attempted, conspired, or solicited to commit the murder of such child; aided or abetted the voluntary manslaughter of such child; or committed a felony assault of such child which resulted in serious bodily injury. The State also alleged that termination of Tammy's parental rights is in Hailey's best interests.

On November 23, 2005, Theodore filed a motion for leave to intervene, stating that he is Hailey's biological father. The trial court granted Theodore's motion. Theodore also filed a motion seeking visitation with Hailey which the court set for hearing. After the hearing, the court overruled that motion, finding that because Theodore is incarcerated, visitation between Hailey and Theodore is not in Hailey's best interests.

On April 17, 2006, Theodore filed another motion requesting visitation with Hailey and further requesting that the court place Hailey with one of three people. A hearing on Theodore's motion was held on May 23. At that hearing, Erin Bader, a protection and safety worker with the Nebraska Department of Health and Human Services (Department), testified that she opposed visitation between Theodore and Hailey due to Theodore's continued

incarceration and the fact that Theodore's expected release date is not until 2013.

Bader also testified that Theodore had provided her with the names of several people with whom Hailey could be placed. Bader testified that the Department ruled out two of the people Theodore listed but was pursuing placement of Hailey with Theodore's sister. Bader testified that the Department's policy is to place a child with relatives as long as a relative completes a satisfactory background check and a home study. Bader testified that as long as Theodore's sister met these requirements and Bader's supervisor approved, Hailey would be placed with Theodore's sister. Bader testified that she had completed her paperwork, but was waiting on the results of the sister's home study. Bader testified that it "takes quite a bit of time" to get such results. The court then overruled Theodore's motion for a change in Hailey's placement as well as Theodore's request for visitation.

Hearings on Hailey's adjudication, the termination of Tammy's parental rights, and the State's motion to eliminate the requirement of reasonable efforts to reunify were held on April 6, 7, and 13, 2006. At the April 6 hearing, Tammy testified that she was currently residing at "the Lancaster County Correctional Facility" and had been there since March 28 because of her conviction for possession of a controlled substance and her 90-day sentence. Tammy testified that that offense occurred in July 2005.

Tammy testified that besides Hailey and Christopher, she has three other children, Ashley, born November 26, 1990; Kyle, born April 29, 1992; and Luke, born May 11, 1994. Tammy testified that the State removed Ashley from her care when Ashley was 3 or 4 months old because Ashley's father was allegedly abusing Ashley. Tammy testified that Ashley's father was abusive toward Tammy and that to protect Ashley, she allowed her parents to obtain guardianship of Ashley. Tammy testified that as of the time of trial, Ashley had never been returned to her care but she still visited Ashley.

Tammy testified that Ashley and Kyle have the same father and that Kyle and Ashley's paternal grandmother "kidnapped" Kyle when he was approximately a year old. Tammy testified

that a hearing was subsequently held regarding Kyle's custody and that the judge decided Kyle and Ashley's grandmother could take better care of Kyle than Tammy could. Tammy testified that although she used to have visitation with Kyle, she had not seen Kyle in a few years.

Tammy testified that she placed Luke for adoption because she was young, single, and financially unable to support him. Tammy testified that Christopher was never removed from her care, but died in her care when he was 15 months old.

Tammy testified that she and Christopher lived in an apartment together. Tammy testified that in September 1996, she began dating Harold T., and that they started spending the night at each other's home in October. Tammy testified that around November 15, Christopher lost a tooth. Tammy testified that she learned of this fact when Harold told her that Christopher's sheets needed to be changed because there was blood on Christopher's sheets. Tammy testified that Harold claimed not to know how Christopher had lost his tooth. Tammy testified that because children typically do not lose a tooth at 15 months of age, she made a doctor's appointment for Christopher.

Tammy testified that after Christopher's doctor's visit on November 20, 1996, he was admitted to a hospital for as much as 4 days because he had developed an infection in his mouth. Tammy testified that soon afterward, Child Protective Services contacted her and informed her that it was attempting to put Christopher in protective custody because its personnel thought that he was being abused. Tammy testified that Christopher was allowed to leave the hospital with her and that she and Christopher stayed at different residences, including Harold's, in order to hide, "[i]n a sense," from Child Protective Services. Tammy testified that she did not believe that Christopher was "in a bad situation." Tammy testified that Christopher's mouth continued to heal after he got out of the hospital.

Tammy testified that on November 28, 1996, which was Thanksgiving, she was staying at Harold's with Christopher. Tammy testified that that morning, she left Christopher with Harold and went to pick up Kyle for visitation in Iowa. Tammy testified that she returned to Harold's a couple of hours later and was told Christopher's face had been burned. Harold told

her initially that Christopher had "looked into the heater" and later that Christopher had fallen into it. Tammy testified that she believed Harold when he told her Christopher's burns were an accident and that she had no suspicions otherwise. Tammy testified that Harold had physically assaulted Christopher only once before.

Tammy testified that she thought about taking Christopher to the doctor for his burns, but that she decided not to because she knew that if she did, the Department would have grounds to remove Christopher from her care.

Tammy testified that after she observed Christopher's burns, she went to her parents' house for Thanksgiving and stayed there several hours. Tammy stated that she left her parents' home in the early evening and returned Kyle to Iowa, but that before doing so, she dropped Christopher off at Harold's. Tammy testified that she returned about an hour later. Tammy testified that later that same evening, Harold went into Christopher's room to change his diaper and she heard a "really soft thump" and Christopher started to cry. Tammy testified that she heard Harold say, " 'Oh, sorry, sorry' " and that Harold later told her that he had "bumped [Christopher] or somethin[g]."

Tammy testified that the next morning, she went to wake Christopher up and found that he was not breathing. Tammy stated that since Harold did not have a telephone, she had Harold take her to a pay telephone, where she called her mother. The record shows that Harold dropped Tammy and Christopher off at Tammy's home, her mother came over, and Tammy and her mother then took Christopher to a hospital, where he was pronounced dead.

Tammy testified that at the time of trial, she had her own apartment and a full-time job that she had held since December 2005. Tammy testified that she is willing to do whatever it takes to get Hailey back and that she has had no contact with Harold since Christopher's death.

The autopsy photographs of Christopher's face were entered into evidence by the State and showed multiple severe burn marks on Christopher's forehead, cheeks, and nose as well as extreme redness and swelling around Christopher's mouth and chin. These photographs also show burns on Christopher's arms

and hands. The autopsy states that Christopher's burn marks were consistent with someone's forcefully holding Christopher's face against a heating vent. Besides these burns, the autopsy showed that Christopher sustained numerous other injuries including contusions to his head, face, neck, and abdomen, in addition to four hemorrhages in his scalp area. The autopsy shows that Christopher died as a result of brain swelling caused by blunt force trauma to his head.

The record shows that in December 1996, the State charged Tammy with one count of manslaughter and two counts of child abuse. Tammy later entered into a plea agreement in which she would plead guilty to one count of child abuse, a Class III felony. The charge to which Tammy pled stated that on November 28, 1996, between midnight and 1 p.m. in Otoe County, Nebraska, Tammy "did then and there knowingly or intentionally cause or permit a minor child, Christopher . . . to be: (a) placed in a situation that endangered his life or health; or (b) cruelly confined or cruelly punished; or (c) deprived of necessary care; and [this] resulted in serious bodily injury to Christopher . . . ."

In February 1998, the trial court sentenced Tammy to 5 to 12 years in prison. Harold was also charged in relation to Christopher's death and served time for abusing Christopher. The record shows that Tammy received parole in November 2002 and that her parole ended in March 2003.

Two protection and safety workers with the Department, Darci Poland and Valerie Hinrichs, testified in favor of terminating Tammy's parental rights to Hailey. Poland testified that she had contact with Tammy and Christopher in 1996 after the Department received an anonymous call on November 14 expressing concern over Christopher's health. Poland testified that she visited Tammy at home on November 18 and that Christopher was with Tammy. Poland testified that the left side of Christopher's mouth was red, swollen, and infected; his left eye was matted, red, and bruised; and he had a sore behind his left ear.

Poland testified that Tammy told her that she had a doctor's appointment for Christopher scheduled for later that day. Poland testified that after Christopher's appointment, she called the doctor's office and learned that Christopher had been hospitalized

and would remain in the hospital for the next few days. Poland testified that after Christopher was discharged on November 21, 1996, she attempted to visit Tammy at home on November 24. Tammy was not there, so she went back on November 25 and found Tammy and Christopher at home. Poland testified that Christopher appeared to be significantly better.

Poland testified that she set up an appointment for an intensive family preservation team to visit Tammy on November 27, 1996, and that Tammy kept that appointment. Poland testified that she and the team visited Tammy on November 27 and that Christopher appeared to be doing well. Poland testified that Christopher also had a followup appointment at the doctor's office on that same date and that the doctor did not relay any concerns regarding Christopher's health.

Poland testified that Tammy never mentioned Harold's name to her, even though she asked Tammy if she had a boyfriend or if someone else provided care for Christopher. Poland testified that she had formed an opinion as to whether it is in Hailey's best interests to terminate Tammy's parental rights because of the case involving Christopher, but she was prevented by objection from stating that opinion.

Hinrichs testified that she was assigned to do the investigation or initial assessment on Hailey. Hinrichs testified that Tammy had not had a consistent place to live for an extended period of time in addition to the fact that Tammy was incarcerated for several years. Hinrichs testified that adoption is in Hailey's best interests because there are no services the Department can offer Tammy to provide for Hailey's safety and well-being, based upon Tammy's prior contacts with the Department and Tammy's criminal case involving Christopher. Hinrichs testified that she has not seen any evidence demonstrating a change in Tammy's lifestyle allowing Tammy to provide for Hailey's safety and well-being. Hinrichs stated that Hailey's current foster parents expressed a desire "to provide for her long term."

In an order filed May 26, 2006, the trial court found that Hailey is a child as defined by § 43-247(3)(a) because Tammy's conduct as it related to Christopher was of such a nature as to place Hailey at risk of harm. The trial court stated that Tammy

either was aware that Harold was inflicting injury upon Christopher or should have been aware that this was occurring.

Acknowledging the State's assertion that reasonable efforts to reunify Hailey with Tammy would be contrary to Hailey's best interests and would be contrary to the paramount concern of Hailey's health and safety, the court found by clear and convincing evidence that the requirement for reasonable efforts to "preserve and reunify [Hailey] with [Tammy]" should be eliminated because Tammy committed the first or second degree murder or voluntary manslaughter of Christopher; aided or abetted, attempted, conspired, or solicited to commit the murder of Christopher; aided or abetted the voluntary manslaughter of Christopher; committed a felony assault of Christopher which resulted in serious bodily injury to Christopher; or aided or abetted such a felony assault of Christopher.

The court further found by clear and convincing evidence that Tammy's parental rights should be terminated under § 43-292(2) and (10) because Tammy has substantially and continuously or repeatedly neglected and refused to give a sibling of Hailey's, Christopher, necessary parental care and protection and because Tammy had committed the murder or voluntary manslaughter of Christopher; aided or abetted, attempted, conspired, or solicited to commit the murder of Christopher; aided or abetted the voluntary manslaughter of Christopher; or committed a felony assault that resulted in serious bodily injury to Hailey or Christopher. The court also found that termination of Tammy's parental rights is in Hailey's best interests. Theodore appeals, and Tammy cross-appeals.

ASSIGNMENTS OF ERROR

In his appeal, Theodore contends that the trial court erred in (1) overruling his motion for visitation with Hailey and (2) failing to order the Department to consider "any and all relative placements for Hailey." In her cross-appeal, Tammy argues that the trial court erred in finding that (1) Hailey is a child as defined in § 43-247(3)(a), (2) termination of Tammy's parental rights is warranted under § 43-292(2) and (10), (3) termination of her parental rights is in Hailey's best interests, and (4) the State is not required to use reasonable efforts to reunify her with Hailey.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Theodore's Motion for Visitation.

Theodore argues that the trial court erred in overruling his motion for visitation with Hailey. In November 2005, Theodore filed a motion seeking visitation with Hailey which the court set for hearing. After the hearing, the court overruled the motion, finding that Hailey's visitation with Theodore, who was currently incarcerated, was not in Hailey's best interests.

On April 17, 2006, Theodore filed another motion requesting visitation with Hailey. The record shows that Theodore remained incarcerated at that time. At a hearing, the State presented testimony opposing visitation for Theodore due to his continued incarceration and the fact that Theodore's expected release date is not until 2013. The trial court then overruled this motion for visitation on May 26.

[2] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006).

In the instant case, we have noted that May 26, 2006, is not the first time the court overruled a motion by Theodore for visitation with Hailey. The court denied Theodore's first motion for visitation in January, and that order clearly affected one of Theodore's substantial rights. Theodore did not file an appeal from that order, but subsequently filed the second motion for visitation, which the trial court also overruled. It is from this second order that Theodore appeals.

[3] Therefore, this appeal is simply an attempt to appeal after the time for an appeal has expired. See, e.g., *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *Federal*

Land Bank v. McElhose, 222 Neb. 448, 384 N.W.2d 295 (1986); *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996). Although dispositional orders of a juvenile court are final, appealable orders, if an order is not new, but merely a continuation of a previous order, it does not extend the time for appeal. *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997); *In re Interest of Zachary L., supra.*

Given that the court's second order denying Theodore visitation is merely a continuation of the original order, we conclude that this order did not affect one of Theodore's substantial rights, and therefore, we lack jurisdiction to consider Theodore's claim that the trial court erred in denying him visitation with Hailey. This assignment of error is without merit.

Theodore's Motion Regarding Hailey's Placement.

Theodore also argues that the trial court erred in failing to order the Department to consider any and all relative placements for Hailey. Hearing on Theodore's motion requesting that the court place Hailey with one of three people was held on May 23, 2006.

Bader, a protection and safety worker with the Department, testified that Theodore had provided her with the names of several people with whom Hailey could be placed. Bader testified that the Department ruled out two of the people Theodore listed but was pursuing placement of Hailey with Theodore's sister. Bader testified that the Department's policy is to place a child with relatives as long as a relative completes a satisfactory background check and a home study. Bader testified that as long as Theodore's sister meets these requirements and her supervisor approves, Hailey will be placed with Theodore's sister. Bader testified that she had completed her paperwork, but was waiting on the results of Theodore's sister's home study. Bader testified that it "takes quite a bit of time" to get such results. The court then overruled Theodore's motion.

After reviewing the record, we conclude that given the evidence that the Department was in the process of considering Theodore's sister as a placement for Hailey, the trial court did not err in failing to order the Department to consider "any and all relative placements for Hailey."

Tammy's Cross-Appeal From Hailey's Adjudication.

In her cross-appeal, Tammy argues that the trial court erred in finding that Hailey is a child as defined in § 43-247(3)(a). In its petition, the State alleged that Hailey is a child as defined by § 43-247(3)(a) in that Hailey lacks proper parental care by reason of the faults or habits of Tammy. Specifically, the petition alleged that on November 28 or 29, 1996, Tammy committed felony child abuse resulting in serious bodily injury to Christopher. The State alleged that these circumstances place Hailey at risk of harm.

[4] At the adjudication stage of a dependency proceeding, for a juvenile court to assume jurisdiction of minor children, the State must prove the allegations of the petition by a preponderance of the evidence. See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

The record shows that in December 1996, the State charged Tammy with one count of manslaughter and two counts of child abuse regarding Christopher. Tammy later entered into a plea agreement in which she would plead guilty to one count of child abuse, a Class III felony. The charge to which Tammy pled stated that on November 28, 1996, between midnight and 1 p.m. in Otoe County, Tammy "did then and there knowingly or intentionally cause or permit a minor child, Christopher . . . to be: (a) placed in a situation that endangered his life or health; or (b) cruelly confined or cruelly punished; or (c) deprived of necessary care; and [this] resulted in serious bodily injury to Christopher . . . ." In February 1998, the trial court sentenced Tammy to 5 to 12 years in prison for abusing Christopher.

Tammy argues that the court erred in finding that Hailey is a child as defined by § 43-247(3)(a) because Tammy's actions in 1996 toward Christopher do not place Hailey at risk of harm. We disagree. While Tammy's conduct in relation to Christopher occurred 9 years prior to Hailey's birth, the record shows that Tammy's conviction was for an extremely grave charge, that of felony child abuse resulting in serious injury to Christopher.

Therefore, although a number of years have passed since Tammy's conviction, the fact that the standard to adjudicate is preponderance of the evidence leads us to the conclusion that the trial court did not err in finding that Hailey is a child as

defined by § 43-247(3)(a). The trial court was correct in finding that Tammy's conduct as it related to Christopher was of such a nature as to place Hailey at risk of harm.

Termination of Tammy's Parental Rights.

Tammy also argues that the trial court erred in terminating her parental rights to Hailey and in finding that such termination is in Hailey's best interests. The State sought termination of Tammy's parental rights under § 43-292(2) and (10).

[5-7] Section 43-292(2) states that parental rights may be terminated when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection, while § 43-292(10) allows termination if a parent has (a) committed murder of another child of the parent; (b) committed voluntary manslaughter of another child of the parent; (c) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent; or (d) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent. The standard for termination of parental rights is clear and convincing evidence. See *In re Interest of Chloe L. & Ethan L.*, 14 Neb. App. 663, 712 N.W.2d 289 (2006).

[8] As to the termination of Tammy's parental rights under § 43-292(10), aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[9,10] Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory. *Id.* One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *Id.*

The record in the instant case contains evidence to show that Tammy committed the offense of aiding or abetting or conspiring with Harold to kill Christopher. The record shows that Tammy committed the offense of aiding or abetting because she assisted or encouraged the murder or voluntary manslaughter of Christopher by placing Christopher in a situation that endangered his life. Tammy did so by leaving Christopher alone with Harold when she knew or should have known that Harold was abusing Christopher.

The record shows that there are two occasions prior to Christopher's death suggesting Harold's abuse of Christopher. First of all, in late October or early November 1996, Tammy was getting ready to leave Harold's residence and Christopher was crying. Tammy testified that as she was "getting [Christopher's] diaper bag put together," Christopher's cry changed, and that when she turned to see what was wrong, she saw Christopher reaching for his face. Tammy testified that she then asked Harold, who was nearby, what had happened and that Harold stated, " 'Oh, well, I didn't realize he was that close to me and I accidentally hit his face.' "

Furthermore, Tammy testified that on approximately November 15, 1996, Harold came to Tammy and told her that he needed to change Christopher's sheets because one of Christopher's teeth fell out and Christopher's sheets were bloody. Harold did not tell Tammy how Christopher lost his tooth, claiming not to know. Tammy's mother testified that the loss of the tooth, or injury to Christopher's mouth, occurred earlier, on either November 11 or November 12. Tammy testified that after this occurred, she made a doctor's appointment for Christopher because 15-month-old children generally do not lose their teeth.

The record shows that prior to Christopher's doctor's visit, Christopher grew very weak, his mouth became infected as a result of bacteria invading the lacerations in his mouth, and he became anemic. Additionally, Poland, one of the Department's protection and safety workers, testified that she visited Tammy at home in the early afternoon of November 18, 1996, and that Tammy was taking Christopher to the doctor later that day. Poland testified that the left side of Christopher's mouth was

red, swollen, and infected; his left eye was matted, red, and bruised; and he had a sore behind his left ear.

After seeing the doctor, Christopher was hospitalized for 4 days until his infection cleared up. During Christopher's hospitalization or shortly thereafter, the Department contacted Tammy's father and told him that its personnel were certain that Christopher was being abused and that they were attempting to remove Christopher from Tammy's care as a result. Tammy testified that she was aware of the Department's concerns, but did not believe that Christopher was in a bad situation. Poland testified that she spoke with her supervisor and the county attorney about filing a petition to adjudicate Tammy regarding Christopher under § 43-247(3)(a). Although Poland recommended that such a petition be filed, the county attorney determined not to and that Christopher would remain in Tammy's care and services would be provided to Tammy to assist her in caring for Christopher. It was later determined that the injury to Christopher's mouth was the result of blunt force trauma.

The record shows that after Christopher was released from the hospital, Christopher went back to live with Tammy, and that Tammy continued to date Harold and spend the night at Harold's residence. In fact, the evidence shows that if anything, Tammy may have increased the amount of time she spent at Harold's residence in order to, "[i]n a sense," hide from the Department so that its personnel could not remove Christopher from her care.

Tammy testified that on November 28, 1996, which was Thanksgiving, she was staying at Harold's with Christopher. Tammy testified that that morning, she left Christopher with Harold and went to pick up one of her other children, Kyle, for visitation. Tammy testified that she returned to Harold's residence a couple of hours later and was told Christopher's face had been burned. Harold told her initially that Christopher had "looked into the heater" and later that Christopher had fallen into the heater. Tammy testified that she thought about taking Christopher to the doctor for his burns, but that she decided not to because she knew that if she did, the Department would have grounds to remove Christopher from her care.

Tammy testified that after she observed Christopher's burns, she went to her parents' house for Thanksgiving with Christopher

and stayed there several hours. Tammy stated that she left her parents' home in the early evening and returned Kyle to Iowa, but that before doing so, she dropped Christopher off at Harold's once again. Tammy testified that she returned about an hour later. Tammy testified that later that same evening, Harold went into Christopher's room to change his diaper and she heard a "really soft thump" and Christopher started to cry. Tammy testified that she heard Harold say, " 'Oh, sorry, sorry' " and that Harold later told her that he had "bumped [Christopher] or somethin[g]."

Tammy testified that the next morning, she went to wake up Christopher and found that he was not breathing. After Tammy took Christopher to the hospital, he was pronounced dead. The autopsy photographs of Christopher's face entered into evidence by the State show multiple severe burn marks on Christopher's forehead, cheeks, and nose as well as extreme redness and swelling around Christopher's mouth and chin. These photographs also show burns on Christopher's arms and hands. The autopsy states that Christopher's burn marks were consistent with someone's forcefully holding Christopher's face against a heating vent. Besides these burns, the autopsy showed that Christopher sustained numerous other injuries including contusions to his head, face, neck, and abdomen, in addition to four hemorrhages in his scalp area. The autopsy shows that Christopher died as a result of brain swelling caused by blunt force trauma to his head. It is impossible to conclude, given the extent of Christopher's injuries, that Christopher sustained all of these injuries on November 28, 1996, and that Tammy was unaware that Harold was inflicting these injuries.

Furthermore, we note that the felony child abuse charge which Tammy pled to stated that Tammy was guilty of child abuse given that on November 28, 1996, Tammy knowingly or intentionally caused or permitted Christopher to be either placed in a situation that endangered his life or health, cruelly confined or cruelly punished, or deprived of necessary care and that Tammy's actions resulted in serious bodily injury to Christopher.

We note that in 1998, Tammy was found guilty of felony child abuse because Tammy knowingly or intentionally caused or permitted Christopher to be placed in a situation that endangered his life. This record shows that Tammy knew or should have

known that Harold was abusing Christopher and that despite this knowledge, Tammy left Christopher with Harold. As a result, Christopher suffered severe injuries which resulted in his death. Given these facts, we find that the trial court did not err in terminating Tammy's parental rights under § 43-292(10), because Tammy aided or abetted Christopher's murder or voluntary manslaughter by her actions.

Best Interests of Hailey.

Tammy argues that the trial court also erred in finding that the termination of her parental rights is in Hailey's best interests. Hinrichs testified that adoption is in Hailey's best interests because there are no services the Department can offer Tammy to provide for Hailey's safety and well-being, based upon Tammy's prior contacts with the Department and Tammy's criminal case involving Christopher. Hinrichs testified that she has not seen any evidence demonstrating a change in Tammy's lifestyle allowing Tammy to provide for Hailey's safety and well-being. The record shows that Hailey's foster parents expressed a desire "to provide for her long term."

We note that Hailey is Tammy's fifth child and that Tammy's track record with her children is not favorable. As to Tammy's first two children, the record shows that relatives have physical custody of both Ashley and Kyle. Tammy testified that the State removed Ashley from her care when Ashley was 3 or 4 months old because Ashley's father was allegedly abusing Ashley. Tammy testified that Ashley's father was abusive toward Tammy and that to protect Ashley, she allowed her parents to obtain guardianship of Ashley. Tammy testified that Kyle was also removed from her home and that at a subsequent hearing, the judge decided that Kyle and Ashley's grandmother could take better care of Kyle than Tammy could. The record shows that Tammy has visitation with Ashley, but had not seen Kyle in a few years. Tammy testified that she placed Luke for adoption because she was young, single, and financially unable to support him.

After being convicted of felony child abuse of Christopher in 1998, Tammy remained incarcerated until she received parole in 2002. Tammy was on probation until March 2003 and met Theodore at a work release center in 2003. Tammy became pregnant with Hailey in early 2005, and in July or August 2005,

Tammy, while pregnant with Hailey, was charged with possession of a controlled substance. Tammy was convicted of that offense and spent 90 days in jail in 2006.

Reviewing the record as a whole, including both Tammy's past behavior and her more recent behavior, we conclude that the trial court did not err in finding that the termination of Tammy's parental right is in Hailey's best interests.

Elimination of Requirement of Reasonable Efforts to Reunify.

Tammy also argues that the trial court erred in finding that the State was not required to use reasonable efforts to reunify Tammy with Hailey. The question arises by virtue of the language of Neb. Rev. Stat. § 43-283.01(4) (Reissue 2004), which states in relevant part:

> Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

[11] It is clear from looking at the language of § 43-283.01(4)(b)(iii) that this language mirrors that contained in § 43-292(10)(c). The juvenile court is a "court of competent jurisdiction" to make a determination regarding whether the exceptions under § 43-283.01(4)(b) apply to excuse reasonable efforts to reunify. See, *In re Interest of Anthony V.*, 12 Neb. App. 567, 680 N.W.2d 221 (2004); *In re Interest of Janet J.*, 12 Neb. App. 42, 666 N.W.2d 741 (2003), *disapproved on other*

grounds, In re Interest of Jac'Quez N., 266 Neb. 782, 669 N.W.2d 429 (2003).

We have already found that the record supports a finding that Tammy aided or abetted, or attempted, conspired, or solicited to commit, the murder or voluntary manslaughter of Christopher. Therefore, the trial court did not err in finding that the State was not required to use reasonable efforts to reunify Tammy with Hailey.

CONCLUSION

After reviewing the record, we conclude that we lack jurisdiction to determine whether the trial court erred in overruling Theodore's motion for visitation with Hailey. The trial court did not err in failing to order the Department to consider "any and all relative placements" for Hailey. Similarly, as to Tammy's cross-appeal, the trial court did not err in finding that Hailey is a child as defined in § 43-247(3)(a) or in finding that termination of Tammy's parental rights to Hailey is warranted under § 43-292(10). Additionally, the trial court did not err in finding that the State is not required to use reasonable efforts to reunify Tammy with Hailey. Therefore, we affirm the trial court's order in its entirety.

AFFIRMED.

MBH, INC., APPELLEE, V. JOHN OTTE OIL & PROPANE, INC., APPELLANT.

727 N.W.2d 238

Filed January 23, 2007. No. A-05-292.

1. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on

appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

4. **Uniform Commercial Code: Words and Phrases.** The Uniform Commercial Code defines goods as all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8 of the code), and things in action.
5. **Contracts.** The determination of whether goods or nongoods predominate a contract is generally a question of law.
6. **Uniform Commercial Code: Contracts: Sales.** The Uniform Commercial Code applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services.
7. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
8. ____: ____. In a case involving a breach of contract, the proper measure of damages is an amount which will compensate the injured party for loss which fulfillment of the contract would have prevented or breach of it has entailed.
9. **Contracts: Proof.** A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.
10. **Contracts.** It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
11. **Contracts: Parties: Time.** A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
12. **Contracts: Time.** When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
13. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
14. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.
15. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
16. **Contracts: Waiver.** Conditions precedent in a contract may be waived.
17. **Contracts.** The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Mark A. Fahleson and Glen Th. Parks, of Rembolt Ludtke, L.L.P., for appellant.

Shaylene M. Smith and Bradley T. Kalkwarf, of Kalkwarf & Smith Law Offices, L.L.C., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

John Otte Oil & Propane, Inc. (Otte), appeals from a judgment of the district court for Lancaster County which awarded $26,605.39 to MBH, Inc., as damages resulting from Otte's breach of a sales contract and $200 to Otte for MBH's breach of the same contract. We conclude that the disputed terms of the contract are sufficiently definite to be enforced. And although we conclude that the trial court erred in applying the Uniform Commercial Code (U.C.C.) to the sales contract at issue, because we conclude that the factual findings reached by the trial court were not clearly erroneous and the trial court awarded proper damages, we affirm.

BACKGROUND

On September 13, 1996, MBH, doing business under the trade name Hallam Grain Co., entered into a contract with Otte for the sale of Hallam Grain Co., a business that bought and sold grain, chemicals, and fertilizer. MBH agreed to sell Hallam Grain Co. to Otte as an ongoing business. The sales contract provided for the sale of real estate, buildings, fixtures, furniture, equipment, personal property, goodwill, inventory, and other assets associated with the said business. MBH also agreed to sell the name "Hallam Grain Co." to Otte and signed a covenant not to compete as part of the transaction. The contract provided for a purchase price of $430,000 and specified that the transaction was to be closed on or before October 15. The contract allocated the purchase price as follows:

Land	$10,000.00
Buildings	$170,000.00
Covenant not to compete	$100,000.00
All personal property, equipment, furniture and fixtures as reflected on attached Schedule "A"	$150,000.00
TOTAL	$430,000.00

Paragraph 5 of the contract provided for the sale of certain inventory items as follows:

> Seller and Buyer further agree that, at the time of closing, Seller will sell, transfer and convey to Buyer all remaining chemicals, grain, and fertilizer at a price not to exceed the sum of One Hundred Thousand Dollars ($100,000.00). Such sale is to be made after an inventory is taken by Seller and Buyer, of all such chemicals, grain and fertilizer, after the close of business on the day preceding the date of closing.

The contract did not further define "remaining chemicals, grain, and fertilizer," provided no further pricing information for these inventory items, and did not provide any mechanism for calculating the value of these items upon completion of the described inventory.

Additionally, the contract provided:

> Seller is the owner of merchantable title to all the property described in [an exhibit] attached hereto and made a part hereof, free and clear of any and all liens, charges, encumbrances, security interests or other burdens of every kind whatsoever, or will release all of such encumbrances at or before the time of closing.

Listed in the exhibit, which was attached to the sales contract and incorporated by reference, were the specific farm implements, facilities, and equipment that were included in the transaction. A grain vacuum was among the items listed in the exhibit.

After the sale was closed, MBH filed a petition against Otte in the district court, alleging that Otte failed to pay MBH for several items of inventory listed in paragraph 5 of the contract, which items had been in Otte's possession after Hallam Grain

Co. was transferred to Otte. Otte filed a demurrer for failure to state facts sufficient to constitute a cause of action, claiming that the sales contract was unenforceable because it was too indefinite, the minds of the parties did not meet at every point, issues were left open for future arrangement, and it was an unenforceable agreement to agree. The district court sustained Otte's demurrer and dismissed the action. In *MBH, Inc. v. John Otte Oil & Propane, Inc.*, No. A-00-287, 2001 WL 880683 (Neb. App. Aug. 7, 2001) (not designated for permanent publication), we held that taken liberally, MBH's petition set forth a cause of action, and therefore, we remanded the cause for further proceedings in accordance with our opinion.

In accordance with our instructions in *MBH, Inc.*, the trial court reinstated MBH's petition. MBH alleged in its second amended petition, filed on November 25, 2002, that it entered into a contract with Otte for the sale of Hallam Grain Co. on September 13, 1996. MBH alleged that on or about October 15, the contract was closed, and that on that same day, MBH provided Otte with a detailed inventory of all the chemicals to be purchased. The amended petition alleged that Otte had had continuous possession of the items listed in the inventory from October 15, 1996, to the time the amended petition was filed and that MBH made repeated attempts at collection but Otte refused to pay. MBH alleged that the value of the chemical inventory is $21,827.39. MBH also alleged that it provided Otte billings representing the amount of anhydrous ammonia and wheat it transferred to Otte and that MBH was due $3,471.50 for the anhydrous ammonia and $3,386.71 for the wheat.

On January 7, 2003, Otte filed an answer admitting that it entered into a contract to purchase Hallam Grain Co. from MBH that contained a provision for the sale of chemicals, fertilizer, and grain after a joint inventory and admitting that MBH "left various quantities of worthless agricultural chemicals on Otte's premises after the closing of the sales transaction," but alleging that Otte requested that MBH retrieve such chemicals and that MBH refused. Otte denied the majority of MBH's other allegations. Otte also filed affirmative defenses and filed counterclaims. Otte alleged in its first and only relevant counterclaim that MBH breached the sales contract by selling Otte a grain

vacuum system that was actually owned by a third party, causing it to be repossessed after Otte failed to make appropriate payment.

A bench trial was held. Relevant testimony and evidence ascertained during the trial will be discussed where pertinent in the analysis section of this opinion. Upon completion of the trial, the court entered judgment. The court held that "the predominant thrust of the sale was the sale of goods and therefore, Article 2 of the U.C.C. applies to the contract between MBH and Otte." The court further determined that a joint inventory of the chemicals, fertilizer, and grain was to occur on the day preceding the close of the sale as a condition to the sale of these items, but that a joint inventory was not taken on the day before the closing. However, the court found that inventories of the chemicals, grain, and fertilizer were taken at or near the time of the sale and that Otte's principal officer and shareholder or his employees were present during the taking of these inventories. The court found that MBH did transfer all remaining chemicals, grain, and fertilizer to Otte at the time of the sale and that Otte "manifested the intent to accept, either indirectly or directly, such items, without the joint inventory having occurred after the close of business on the day before the closing." Therefore, the court held, Otte waived the above-mentioned condition, making "the remaining provisions of the contract . . . enforceable."

In response to Otte's contention that many of the chemicals transferred by MBH were obsolete by the time the sale took place and therefore did not conform to the contract, the court found that the chemicals were still of use to Hallam Grain Co., were not obsolete, and therefore conformed to the contract. The court found that because these items conformed to the contract, Otte did not have the option under the U.C.C. to reject the chemicals. The court therefore concluded that Otte breached the contract by not paying for the chemicals and awarded MBH $21,827.39 in damages. The court also concluded that anhydrous ammonia and wheat were transferred to Otte, that Otte failed to pay for either, and that therefore, Otte was liable to MBH for $3,471.50 for the anhydrous ammonia and $1,306.50 for the wheat.

The court further determined that Otte was entitled to the fair market value of the grain vacuum MBH sold to Otte that was repossessed after the sale. The court awarded Otte $200 because evidence showed that the vacuum was sold for this amount after it was repossessed.

After entry of the trial court's order, Otte timely appeals.

ASSIGNMENTS OF ERROR

Otte alleges, restated and consolidated, that the trial court erred (1) by finding that article 2 of the Nebraska U.C.C. applied to the contract; (2) in determining the damage amount Otte was entitled to as compensation for the repossessed grain vacuum; (3) by finding that paragraph 5 of the contract was enforceable; (4) by determining that the goods conformed to the contract and therefore not finding that Otte's rejection of the goods was effective; (5) by finding that the condition precedent in paragraph 5 of the contract was waived by Otte; (6) by awarding MBH the value of materials other than chemicals, grain, and fertilizer; and (7) in determining the damage amount for Otte's alleged breach.

STANDARD OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

[2] The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

[3] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

ANALYSIS

Applicability of U.C.C.

[4] The Nebraska U.C.C. applies to transactions in goods. Neb. U.C.C. § 2-102 (Reissue 2001). The U.C.C. defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action." Neb. U.C.C. § 2-105 (Reissue 2001). If a transaction is not for the sale of goods, the provisions of the U.C.C. do not apply to that transaction. See *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985).

The sales contract at issue provides for the transfer of both goods and nongoods. The goods at issue include furniture, equipment, personal property, and inventory, including chemicals, grain, and fertilizer. The nongoods include real estate, buildings, goodwill, the business' trade name, and the covenant not to compete. We are therefore confronted with a mixed contract and must decide whether the U.C.C. applies.

[5] The trial court held that the U.C.C. applied to the sales contract. Otte alleges that this decision was erroneous. While MBH disagrees with Otte's argument, both parties believe that while Nebraska courts have not yet specifically addressed this issue, whether the U.C.C. applies to a mixed contract is a question of law. We agree. We also agree with courts from other jurisdictions that have held that the determination of whether goods or nongoods predominate a contract is generally a question of law. See, e.g., *Linden v. Cascade Stone Co., Inc.*, 283 Wis. 2d 606, 699 N.W.2d 189 (2005) (interpreting nature of contract presents question of law subject to independent review); *Valley Farmers' Elevator v. Lindsay Bros.*, 398 N.W.2d 553 (Minn. 1987) (question as to classification of hybrid contract is generally one of law), *overruled on other grounds, Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). We therefore engage in an independent review of this issue. See *Reichert, supra.*

[6] To determine whether the U.C.C. applies to the transaction in the instant case, we must ascertain the predominant purpose of the transaction.

> The test for inclusion in or exclusion from the sales provisions [of the U.C.C.] is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.

Mennonite Deaconess Home & Hosp., 219 Neb. at 308, 363 N.W.2d at 160. The U.C.C. applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services. See *Mennonite Deaconess Home & Hosp., supra.* The same analysis may be used when a transaction includes the sale of goods mixed with the sale of nongoods, as opposed to services. See *Hammond v. Streeter*, 225 Neb. 491, 495, 406 N.W.2d 633, 636 (1987) ("[i]n the present case, as is often true in the sale of a business, the sale of the Hammond Flying Service involved a mixed sale of goods, such as the runway markers, and nongoods, such as the lease on real estate").

We have found no Nebraska case that is factually similar to the instant case and analyzed whether the U.C.C. applies to the sale of an ongoing business. We therefore look to decisions from other jurisdictions that have addressed this issue in a similar context. Our research reveals that many courts have concluded in their decisions that the U.C.C. does not apply to mixed sales contracts for the sale of ongoing businesses. See, e.g., *Dravo Corp. v. White Consol. Industries*, 602 F. Supp. 1136 (W.D. Pa. 1985); *Morgan Pub., Inc. v. Squire Pub. Inc.*, 26 S.W.3d 164 (Mo. App. 2000); *Stewart v. Lucero*, 121 N.M. 722, 918 P.2d 1 (1996); *D.G. Porter, Inc. v. Fridley*, 373 N.W.2d 917 (N.D. 1985); *Field v. Golden Triangle Broad., Inc.*, 451 Pa. 410, 305 A.2d 689 (1973). Our research also reveals several decisions holding that the U.C.C. was applicable to sales of ongoing businesses. See, e.g., *De Filippo v. Ford Motor Company*, 516 F.2d 1313 (3d Cir. 1975); *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974). However, the facts in those cases differed from the facts presented in the instant case, as real estate and goodwill were not transferred in those cases. See *id.*

We find the first line of cases more persuasive. One such case is *D.G. Porter, Inc., supra.* In that case, the parties entered into a contract for the sale of a restaurant. The purchase agreement for the sale involved the transfer of goods, including furniture, equipment, and inventory, and nongoods, including goodwill, a retail liquor license, the assignment of the lease of the business premises, the transfer of fixtures, and the transfer of insurance policies. The court concluded that the transfer of nongoods constituted the essential element of the contract and declined to apply the U.C.C.

In the instant case, we determine that the U.C.C. is inapplicable. The predominant purpose of the contract was the sale of an ongoing business. The essential elements of the contract are nongoods, including real estate, buildings, and goodwill. Several factors lead us to this conclusion. First, the majority of the purchase price is allocated to the purchase of nongoods. This is true even when considering the maximum purchase price for the chemicals, grain, and fertilizer. Second, we believe that the heart of the contract is the goodwill and the real estate. Without the transfer of these things, many of the goods transferred to Otte would be of little or no use. Further, a large part of the goods, including the chemicals, grain, and fertilizer, contemplated in the sale were not itemized in the contract. An inventory of these goods was to occur on the day before the closing. It seems unlikely that elements which are the primary purpose of a contract would remain unspecified until the day before the closing. Viewing the entire contract, the primary purpose was the sale of nongoods.

Damages for Grain Vacuum.

Otte argues that while the district court correctly determined that MBH breached the sales agreement by transferring to Otte a grain vacuum that was subsequently repossessed, the court committed reversible error when it awarded an inadequate amount of damages for the breach.

[7,8] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). In

a case involving a breach of contract, the proper measure of damages is an amount which will compensate the injured party for loss which fulfillment of the contract would have prevented or breach of it has entailed. *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988).

The evidence adduced at trial shows that MBH agreed to sell Otte a grain vacuum system "free and clear of any and all liens, charges, encumbrances, security interests or other burdens of every kind whatsoever" and therefore breached this provision of the sales contract when it sold Otte an encumbered vacuum. The court relied on evidence submitted during trial showing that the vacuum was sold for $200 after it was repossessed and awarded Otte $200. Otte submitted evidence that it paid $16,645.13 to replace the vacuum and argues that this amount is the correct measure of damages. However, a former Otte employee testified that he was employed by Otte when it purchased the replacement grain vacuum. He testified that he did not attempt to determine if the balance due on the repossessed vacuum could be paid so that Otte could keep the vacuum. He further testified that the value of the repossessed grain vacuum was substantially less than the value of the replacement vacuum. Otte's principal officer and shareholder testified that he did not attempt to find a vacuum priced lower than the one he purchased for $16,645. We conclude that the trial court's determination of damages was not clearly wrong.

Paragraph 5 of Sales Contract.

Otte's third, fourth, and fifth assignments of error relate to the trial court's interpretation of paragraph 5 of the sales contract. Because we determined that the U.C.C. is not applicable, Otte's fourth assignment of error will not be discussed, as it is premised on the assumption that the U.C.C. applies.

Otte first argues that "[p]aragraph 5 lacks any quantity of goods to be sold under the contract and lacks a sale price (or even a method at determining a price); as a result, it is unenforceable according to general contract principles." Brief for appellant at 19-20. Otte elaborates that paragraph 5 is too indefinite to be enforced, creates an unenforceable agreement to agree, and does not evince a meeting of the minds necessary for an enforceable contract. Because MBH seeks to collect damages for a breach of

paragraph 5, we must determine whether paragraph 5 creates enforceable obligations.

[9] We recognize that the construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. See *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract. *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

[10] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Id.* It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto. *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

[11,12] A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. *Id.*

When the parties entered into the sales contract on September 13, 1996, the terms of paragraph 5 were not definite. The quantity of goods to be transferred was not defined. The provision contemplated that the specific items to be transferred would be determined by a joint inventory to be performed on the day preceding the closing. The trial court found that the joint inventory did not occur. The terms specified that the price for the items was not to exceed $100,000, but did not further specify how the price was to be determined. Because the parties left elements of this provision for future arrangement, this was not an enforceable contract provision on September 13.

In accordance with the Nebraska Supreme Court's decision in *Nebraska Nutrients, supra*, we continue our analysis to determine

if paragraph 5 became enforceable at any time after September 13. In *Nebraska Nutrients*, the court addressed whether an enforceable contract was created by language that provided in part: " '[The appellant] shall advance, as a loan to [a joint venture he is a party to], a mutually agreed upon sum of money and shall lend his business experience to the venture.' " *Id.* at 752, 626 N.W.2d at 499. The appellant in that case argued that the language at issue constituted an agreement to agree and was unenforceable because an essential term, the amount of the appellant's financial contribution, was left open for future arrangement. The appellees conceded that the " 'mutually agreed upon sum of money' " was a term to be agreed upon at a future time. *Id.*

The court found that the agreement "did not contain the essential term of the amount of funds which [the appellant] would advance." *Id.* at 755, 626 N.W.2d at 501. This conclusion reinforces our decision in the instant case that paragraph 5 was not enforceable when it was created, because the quantity and price of the goods were not specified in the contract.

However, the *Nebraska Nutrients* court continued its analysis. It recognized that an unenforceable agreement to agree may become enforceable when the missing term is subsequently supplied by the parties. See *id.* The court recited the rule that " '[e]ven though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by later verbal clarification or their subsequent conduct that indicates their own practical interpretation.' " *Id.* at 755, 626 N.W.2d at 500-01.

The court then concluded that the agreement became enforceable 35 days after the parties entered into the contract. It became enforceable because at that time, the appellant agreed that he would fund " 'the rest of the construction [needed for the joint venture],' " making his obligation "defined with reasonable certainty." *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 755, 626 N.W.2d 472, 501 (2001). The court elaborated that "the nature and extent of [the appellant's] obligation under the . . . agreement [was defined] so as to provide a standard by which his performance could subsequently be measured." *Id.*

We find that the facts of the instant case are similar to the facts at issue in *Nebraska Nutrients*. In the instant case, the terms of paragraph 5 became enforceable after the closing. The terms became defined by the parties' subsequent actions that indicated their interpretation of the terms. MBH's delivery of chemicals, fertilizer, and grain along with inventories of these items and Otte's acceptance of these items supplied the terms missing from paragraph 5, making it an enforceable provision. This occurred despite the fact that the joint inventory contemplated by the parties was not completed. We further explain our decision in our following response to Otte's argument that the trial court erred when it found that Otte waived the joint inventory as a condition precedent to enforcement of paragraph 5.

Otte argues the trial court correctly found that the joint inventory was a condition precedent to Otte's obligation to purchase the items listed in paragraph 5 and that the condition precedent was not met. Because neither party contests the court's determination, we assume without deciding that performance of the joint inventory was a condition precedent. However, we reject Otte's argument that the court erred when it found that Otte waived this condition.

[13-17] Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part. *Id.* A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. *Id.* Conditions precedent in a contract may be waived. *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982). The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. *Id.*

The trial court found that the "condition precedent found within the contract was waived by [Otte], by [its principal officer

and shareholder's] accepting items without performing a joint inventory with MBH after the close of business on the day before the closing." To reach this conclusion, the trial court considered testimony by two of MBH's officers that Otte's principal officer and shareholder or his employees were present when an inventory of these items was taken, which shows that Otte's principal officer and shareholder was aware of the inventory items that remained at Hallam Grain Co. after the closing for transfer to Otte. There was also testimony that Otte did not inform MBH until many months after the closing that it did not want the chemicals that were left at Hallam Grain Co. Although this was controverted, the trial court resolved this factual dispute adversely to Otte. The court concluded that the evidence demonstrated that Otte manifested the intent to accept, either directly or indirectly, the chemicals, grain, and fertilizer without the joint inventory's having first occurred. This decision was not clearly wrong.

The trial court's resolution of this issue leads us to conclude as a matter of law that the terms of paragraph 5 are binding and enforceable. MBH's creation of inventory lists and transfer of items to Otte and Otte's acceptance of the items supplied the quantity absent from paragraph 5. We find that by accepting the goods, Otte also accepted the prices calculated by MBH at the time the inventory lists were created and billed to Otte.

Damage Amount for Otte's Breach.

Otte's final assignments of error pertain to the damages the trial court awarded to MBH for Otte's breach. Otte argues that the district court erred when it awarded MBH $21,827.39 as compensation for Otte's failure to pay for the chemicals transferred to Otte. Otte argues that this amount represents more than the chemicals, including items such as twine, gloves, a tin shed, motors for a " 'station house,' " gasoline, and diesel. Brief for appellant at 31. Otte also argues that MBH failed to meet the burden of establishing the price of the chemicals.

We recognize that the amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Brandon v. County of Richardson*, 264 Neb.

1020, 653 N.W.2d 829 (2002). While the amount awarded to MBH represents more than the price for the chemicals, we find that an award of items beyond the chemicals is supported by the evidence. There was evidence presented that other items were transferred to Otte for which MBH was not paid.

Otte argues that "[t]he only competent evidence in the record establishing the value of the remaining chemicals is that of [an agricultural supplies sales] expert . . . . [He] opined that the remaining chemicals were valued at $3,061.00." Brief for appellant at 31. However, the testimony of another of MBH's officers provides evidence supporting the damage award of $21,827.39. That officer itemized and priced the chemicals at issue. He testified that he prepared the inventory on or about September 8, 1996. He included on the list a chemical inventory and the prices of the chemicals as ascertained by a pricelist provided by the wholesaler from whom he bought the chemicals. He opined that the prices represented the fair market value of the chemicals at the time of closing. Otte did not assign error regarding the receipt of this testimony in evidence. Rather, Otte invites us to substitute our judgment for that of the district court on the issue of credibility. We conclude that the determination of credibility falls within the province of the trial court and that the court awarded MBH an amount of damages that is supported by the evidence.

CONCLUSION

Paragraph 5 of the sales contract became enforceable when the parties' actions after the contract was created defined the parties' obligations under the contract. While the trial court erred in applying the U.C.C. to the transaction at issue, the trial court's factual findings and damage awards were not clearly erroneous. We therefore affirm.

AFFIRMED.

JOSE ANGEL GARCIA, APPELLANT, V. PLATTE VALLEY CONSTRUCTION CO. AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLEES.

727 N.W.2d 698

Filed January 30, 2007. No. A-06-490.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such.
4. ____: ____: ____. "Conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown.
5. **Judgments.** A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.

Appeal from the Nebraska Workers' Compensation Court. Appeal dismissed, and cause remanded with directions.

Samuel W. Segrist, of Meister & Segrist, P.C., L.L.O., for appellant.

John K. Sorensen, of Sorensen, Mickey & Hahn, P.C., for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Jose Angel Garcia appeals from the judgment of the review panel of the Nebraska Workers' Compensation Court affirming the trial court's denial of Garcia's motion for waiting-time

penalties and attorney fees. For the reasons set forth herein, we dismiss the appeal and the cause is remanded with directions.

STATEMENT OF FACTS

Garcia injured his back while working for Platte Valley Construction Co. (Platte Valley) on August 7, 1995. Garcia was awarded temporary partial disability benefits and past and future medical benefits by the Nebraska Workers' Compensation Court on October 24, 1996. Garcia filed an application for modification of the award on January 31, 2000. On December 28, the trial court entered a further award ordering Platte Valley to pay Garcia's pending medical expenses.

On December 17, 2004, an "Application for Approval of Compromise and Final Lump Sum Settlement" was filed in the compensation court. The application indicated that the parties had jointly stipulated and agreed that Garcia would accept payment in the amount of $135,000 "in a lump sum, in full and complete satisfaction and payment of any and all claims for compensation or benefits which [Garcia] has or may have or may claim to have."

The only paragraph of the application that is relevant to the instant case is paragraph 9, which indicated that Garcia was a Medicaid recipient and that the "lump sum settlement [would be] subject to the requirement for a Medicare Set Aside Agreement and set aside allocation in the amount of $8,487.05." This sum was to be paid from the $135,000 lump sum received by Garcia. Paragraph 9 of the application also indicated that Garcia had "received, and will execute an agreement setting forth the terms and conditions for beneficiary administered Medicare set-aside account, and provide a copy of the same to [the Centers for Medicare & Medicaid Services]."

On January 12, 2005, the compensation court entered an order approving the parties' lump-sum settlement application. Specifically, the court ordered that the parties' application "is hereby approved" and that "[u]pon performance of the terms of such application, and the payment of $135,000.00, [Platte Valley and its] successors and assigns shall be discharged from all further liability on account of the accident and injuries of August 7, 1995."

On March 14, 2005, Garcia filed a motion for waiting-time penalties and attorney fees. In his motion, Garcia claimed, "Thirty days from January 12, 2005 was Friday, February 11, 2005. As of this date none of the settlement proceeds owed by [Platte Valley] had been paid to [Garcia] or [his] counsel." Further, the motion alleged, "By February 17, 2005 no settlement proceeds had . . . been received by [Garcia] or [his] counsel. [His] counsel on February 17, 2005 and February 18, 2005 sent correspondence to counsel for [Platte Valley] requesting that the settlement checks be delivered to [Garcia's] counsel." Garcia alleged that on February 21, his attorney received a letter from Platte Valley's attorney indicating that Platte Valley's attorney had the checks, and that on February 22, Garcia's attorney delivered a letter to Platte Valley's attorney asking that the checks be delivered. The checks were delivered by Platte Valley on February 23.

On April 4, 2005, Platte Valley filed an objection to Garcia's motion for waiting-time penalties and attorney fees. In its objection, Platte Valley asserted that the parties' application to approve the lump-sum settlement "included a provision obligating [Garcia] to execute a Medicare set-aside agreement, and to provide the same to the Centers for Medicare and Medicaid Services . . . for . . . approval" and that "[p]aragraph IX of the [application] specifically made these requirements part of the [application]." The objection further stated, "By letter dated February 16, 2005, [Garcia's] counsel sent to [Platte Valley's] counsel a copy of the set-aside agreement and other documents to be executed by [Garcia]. The set-aside agreement contained blanks and was purportedly signed by [Garcia] on September 24, 2004." Platte Valley asserted that it had not received documentation from Garcia regarding approval by the Centers for Medicare & Medicaid Services (CMS) of the set-aside agreement in a timely fashion, that it received this documentation on February 22, 2005, and that payment was provided to Garcia on February 23.

On April 5, 2005, a hearing was had on Garcia's motion for waiting-time penalties and attorney fees. On April 22, the trial court entered an order overruling Garcia's motion. Specifically, the trial court held as follows:

> I read the application and [the] order which approved [the application] to be "subject to the requirement for a Medicare Set Aside Agreement" which at the time of the order of January 12, 2005, had not been approved by CMS. Although counsel for both parties may have believed the Workers' Compensation Medicare Set-Aside Arrangement [(WCMSA)] had been approved, in fact, it was not until February 17, 2005 . . . . That correspondence from CMS provided in bold-face "**Approval of this WCMSA is not effective until a copy of the final executed workers' compensation settlement agreement, which must include this approved WCMSA amount, is received by CMS at the following address**[.]" Counsel for [Platte Valley] forwarded the application and order approving the lump sum settlement, which included the approved WCMSA amount, to CMS on February 22, 2005 . . . . [Platte Valley's] counsel then caused the settlement checks to be hand-delivered to [Garcia's] counsel's office on February 23, 2005 . . . .
>
> I find the Order Approving Compromise and Final Lump Sum Settlement of January 12, 2005, was a "conditional order" because it was "subject to" approval of the WCMSA by CMS. Conditional orders are generally void. Maddux v. Maddux, 239 Neb. 239, 475 N.W.2d 524 (1991); County of Sherman v. Evans, 247 Neb. 288, 526 N.W.2d 232 (1995); Lyle v. Drivers Mgmt., 12 Neb.App. 350, 673 N.W.2d 237 (2004). Even if it were creatively argued that [that] order was an exception to the general rule because it was based upon a future condition which was met, the condition—approval by CMS—was not met until February 17, 2005, and payment occurred February 23, 2005, well within 30 days of the occurrence of the condition which made the conditional order final. Either way, [Garcia's] Motion for Waiting Time Penalty, Attorney Fee, and Interest is denied.

On May 5, 2005, Garcia filed an application for review with the review panel for the Nebraska Workers' Compensation Court. On April 3, 2006, the review panel entered its order affirming the judgment of the trial court overruling Garcia's motion for

waiting-time penalties and attorney fees. Garcia has timely appealed to this court.

ASSIGNMENTS OF ERROR

Garcia alleges that the review panel erred when it affirmed the trial court's finding that the trial court's order approving the parties' lump-sum settlement application was a conditional order and when it affirmed the trial court's decision overruling Garcia's motion for waiting-time penalties and attorney fees.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

ANALYSIS

Garcia first alleges that the review panel committed error when it affirmed the trial court's order finding that the January 12, 2005, order approving the parties' lump-sum settlement application was a conditional order.

In its order overruling Garcia's motion for waiting-time penalties and attorney fees, the trial court found as follows:

> I read the application and [the] order which approved [the application] to be "subject to the requirement for a Medicare Set Aside Agreement" which at the time of the order of January 12, 2005, had not been approved by CMS. Although counsel for both parties may have believed the Workers' Compensation Medicare Set-Aside Arrangement [(WCMSA)] had been approved, in fact, it was not until February 17, 2005 . . . . That correspondence from CMS provided in bold-face "**Approval of this**

> **WCMSA is not effective until a copy of the final executed workers' compensation settlement agreement, which must include this approved WCMSA amount, is received by CMS at the following address**[.]" Counsel for [Platte Valley] forwarded the application and order approving the lump sum settlement, which included the approved WCMSA amount, to CMS on February 22, 2005 . . . . [Platte Valley's] counsel then caused the settlement checks to be hand-delivered to [Garcia's] counsel's office on February 23, 2005 . . . .
>
> I find the Order Approving Compromise and Final Lump Sum Settlement of January 12, 2005, was a "conditional order" because it was "subject to" approval of the WCMSA by CMS.

[3-5] A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Thus, orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. *Id.* These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown. *Id.* A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Id.*

We find that the trial court's reading of the parties' application for approval of their lump-sum settlement was not clearly wrong. The application contains conditional language in that it indicates that "this lump sum settlement will be subject to the requirement for a Medicare Set Aside Agreement" and that Garcia "has received, and will execute an agreement setting forth the terms and conditions for beneficiary administered Medicare set-aside account, and provide a copy of the same to CMS." The record clearly indicates that this set-aside agreement was not completed by the time the January 12, 2005, order was entered; in fact, it does not appear that the set-aside agreement was completed until more than a month after the January 12

order was entered. In a letter dated February 17, 2005, CMS indicated that CMS had "determined that $8,487.00 adequately considers Medicare's interests." There is nothing in the record to indicate that CMS had approved the set-aside agreement prior to February 17.

Accordingly, we find that the trial court properly found that the January 12, 2005, order approving the parties' lump-sum settlement application was a conditional order. Because that order did not "perform in praesenti," we further find that the January 12 order was wholly void. That order does not operate as a final judgment, and it is wholly ineffective as such. Therefore, we find that the instant appeal must be dismissed for lack of a final, appealable order and that the proper resolution is to remand to the review panel for remand to the trial court for entry of a final order in this case.

CONCLUSION

Because we agree with the trial court that the January 12, 2005, order was a void conditional order, we dismiss the instant appeal and remand the cause back to the review panel for remand to the trial court for entry of a final order in the instant case.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

ANONYMOUS, APPELLANT, V. PAUL VASCONCELLOS AND BLUE VALLEY MENTAL HEALTH ASSOCIATION, A NEBRASKA NONPROFIT CORPORATION, APPELLEES.

727 N.W.2d 708

Filed February 6, 2007. No. A-05-743.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. ____: ____. A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court.
4. **Limitations of Actions: Malpractice: Time.** Nebraska has a 2-year statute of limitations for actions for professional negligence except that causes of action not discovered, and which could not have been reasonably discovered until after the limitations period has run, can be filed within 1 year of discovery, with an overall limitation of 10 years after the date of rendering or failing to render such professional service which provides the basis for the cause of action.
5. **Limitations of Actions: Malpractice.** For claims alleging professional malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed.
6. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
7. **Limitations of Actions: Malpractice.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
8. **Limitations of Actions: Words and Phrases.** Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court.
9. **Limitations of Actions.** A cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action.
10. **Actions: Words and Phrases.** A cause of action consists of the set of facts on which a recovery may be had.
11. **Limitations of Actions.** The discovery of the basis of the cause of action is the preeminent concept in determining whether the discovery exception applies to toll the statute of limitations.
12. **Actions.** A theory of recovery is not itself a cause of action.
13. **Limitations of Actions: Time.** Under the 1-year discovery provision of Neb. Rev. Stat. § 25-222 (Reissue 1995), it is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed.
14. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission refers to a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with the production of evidence by conceding for purposes of litigation that the subject of the admission is true.

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

Daniel H. Friedman and Herbert J. Friedman, of Friedman Law Offices, for appellant.

Robert F. Bartle, of Bartle & Geier, for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Anonymous filed suit against Paul Vasconcellos, a licensed mental health professional (LMHP) with training as a family and marriage therapist, and his employer, Blue Valley Mental Health Association (Blue Valley), a nonprofit corporation engaged in the practice of psychotherapy and mental health counseling in Seward, Nebraska. Anonymous claimed that Vasconcellos, while acting in the course and scope of his employment, improperly treated Anonymous. Finding that Anonymous' claims were barred by the statute of limitations pursuant to Neb. Rev. Stat. § 25-222 (Reissue 1995), the district court granted summary judgment and dismissed the complaint. Finding that the discovery exception to the running of the applicable statute of limitation does not apply, we affirm.

FACTUAL BACKGROUND

Anonymous, born August 11, 1961, alleges that during the 1970's, while she was attending St. John's Elementary School (the School) in Seward, David Mannigel, a teacher who later became the principal, sexually abused her between the ages of 10 and 12. The School is associated with St. John Lutheran Church (the Church) in Seward. Anonymous was a member of the Church from her birth until she got married in 1984.

Since 1978, Vasconcellos has been a member and visiting pastor of the Church. Vasconcellos is an LMHP and practices as a family and marriage therapist. Vasconcellos admits that treating patients who have been sexually abused requires specialized training and that he does not have such specialized training.

Anonymous became Vasconcellos' patient in 1990, when she was approximately 29 years old. That treatment was at Pioneer Mental Health, a community mental health center where Vasconcellos was then employed. The evidence before us is that Vasconcellos did not remember the details of such treatment and that Anonymous did not recall if the issue of Mannigel's sexual abuse of her arose at that time. There are apparently no written records of such treatment. Anonymous testified she went

to Vasconcellos for counseling because she knew that he knew Mannigel; because they were both affiliated with the Church; because she saw Vasconcellos as an "honest Christian figure"; because she knew Vasconcellos from when she attended Concordia University in Seward for 1 year, where he worked; and because Vasconcellos' children attended the School, where Mannigel worked.

On four occasions in 1996, Vasconcellos treated Anonymous, then 35 years old, who reported symptoms primarily of anger and depression. During the 1996 sessions, Anonymous told Vasconcellos that she had been sexually abused by Mannigel during her childhood. According to Anonymous, Vasconcellos appeared shocked when she told him that Mannigel had sexually abused her and Vasconcellos wanted to change the subject. Anonymous testified that when she said she wanted to confront Mannigel, Vasconcellos told her both that a confrontation with Mannigel could be dangerous to her and that she might not get the response she wanted from him. While Anonymous understood that her sessions with Vasconcellos were confidential, she hoped that Vasconcellos would report the abuse to authorities, although she never instructed him to do so. In February 1997, Vasconcellos wrote in the "Closing Summary" in his records that it was mutually agreed between Anonymous and himself that Anonymous "would return for therapy as needed."

In 2000, Vasconcellos treated Anonymous on April 20, and the intake medical record from that visit reflects that Anonymous presented with problems of overwhelming stress and anxiety about death. Vasconcellos recommended that Anonymous "be evaluated by both a clinical psychologist and psychiatrist," although he did not refer Anonymous to a clinical psychologist or a psychiatrist. Both the 1996 and the 2000 medical records from Blue Valley reflect that Anonymous reported she had been sexually abused during her childhood, although the medical records do not mention Mannigel.

The record shows that during the time period of the therapy sessions with Anonymous, Vasconcellos considered Mannigel to be a personal friend and played cards in a social setting with Mannigel. The record further shows that Vasconcellos did not

inform Anonymous either that he was friends with Mannigel or that he played cards with Mannigel.

In March 2001, Anonymous came forward to the Church's administration with her allegations of sexual abuse. Soon thereafter, in June 2001, Mannigel committed suicide.

PLEADINGS

On February 17, 2004, Anonymous filed in the Lancaster County District Court a complaint for damages against Vasconcellos and Blue Valley. The core allegations were that Vasconcellos failed to properly treat her because he had a conflict of interest due to his relationship with Mannigel, because he did not report to law enforcement authorities that she had been sexually abused as a child, and because he was unqualified to treat a victim of sexual abuse. The Lancaster County District Court transferred the case to the Seward County District Court after Blue Valley filed a motion alleging improper venue.

On September 7, 2004, Anonymous filed an amended complaint for damages. In the amended complaint, Anonymous alleged that she

> was not aware that Vasconcellos was a personal friend of Mannigel and had a conflict of interest, or that he had failed to properly treat her and was in fact, treating her for a condition for which he had no experience until on or about October 9, 2003[,] when she was advised [of such facts] by [her] counsel subsequent to the deposition of Vasconcellos in another case.

Anonymous asserted that the statute of limitations was tolled "because [she] was not aware that Vasconcellos had committed malpractice until after the two year statute of limitations [and] because the cause of action was not discovered and could not . . . reasonably have been discovered within such two-year period." Anonymous alleged that her lawsuit was filed within 1 year from the date of discovery.

Vasconcellos and Blue Valley (collectively Appellees) asserted in their answer that Anonymous' claims were barred by the applicable statute of limitations, and on January 11, 2005, they filed a motion for summary judgment alleging that Anonymous' claims were barred by the statute of limitations.

SUMMARY JUDGMENT

On February 28, 2005, a hearing was held on the motion for summary judgment. The district court received into evidence eight exhibits, which contained information we will use in our analysis.

The parties also stipulated that if Anonymous were to testify, she would testify that (1) she was not aware that Vasconcellos was a social friend of Mannigel's or that Vasconcellos considered Mannigel as part of a circle of friends; (2) Vasconcellos failed to advise Anonymous that he was personally acquainted with Mannigel; (3) Vasconcellos did not have training to treat sexually abused persons and failed to advise Anonymous of that fact, but continued to treat her; and (4) Anonymous was not aware of these facts until Vasconcellos' October 8, 2003, deposition.

On June 6, 2005, the district court filed, with extensive written findings, its order sustaining Vasconcellos and Blue Valley's motion for summary judgment. Anonymous now appeals.

ASSIGNMENT OF ERROR

Anonymous alleges that the district court erred by granting Appellees' motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003).

[2] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court. See *Essen v. Gilmore*, 259 Neb. 55, 607 N.W.2d 829 (2000).

ANALYSIS

[4,5] Nebraska has a 2-year statute of limitations for actions for professional negligence except that causes of action not discovered, and which could not have been reasonably discovered until after the limitations period has run, can be filed within 1 year of discovery, with an overall limitation of 10 years after the date of rendering or failing to render such professional service which provides the basis for the cause of action. See § 25-222. For claims alleging professional malpractice, the period of limitations begins to run when the treatment relating to the allegedly wrongful act or omission is completed. See *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996). The record shows that Vasconcellos last treated Anonymous on April 20, 2000, and Anonymous contends that she did not discover her claim within the following 2 years or by April 20, 2002. However, if she discovered her claim by such date, this action is obviously barred by the statute of limitations.

[6,7] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *In-Line Suspension v. Weinberg & Weinberg*, 12 Neb. App. 908, 687 N.W.2d 418 (2004).

[8-12] In *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 26, 430 N.W.2d 34, 37 (1988), the court said: "Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court." Later authority holds that a cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A cause of action consists of the set of facts on which a recovery may be had. *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992). The discovery of the "basis of the cause of

action" is the preeminent concept in determining whether the discovery exception applies to toll the statute of limitations. See *Gering-Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 846, 612 N.W.2d 897, 903 (2000). See, also, *Weaver v. Cheung*, 254 Neb. 349, 576 N.W.2d 773 (1998); *McGinley v. McGinley*, 7 Neb. App. 410, 583 N.W.2d 77 (1998). A theory of recovery is not itself a cause of action. *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002).

From the foregoing authority, the key question in the instant case is: When did Anonymous learn of the "basis" of her cause of action? As pointed out by *Georgetowne Ltd. Part. v. Geotechnical Servs., supra*, this is different than Anonymous learning that she had a legal right to seek redress in a court of law or learning about her theories of recovery for the alleged improper treatment.

[13] It is clear from the record the "basis" of Anonymous' cause of action for improper treatment was that she had been sexually abused as a child, which caused emotional and psychological difficulties in her life; that she informed Vasconcellos about the sexual abuse; and that Vasconcellos never treated her for the sexual abuse. Viewing the evidence most favorably to Anonymous, we assume, for analytical purposes only, that Vasconcellos' treatment of her was improper. However, why the treatment was improper is not part of the discovery exception analysis; rather, the "why" or reasons for the improper treatment are related to her theories of recovery and to whether she actually has a legal right to redress. See *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988) (under 1-year discovery provision of § 25-222, it is not necessary that plaintiff have knowledge of exact nature or source of problem, but only knowledge that problem existed). Therefore, whether Vasconcellos' treatment was improper because of his lack of qualifications to treat sexual abuse victims and his failure to report the abuse to law enforcement as well as the fact that he was the abuser's friend, or any other reason, is not relevant to the issue before us. We hold that the "basis" of her cause of action is that Anonymous had been improperly treated by Vasconcellos for the consequences of her past sexual abuse.

Discovery of why she was improperly treated is not what tolls the 2-year statute of limitations.

Being fully aware that the 2-year statute of limitations has obviously run, Anonymous attempts to bring herself within the discovery exception by using the information her attorney told her on October 9, 2003, about Vasconcellos' testimony given in a deposition on October 8. The parties agreed at the hearing on this motion for summary judgment that Anonymous would testify that after Vasconcellos' deposition on October 8, she learned of Vasconcellos' friendship with Mannigel and his lack of expertise with victims of sexual abuse. Anonymous claims that October 9 was her "date of discovery," when her attorney informed her about what Vasconcellos revealed during his deposition, and that she filed suit within 1 year of that date. But, what Anonymous learned on October 9 relates solely to why she was improperly treated, which is different than the basis of her cause of action—that Vasconcellos negligently treated her for the sexual abuse she experienced as a child.

Returning to the question of when Anonymous learned about the basis of her cause of action, we quote her answers to Appellees' first interrogatories, where she said:

> I finally came to realize that the reason for my anger, depression, and events in my life in general were a direct result of the sexual abuse I had suffered by . . . Mannigel after counseling [w]ith Dr. Bob Larson. It wasn't until he told me that the abuse was the "big thing["] or event in my life that I had been looking for that I fully realized that I had been abused.

Anonymous further testified that Dr. Bob Larson had told her that he was "surprised" and "amazed" that none of her prior counselors had dealt with the sexual abuse issue.

After Anonymous ended her treatment with Vasconcellos following her April 20, 2000, session, Anonymous sought treatment from Dr. Larson. While Anonymous could not precisely identify either the dates that Dr. Larson treated her or the precise date that he told her that she needed to be treated for sexual abuse, Anonymous admitted that she sought treatment from Dr. Larson at or around the time that she came forward to the

Church regarding her allegation that Mannigel sexually abused her when she was a child. She did this in March 2001.

In response to Appellees' interrogatory requesting identification of Anonymous' medical records, she identified her medical records from Dr. Larson as having a date of February 14, 2002. Anonymous said that after she stopped treatment with Dr. Larson, she received treatment from an individual through Lutheran Family Services. In her answers to Appellees' interrogatories, Anonymous disclosed medical records of her treatment with Lutheran Family Services beginning in July 2002, meaning that her treatment with Dr. Larson had ceased by that time.

Taking the most favorable view of when Anonymous had her key conversation with Dr. Larson, which is the most generous view of when she discovered the basis of her cause of action, we conclude that at the latest, Anonymous' treatment with Dr. Larson had concluded by July 2002. Accordingly, the latest she could have been told the facts by Dr. Larson which constitute the basis of her claim is July 31, 2002. Thus, even if we assume that Anonymous was not aware of the basis of her cause of action against Vasconcellos within 2 years of her last session with Vasconcellos on April 20, 2000, the date of discovery of her claim for negligent treatment by Vasconcellos was no later than July 31, 2002. At best, she had until July 31, 2003, to file her lawsuit against Vasconcellos. Because Anonymous did not file her suit until February 17, 2004, Anonymous' suit is barred by the statute of limitations. The district court reached the same result upon a similar analysis.

[14] The above analysis does not take into account some other key material from the record which constitutes another reason for affirmance of the dismissal of the action as barred by the statute of limitations. In Anonymous' amended complaint admitted into evidence at the hearing in the motion for summary judgment, she alleges that she saw Vasconcellos four times in 1996 and on April 20, 2000. She then alleges:

> [Anonymous] related to Vasconcellos during the history taken by Vasconcellos, on each occasion that she consulted with him, that [Anonymous] had been sexually abused by Mannigel while a student at [the] School and that all of

> [Anonymous'] life she had experienced significant emotional and psychological difficulties as a result of that encounter.

Such allegations are a judicial admission dispensing with any need for proof of such facts. See *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 491 N.W.2d 368 (1992) (judicial admission refers to formal act done in course of judicial proceedings which is substitute for evidence, thereby waiving and dispensing with production of evidence by conceding for purposes of litigation that subject of admission is true). Additionally, Anonymous testified that when she was 18 years of age, she began looking for emotional help because of depression, and when asked if she knew what was "producing [her] depression," her answer was, "It still had to do with [Mannigel]."

Therefore, there is undisputed evidence via Anonymous' judicial admission that she knew within 2 years of her last treatment by Vasconcellos that her "significant emotional and psychological difficulties," to use her own words, were the result of sexual abuse by Mannigel. And, Anonymous was obviously aware during Vasconcellos' treatment that he was not treating her for sexual abuse, which, as said above, is the "basis of her cause of action." On October 9, 2003, Anonymous merely gained knowledge about why Vasconcellos may have improperly treated her, which, as said before, is not the type of information which triggers the discovery exception. Thus, the discovery exception to the 2-year statute of limitations is not implicated in this case, because the premise behind her invocation of the discovery exception—the alleged lack of knowledge of the connection between her sexual abuse and her emotional and psychological difficulties until told of such by Dr. Larson—must fail, given her judicial admission in the amended complaint to the contrary.

That said, while we have examined the discovery exception because that is how the parties and the trial court approached the statute of limitations issue, Anonymous' claim is also barred by the statute of limitations because during the 2-year statute of limitations period, she knew the "basis of her cause of action."

CONCLUSION

We conclude that Anonymous' complaint is barred by the statute of limitations. We affirm the district court's grant of summary judgment and dismissal of the complaint.

AFFIRMED.

STATE OF NEBRASKA EX REL. BILLY TYLER, APPELLANT, V. ROBERT HOUSTON AND MIKE KENNEY, APPELLEES.

727 N.W.2d 703

Filed February 6, 2007. No. A-06-010.

1. **Sentences: Time: Prisoners.** Where a prisoner is discharged from a penal institution, without any contributing fault on his or her part, and without violation of conditions of parole, his or her sentence continues to run while he or she is at liberty.
2. ____: ____: ____. There is an exception to the right to a continuous sentence in situations where the interruption of the sentence is caused by escape, violation of parole, or some other fault of the prisoner.

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

Billy Tyler, pro se.

Jon Bruning, Attorney General, and Linda Willard for appellees.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Billy Tyler appeals from an order of the district court for Lancaster County dismissing his petition for habeas corpus relief. The present case is one of a number of actions brought by Tyler in a variety of different courts on the issue of whether Tyler is entitled to credit against his prison sentence for time he spent released on bond pursuant to a grant of habeas relief in July 2003. See, e.g., cases Nos. A-06-696, A-06-604, A-06-603, A-06-602, A-06-380, A-06-189, A-06-183, A-06-076, A-06-053, A-06-052, A-06-026, A-05-1568, A-05-1334, A-05-833, A-05-342, A-05-128, and A-04-1418. We find no merit to Tyler's

appeal, conclude that the district court properly found Tyler was not entitled to habeas relief at the time he filed the petition in this case, and affirm the district court's dismissal of Tyler's petition.

II. BACKGROUND

Tyler was originally sentenced on February 9, 1996, to three concurrent terms of 7 to 10 years' imprisonment upon Tyler's convictions on three counts of unlawful delivery of a controlled substance. Tyler was given credit for 80 days served.

On July 7, 2003, the district court granted a petition for habeas corpus relief filed by Tyler. The district court found Tyler's continued detention by the Nebraska Department of Correctional Services (Department) after November 22, 2002, was without legal authority. As such, the district court ordered Tyler to be discharged pursuant to an appearance bond pending an appeal by the Department. The appearance bond, signed by Tyler, specified that Tyler agreed "to appear in the District Court . . . as directed by the Court as ordered either for court ordered hearings or as mandated by [the] Court of Appeals or Supreme Court upon resolution of the [appeal]."

In February 2004, the Nebraska Supreme Court reversed the grant of habeas corpus relief. See *State ex rel. Tyler v. Britten*, 267 Neb. xxii (No. S-03-762, Feb. 19, 2004). The mandate was issued on March 26 and entered by the district court on March 30. On March 30, the district court ordered Tyler to appear as follows:

> Tyler is ordered to immediately surrender himself to the . . . Department . . . to complete his sentence as provided by law.
>
> . . . Tyler is directed to appear at the District Court . . . no later than Monday April 19, 2004, at 10:00 a.m. to surrender to the authorities . . . unless he voluntarily surrenders himself before that date. Failure of [Tyler] to surrender himself as ordered by this court shall result in revocation of his appearance bond and warrant for his arrest on April 19, 2004.

Tyler did not surrender himself as ordered by the district court. Tyler was subsequently arrested on November 7.

In July 2003, when Tyler was released on bond, the Department had calculated his projected release date to be

November 18, 2005. At the time of Tyler's release, he had been the subject of numerous disciplinary actions which had resulted in "disciplinary segregation time equivalent to the remainder of his unserved sentence." In other words, at the time of Tyler's release, he had not accumulated any good time credit. None of the disciplinary sanctions have been overturned. As such, at the time of Tyler's release on bond, he had approximately 862 days remaining on his sentence. (July 10, 2003, through July 9, 2004, is 366 days; July 10, 2004, through July 9, 2005, is 365 days; and July 10 through November 17, 2005, is 131 days.)

On September 8, 2005, Tyler filed the petition for habeas corpus relief in this case. Tyler alleged that he was entitled to credit against his sentence for the time from his release on bond until his being returned to incarceration in November 2004. Tyler alleged that with the credit against his sentence, he was then entitled to absolute discharge. Tyler has filed in various courts numerous similar proceedings asserting his entitlement to credit for the time he was released on bond.

On October 28, 2005, the district court entered an order dismissing Tyler's petition. The district court found that Tyler was out of custody in violation of his bond from March 30 until November 6, 2004, a total of 221 days. The district court made no finding whether Tyler was entitled to credit against his sentence for the time he was legitimately out of custody on bond—from July 10, 2003, through March 29, 2004—but specifically found that he was not entitled to credit for the 221 days he was out of custody in violation of his bond. With respect to Tyler's assertion that he was also entitled to earn good time credit toward an earlier release date while he was out of custody on bond, the district court found that Tyler was not entitled to restoration of good time previously forfeited, because "Tyler was not in the custody of the [D]epartment [while] he was out of custody on bond." The court therefore dismissed Tyler's petition.

On November 4, 2005, Tyler filed a motion asking the district court to reconsider its October 28 order. The district court overruled the motion on November 8, but placed an incorrect docket number on the order. After being notified of the error, the district court issued on November 16 a new order overruling the motion. Tyler filed this appeal.

III. ASSIGNMENT OF ERROR

Tyler's sole assignment of error is that the district court erred in denying him habeas corpus relief.

IV. ANALYSIS

As we read the myriad of filings and orders in this case, noting that the multitude of filings made by Tyler are all handwritten and often bordering on illegibility, we construe the appeal to present two issues: whether Tyler is entitled to credit as time served for the period of time he was out of custody on bond and whether Tyler is entitled to restoration of previously forfeited good time credit for the period of time he was out of custody on bond. The answer to both questions leads us to conclude that the district court was correct in finding that Tyler was not entitled to habeas corpus relief at the time he filed the petition at issue in this case.

1. Time Served Credit

We first consider whether Tyler is entitled to credit as time served for the period of time he was out of custody on bond. This issue was tangentially addressed in this court's opinion in *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005), an opinion Tyler has seized upon and misconstrued in most of the filings he has made in the present case.

In *Tyler v. Nebraska Dept. of Corr. Servs., supra*, this court addressed whether a declaratory judgment action brought by Tyler concerning issues similar to those raised in the present case was properly characterized as frivolous such that the district court could properly deny in forma pauperis status. We concluded that Tyler's claim was not frivolous. We noted that the record presented did not indicate Tyler had violated any of the conditions of his release, and we concluded that Tyler's claim that his sentence should have continued to run during the time he was out of custody on bond was not frivolous. We also, however, specifically emphasized that we were "not expressing any view concerning the ultimate merit of Tyler's claim." *Id.* at 800, 701 N.W.2d at 851. It is the ultimate merit of that claim, in part, that is now presented.

[1] In *Tyler v. Nebraska Dept. of Corr. Servs., supra*, this court looked to the oft-cited case of *White v. Pearlman*, 42 F.2d 788,

789 (10th Cir. 1930), in which the Court of Appeals for the 10th Circuit stated:

> A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. . . . It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty.

See, also, *Luther v. Vanyur*, 14 F. Supp. 2d 773 (E.D.N.C. 1997); *McCorvey v. State*, 675 So. 2d 81 (Ala. Crim. App. 1995). Cf. *Free v. Miles*, 333 F.3d 550 (5th Cir. 2003) (holding prisoner was not entitled to credit on federal sentence for mistakenly serving first 6 months of federal sentence prior to completing service of state sentence and stating that sole purpose of rule against piecemeal incarceration is to prevent governmental abuse of coercive power to imprison person by artificially extending duration of sentence through releases and reincarceration).

Applying those same principles to the case before us, we conclude that the district court did not err in dismissing Tyler's petition. The district court properly concluded that Tyler is not entitled to credit as time served for the period of time he was out of custody and in violation of the terms of his bond, and this finding alone is sufficient to conclude that when Tyler filed his petition, he was not entitled to habeas corpus relief on the basis of any credit as time served. Nonetheless, we conclude that the district court miscalculated the period of time during which Tyler was in violation of his bond.

On March 30, 2004, the district court entered the mandate of the Nebraska Supreme Court reversing the district court's earlier grant of habeas corpus relief to Tyler. The district court specifically directed Tyler, in accordance with the terms of his appearance bond, to "immediately surrender himself"; however, the district court further specified that Tyler was directed to appear "no later than Monday April 19, 2004," or his appearance bond would be revoked and an arrest warrant would be issued. As such, we first conclude that the period of time during which

Tyler was out of custody and in violation of his appearance bond was the period of time from April 19 through November 6, or 202 days—rather than the 221 days found by the district court.

[2] We agree with the district court that Tyler is not entitled to credit for time served during this period of time. The principles of law quoted above specifically recognize an exception to the right to a continuous sentence in situations where the interruption of the sentence is caused by escape, violation of parole, or some other fault of the prisoner. Here, the 202 days during which Tyler was in violation of his appearance bond constitute a period of time during which Tyler's sentence was interrupted through his fault—his failure to appear as directed by the court.

At the time of Tyler's release on bond, his projected release date was November 18, 2005. Because Tyler is not entitled to any credit as time served for the 202 days that he was out of custody and in violation of his appearance bond, his projected release date would have become at least sometime in June 2006.

Tyler filed his petition seeking habeas corpus relief on September 8, 2005. At that time, Tyler still had at least approximately 9 months to serve on his sentence, absent any credit for good time, regardless of whether Tyler is entitled to credit as time served for the period of time he was out of custody on bond and not in violation of the terms of his bond. As such, when Tyler filed for habeas corpus relief and when the court ruled on his petition, the district court correctly held that Tyler was not entitled to habeas corpus relief on the basis of credit as time served. Because we need not do so to resolve this appeal, we expressly decline to address whether Tyler is entitled to credit as time served for any period of time he was out of custody on bond and not in violation of the terms of the bond or whether Tyler was, in fact, not in violation of the terms of his bond during any other periods of time.

2. Good Time Credit

The other issue that must be addressed is whether Tyler is entitled to good time credit for the period of time he was out of custody on bond. Tyler has asserted that pursuant to Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 2006), he should have earned good time credit during the time he was out of custody on bond,

and that such good time credit entitles him to habeas corpus relief. We disagree.

Section 83-1,107(2) provides for good time credit. However, the record indicates that when Tyler was released on bond in July 2003, he had accumulated no good time credit and had actually "accumulated disciplinary segregation time equivalent to the remainder of his unserved sentence." As such, when Tyler was released on bond in July 2003, he had accumulated more than 2 years of disciplinary segregation. Although § 83-1,107(3) allows for restoration of good time, Tyler has provided no authority which would suggest he was entitled to such restoration of good time. In fact, the Department's administrative regulation No. 117.02 provides that previously forfeited good time "may be restored" if the inmate "has demonstrated progressive positive behavior over an extended period of time." Tyler has not demonstrated an entitlement to restoration under this provision.

Additionally, as noted above, for at least 202 of the days Tyler was out of custody on bond, he was out of custody in violation of the terms of his appearance bond. Inasmuch as we have already concluded above that Tyler is not entitled to any credit for this period of time as time served, he is likewise not entitled to any good time credit for the time. We conclude that the district court correctly held that Tyler is not entitled to restoration of good time credit and was not entitled to habeas corpus relief on this basis.

V. CONCLUSION

The issues presented herein are limited to whether Tyler was entitled to habeas corpus relief when he filed his petition for habeas corpus relief and when the district court ordered Tyler was entitled to no relief and dismissed his petition. At those times, Tyler was not entitled to habeas corpus relief under a theory of credit as time served or good time credit. Tyler is entitled to no credit for the 202 days he was out of custody and in violation of his appearance bond. We expressly make no determination concerning Tyler's entitlement to credit as time served for the time he was out of custody on bond and not in violation of the terms of his bond.

AFFIRMED.

[By order of the court, *State v. McCulloch*, 15 Neb. App. 381, 727 N.W.2d 717 (2007), withdrawn. See *State v. McCulloch*, 15 Neb. App. 616, 733 N.W.2d 586 (2007). (Pages 382-89) omitted.)]

RICHARD C. JURA, SPECIAL ADMINISTRATOR OF THE ESTATE OF AMANDA C. JURA, DECEASED, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

727 N.W.2d 735

Filed February 27, 2007. No. A-05-165.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party.

2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages.** Pursuant to Neb. Rev. Stat. § 13-911(1) (Reissue 1997), in case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
4. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** For a passenger to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle.
5. **Police Officers and Sheriffs: Motor Vehicles.** In the context of determining whether a passenger is an innocent third party, the question of whether a person is sought to be apprehended in the fleeing vehicle is a mixed question of fact and law.
6. **Police Officers and Sheriffs: Words and Phrases.** Apprehension by a police officer can mean seizure in the name of the law, arrest, catch, or detain.
7. **Police Officers and Sheriffs: Motor Vehicles.** A police officer's grounds for seeking to apprehend occupants in a vehicular chase situation must have a reasonable basis in the law and facts.

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

William J. Pfeffer, of Pfeffer Law Offices, for appellant.

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

IRWIN and SIEVERS, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

Richard C. Jura (Jura), as special administrator of the estate of Amanda C. Jura, appeals from the decision of the district court for Douglas County which dismissed his wrongful death claim against the City of Omaha (the City). This appeal involves a police pursuit that resulted in a traffic accident that killed two passengers. The issue is whether one of the passengers, Amanda C. Jura (Amanda), was an "innocent third party," thus entitling her estate to recover under Neb. Rev. Stat. § 13-911 (Reissue 1997). We affirm the trial court's finding that Amanda was not an innocent third party.

FACTUAL BACKGROUND

At approximately 4 a.m. on December 8, 2002, in Omaha, Nebraska, Amanda was a back seat passenger in a stolen Lincoln Town Car (Lincoln) driven by Jacob Witt (Witt had the car for approximately 1 week prior to December 8), although it does not appear that Amanda knew the Lincoln was stolen. Also in the Lincoln were Tiffany Bruce, in the front passenger seat, and Robin Abraham, also in the back seat. Amanda, Witt, Bruce, and Abraham left a party at a private residence and took the Lincoln to "get more dope." Amanda and Abraham were introduced to Witt approximately a half hour before leaving with him in the Lincoln. While in the Lincoln, they drove past a police cruiser driven by Omaha police officer Thomas Deignan. Officer Deignan began to follow the Lincoln, but he did not turn on the cruiser's lights or sirens. Officer Deignan admitted that no traffic violations were committed, but he thought it was strange that young people would be out in an expensive car at 4 o'clock in the morning. Officer Deignan called the police dispatcher to check the Lincoln's license plates, and the dispatcher informed Officer Deignan that the Lincoln was reported stolen. The Lincoln "started to take off," and Officer Deignan declared "pursuit" and turned on the cruiser's lights and sirens. Officer Deignan also radioed for other officers to help in the pursuit. During the pursuit, the Lincoln missed a curve, went over an embankment, and crashed into a tree. Amanda and Abraham died as a result of their injuries. Additional facts will be set forth as necessary in our analysis.

PROCEDURAL BACKGROUND

Jura filed a complaint on August 14, 2003. The parties stipulated that Jura satisfied the requirements of the Political Subdivisions Tort Claims Act. Jura's complaint alleged that Amanda was a passenger in the Lincoln driven by Witt; that Witt was attempting to evade vehicular pursuit by one of the City's law enforcement officers; that as a result of Witt's attempt to avoid vehicular pursuit, he lost control of the Lincoln and struck a tree, causing Amanda personal injuries and ultimately her death and resulting in both special and general damages. The complaint alleges that the City was liable under § 13-911, the

strict liability statute for injuries or death to innocent third parties caused by police motor vehicle pursuits.

The City's answer denied that Amanda was an innocent third party under § 13-911. The City alleged contributory negligence and assumption of the risk as affirmative defenses—matters we need not discuss because the case is determined by Amanda's status.

The district court granted the City's motion to bifurcate the issues of liability and damages. A trial was held on October 13 and 19, 2004, regarding the liability issue. At such trial, Jura's case was consolidated with cases brought by or on behalf of the other two passengers. Abraham was found not to be an innocent third party by the trial court, a decision we have previously affirmed. See *Reed v. City of Omaha, ante* p. 234, 724 N.W.2d 834 (2006).

In an order filed January 19, 2005, the trial court found that Amanda was not an " 'innocent third part[y]' within the contemplation of . . . § 13-911(1)." The trial court found that on the evening of December 7, 2004, Amanda and Abraham appeared at Bruce's house, where Witt was present; that the four individuals smoked methamphetamine and marijuana and collectively decided that they were going out to buy more drugs; that they left Bruce's house with Witt driving the stolen Lincoln; that Officer Deignan ran a check on the Lincoln's license plates and found there were no warrants, but that the Lincoln was stolen; that Witt started to " 'take off' " and Officer Deignan began a pursuit; and that the high speed pursuit led to its terminus in a park in Omaha.

The trial court also found that Witt gave inconsistent accounts of the chase. Witt's first statement (and a letter he wrote to Bruce) made no mention of the passengers' requesting him to stop, but, rather, Witt said that someone tried to give him directions not to hit a curb. Witt further stated that the passengers made comments regarding the license plate check and outstanding warrants. Witt told investigators that Abraham said: "[H]urry up and get away from 'em 'cause I got a warrant, I got a warrant in Sarpy County, and I got a warrant somewhere else." Witt's later testimony, as well as Bruce's testimony, was that after the

police started the pursuit, the passengers all sought to dissuade Witt from fleeing. The district court said:

> To the extent that their accounts are inconsistent, the Court concludes that Witt's custodial statement is the most credible version of these events. It was given within hours of the events themselves. It was given by a person who did not know or wasn't focusing on the civil aspects of the case. It was given to interrogators who were concentrating on the criminal side of the case. In sum, it was the most candid, reliable account of those few minutes.

The district court found that Abraham was the passenger who told Witt that she had an arrest warrant outstanding.

As to Amanda, the district court said:

> Amanda Jura comes as close as any of the three to an 'innocent third party.' She may not have been subjectively aware that Witt was driving a stolen vehicle, although a young man without a job behind the wheel of such an expensive car would prompt questions for most people. [Amanda] did not have any outstanding warrants, and she may not have been carrying drugs. Nevertheless, at 4:00 A.M. when this journey began, the four had agreed to drive Witt from the house at which they were smoking methamphetamine to another location, and to continue their drug use or to purchase additional drugs. All were aware that the group possessed controlled substances, and were subject to arrest if stopped and searched. They were all aware, including [Amanda], that they were taking a circuitous route to their destination, to avoid encountering police in the early morning hours. The confluence of all of these facts exceeds acquiescence. [Amanda], together with her friends Bruce and Abraham, promoted or advocated Witt's flight, at the time when they all became aware of and discussed the first officer's data check on their license plates, and the arrest warrant.
>
> None of these girls consented to, or encouraged Witt to drive erratically, or to crash. They just wanted him to get away. They knew that it would be better for them if he did elude police.

Furthermore, the district court held that Amanda fell within the category of individuals " 'sought to be apprehended in the fleeing vehicle' " and, thus, was not an innocent third party entitled to recovery under § 13-911(1). The district court dismissed Jura's case with prejudice.

Jura timely appeals the order of the district court.

ASSIGNMENT OF ERROR

Jura asserts that the district court erred in finding that Amanda was not an innocent third party under the terms of § 13-911.

STANDARD OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

ANALYSIS

[3,4] Jura argues that the district court erred in finding that Amanda was not an innocent third party pursuant to § 13-911(1), which states: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." For a passenger to be an innocent third party, the passenger (1) must not have promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and (2) must not be one who is sought to be apprehended in the fleeing vehicle. *Reed v. City of Omaha, ante* p. 234, 724 N.W.2d 834 (2006). See, also, *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002). Either circumstance prevents a finding that a claimant

in a police pursuit case was an innocent third party. *Reed v. City of Omaha, supra.* As a result, we need not analyze both disqualifying circumstances, and after our study of the record in this case, we conclude that the disqualifying factor of "sought to be apprehended" lends itself to the most straightforward analysis and resolution. Therefore, we do not address the district court's conclusion that Amanda promoted Witt's flight.

[5,6] Whether Amanda was a person "sought to be apprehended in the fleeing vehicle" is a mixed question of fact and law, and given that the facts surrounding the question of "apprehension" are largely undisputed, we reach our own independent conclusion as to whether Amanda was a person "sought to be apprehended." See *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003). Black's Law Dictionary 110 (8th ed. 2004) defines "apprehension" as "[s]eizure in the name of the law; arrest . . . ." But apprehend can also mean to "catch," see *Reyes-Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239, 1243 (11th Cir. 2004), or "detain," see *United States v. Moderacki*, 280 F. Supp. 633, 638 (D. Del. 1968).

Part of the district court's rationale for its conclusion on the issue of apprehension was that "[a]ll were aware that the group possessed controlled substances, and were subject to arrest if stopped and searched." To the extent that the district court meant that everyone in the group was subject to arrest for the drugs in Bruce's purse, we reject that conclusion. All of the passengers knew that Bruce had drugs in her purse, but such fact did not make Amanda necessarily subject to arrest, because the purse was not her property and she was not in possession of the drugs. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977). There was no evidence to show actual or constructive possession of the drugs by Amanda. However, of greater significance is the simple fact that possession of drugs was not the officer's basis for starting or continuing the pursuit, and seeking to apprehend the vehicle's occupants, because he had no knowledge of such circumstance until after the pursuit ended.

Officer Deignan started the pursuit of the Lincoln once he became aware that the vehicle was stolen. The evidence does not establish that Amanda knew the Lincoln was stolen, but as the trial court reasoned, an inference of such knowledge may be permissible. However, Officer Deignan testified as follows:

> Q. [By Bruce's counsel:] Are you aware, with your training as a police officer, as to whether there's such a crime as riding in a stolen vehicle?
>
> A. As far as being a passenger?
>
> Q. Yes.
>
> A. There is a charge. I believe it's 28511, unlawful occupancy. Something similar to that.
>
> Q. Have you ever charged anyone with that?
>
> A. I have not, no.
>
> Q. Would it be accurate to say that you were most interested in stopping the vehicle so that you could apprehend the driver of the stolen vehicle?
>
> A. Not at that time, no.
>
> Q. Didn't matter to you, driver versus passenger?
>
> A. I wanted everybody inside the vehicle.

Officer Deignan also testified: "When you have a stolen vehicle with multiple occupants, you don't know who stole the vehicle, where it was taken from, who might have been driving it earlier. You don't have that information before you stop the vehicle and question the occupants." Also, two other Omaha police officers testified that in a situation involving a stolen vehicle, proper police procedure requires the officer to "catch" all occupants in the car, because not knowing when the vehicle was stolen, it is possible that everyone in the vehicle could have been involved in the auto theft.

[7] Given the testimony of the police officers, we find that Amanda was a person sought to be apprehended in the fleeing vehicle. A police officer's grounds for seeking to apprehend occupants in a vehicular chase situation must have a reasonable basis in the law and facts. Such a basis clearly exists in this case, because the vehicle was a stolen vehicle, as opposed to, for example, a chase starting with a traffic violation. Thus, Amanda was not an innocent third party and her estate is barred from recovering under § 13-911. It follows that we need not address

whether Amanda promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Brockhaus v. Lambert*, 259 Neb. 160, 608 N.W.2d 588 (2000).

AFFIRMED.

INBODY, Chief Judge, not participating.

STATE OF NEBRASKA, APPELLEE, V.
AMBER L. MURPHY, APPELLANT.

727 N.W.2d 730

Filed February 27, 2007. No. A-05-1210.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act.
4. **Postconviction: Jurisdiction: Effectiveness of Counsel: Appeal and Error.** The power to grant a new direct appeal is implicit in Neb. Rev. Stat. § 29-3001 (Reissue 1995), and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
5. **Postconviction: Time: Appeal and Error.** A defendant obtaining postconviction relief of a new direct appeal must properly appeal from his or her original conviction and sentence based on the grant of such postconviction relief. The 30-day limit within which the defendant must file his or her new direct appeal commences on the day that such postconviction relief is granted in the district court.
6. **Postconviction.** Postconviction proceedings are civil in nature.
7. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** When an issue as to the subject matter jurisdiction of the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise sua sponte and determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.
8. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
9. **Stipulations.** Parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded.
10. **Jurisdiction: Stipulations: Appeal and Error.** Appellate jurisdiction of the subject matter can only be conferred in the manner provided by statute and cannot be conferred by stipulation of the parties.

11. **Final Orders: Jurisdiction: Appeal and Error.** An appellate court is not bound by the parties' acquiescence or consent as to whether the district court has entered a final order which would confer jurisdiction upon the appellate court.
12. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by consent.
13. **Judgments: Jurisdiction: Collateral Attack.** Judgments entered by a court without subject matter jurisdiction are void and subject to collateral attack.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Appeal dismissed.

Sonya K. Koperski, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Amber L. Murphy was convicted of distribution of a controlled substance, methamphetamine, following a jury trial in the district court for Hall County and was sentenced to 2 to 4 years' imprisonment. Murphy did not timely perfect an appeal from the original verdict and sentence, but she was subsequently granted the right to file an appeal by the district court, pursuant to a stipulation of the parties. On appeal, Murphy challenges the sufficiency of the evidence to submit the charge to the jury. Because we find that the district court lacked jurisdiction to enter the order allowing Murphy to file an appeal out of time, we dismiss this case for lack of jurisdiction.

BACKGROUND

The State filed an amended information on January 25, 2005, charging Murphy with two counts of distribution of a controlled substance, methamphetamine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Supp. 2003). The State later moved to dismiss the first count of the amended information, which motion was granted by the district court. In count II of the information, the State alleged that on September 9, 2003, Murphy did unlawfully and knowingly or intentionally manufacture, distribute, deliver, or dispense methamphetamine, a controlled substance.

A jury trial was held on January 27, 2005. Because the underlying facts of this case are not relevant to our disposition, we omit further discussion of the factual background.

The jury returned a guilty verdict. On March 15, 2005, the district court entered an order sentencing Murphy to a term of incarceration for a period of 2 to 4 years with credit for time served of 1 day. Murphy did not file a notice of appeal within 30 days of the March 15 sentencing order.

In her brief on appeal, Murphy asserts that on July 25, 2005, she filed a motion for postconviction relief due to the failure of her former counsel to file an appeal within the time required by statute. The record before us does not contain Murphy's postconviction motion, but it does contain a stipulation and an order allegedly filed in connection with the postconviction proceeding. The stipulation, filed September 9, states that the parties "stipulate and agree that [Murphy] may file an Appeal in the above-captioned case." The parties also recommended to the court that the appeal bond previously set continue to be in effect. The district court's order, entered September 19, states:

> [T]his matter comes before the Court on a Stipulation of the parties hereto for the filing of an Appeal and that the Appeal Bond previously set in this case . . . remain in effect. Upon due consideration, the Court finds that the Stipulation should be granted.
>
> IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, AND DECREED BY THE COURT as follows:
>
> 1. [Murphy] is hereby granted 30 days to file an Appeal in this matter.
>
> 2. The Appeal Bond previously set in this case shall remain in effect.
>
> 3. Balance of Post Conviction motion is not adjudicated. JDL

We observe that the third numbered point of the order is handwritten.

On October 11, 2005, Murphy filed a notice of appeal, purporting to appeal from the March 15 sentencing order. This court initially dismissed Murphy's appeal for lack of jurisdiction as having been filed out of time. On January 13, 2006, Murphy

filed a motion for rehearing and sought leave to file a supplemental transcript. On April 21, this court sustained Murphy's motion for rehearing and granted her leave to file a supplemental transcript. The stipulation and order of September 2005 described above are found in the supplemental transcript in this case. In sustaining Murphy's motion for rehearing, we specifically reserved the issue of jurisdiction and ordered the parties to address the issue in their briefs.

ASSIGNMENT OF ERROR

Murphy asserts that the district court erred in finding that there was sufficient evidence of corroboration to submit the charge regarding the September 9, 2003, incident to the jury.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

ANALYSIS

[2] We must first consider whether Murphy has properly perfected her appeal in the present case. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Dunlap, supra.*

It is clear that Murphy did not file a notice of appeal within 30 days of the March 15, 2005, sentencing order. In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order. Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006). Murphy argues that her trial counsel failed to perfect an appeal from the March 15 sentencing order, that she filed a postconviction action to address this failure, and that she properly perfected the present appeal based on the relief granted by the district court in the postconviction proceeding.

[3,4] Where a defendant is denied his or her right to appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act. *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003). The power to grant a new direct appeal is implicit in Neb.

Rev. Stat. § 29-3001 (Reissue 1995), and the district court has jurisdiction to exercise such a power where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings. *State v. Meers, supra.* The court in *State v. Meers* stated:

> When a postconviction claim of ineffective assistance of counsel is based solely upon counsel's failure to perfect an appeal from a conviction, a new direct appeal permits restoration of the convicted defendant's rights and status at the time of counsel's deficient performance by affording the full statutory time to perfect and prosecute a direct appeal while not disturbing the conviction, unless the appeal discloses reversible error.

267 Neb. at 31, 671 N.W.2d at 237.

[5] A defendant obtaining postconviction relief of a new direct appeal must properly appeal from his or her original conviction and sentence based on the grant of such postconviction relief. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The 30-day limit within which the defendant must file his or her new direct appeal commences on the day that such postconviction relief is granted in the district court. *State v. McCracken, supra.*

> Such a procedure allows the appellate court to obtain jurisdiction over the new direct appeal (assuming that the appeal is properly docketed in the appellate court within 30 days of the grant of postconviction relief), while still authorizing district courts to grant appropriate relief when the constitutional defect in the prior proceedings occurred only at the direct appeal stage. The State, of course, maintains its right to appeal the postconviction judgment of the district court.

Id. at 245, 615 N.W.2d at 914.

What is required for purposes of the present appeal is evidence that Murphy was awarded postconviction relief of a new direct appeal and evidence that a notice of appeal was filed within 30 days of the grant of such relief. See *State v. McCracken, supra.* The problem in this case is that the record before us is insufficient to establish that the district court was properly exercising its jurisdiction of a postconviction proceeding.

[6-8] First, the record does not contain Murphy's motion for postconviction relief. Thus, we have no knowledge of the allegations made in the postconviction proceeding. Postconviction proceedings are civil in nature. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). When an issue as to the subject matter jurisdiction of the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise sua sponte and determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). Although in Murphy's brief, she asserts that she filed a motion for postconviction relief "due to the failure of her former counsel to file an appeal within the time required by statute," brief for appellant at 1-2, no such motion appears in the record. A party's brief may not expand the evidentiary record. See *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). Thus, the absence of the postconviction motion in our record precludes us from considering, as a proper element of postconviction relief, the district court's order granting Murphy leave to file an appeal.

Second, and perhaps more importantly, the record fails to provide any factual basis for a determination that Murphy was deprived of any constitutional right in her failure to timely pursue a direct appeal. The only record before us regarding the postconviction proceedings is the stipulation of Murphy's counsel and the prosecutor before the district court, which stipulation states only that Murphy "may file an Appeal in the above-captioned case," and the district court's order pursuant to that stipulation purporting to grant "an Appeal in this matter."

[9] The stipulation does not set forth any facts pertaining to a deprivation of constitutional rights; rather, it is purely conclusory. Parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded. *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.*, 201 Neb. 405, 268 N.W.2d 98 (1978).

Under § 29-3001, the jurisdiction of the district court to grant postconviction relief depends upon the existence of a factual circumstance whereby "there was such a denial or infringement

of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States." The same postconviction statute requires the district court to "make findings of fact and conclusions of law with respect thereto." *Id.* In the case before us, there are no allegations of fact, no stipulations of fact, and no findings of fact showing any such denial or infringement of Murphy's constitutional rights. The stipulation sets forth only the bare conclusory agreement that "an Appeal" be allowed, and the district court's order merely implements that stipulation.

[10-12] The Nebraska Supreme Court has long held that appellate jurisdiction of the subject matter can only be conferred in the manner provided by statute and cannot be conferred by stipulation of the parties. *State, ex rel. Ayres, v. Amsberry*, 104 Neb. 273, 178 N.W. 822 (1920). An appellate court is not bound by the parties' acquiescence or consent as to whether the district court has entered a final order which would confer jurisdiction upon the appellate court. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by consent. See, *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003); *Burkland v. Johnson*, 50 Neb. 858, 70 N.W. 388 (1897). We find that the stipulation was not sufficient to invoke the district court's jurisdiction pursuant to the postconviction statute and constituted an invalid attempt to extend the time for appeal.

[13] Judgments entered by a court without subject matter jurisdiction are void and subject to collateral attack. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). Because the stipulation of the parties was not sufficient to invoke the district court's subject matter jurisdiction in the postconviction proceeding, the district court's order purporting to grant an appeal is void.

CONCLUSION

We conclude that Murphy failed to timely invoke appellate jurisdiction and that the district court order based solely upon a conclusory stipulation of the parties without any factual basis, which order purports to grant 30 days to file an appeal, is without jurisdiction and void. Accordingly, we must dismiss the appeal.

APPEAL DISMISSED.

QWEST BUSINESS RESOURCES, INC., A COLORADO CORPORATION, APPELLEE, V. HEADLINERS–1299 FARNAM, LLC, AN OHIO LIMITED LIABILITY COMPANY, AND RETAIL CONSTRUCTION, LLC, AN OHIO LIMITED LIABILITY COMPANY, APPELLEES, AND HEADLINERS ENTERTAINMENT GROUP, INC., A DELAWARE CORPORATION, APPELLANT.

727 N.W.2d 724

Filed February 27, 2007. No. A-06-1361.

1. **Jurisdiction.** The question of jurisdiction is a question of law.
2. **Attorney Fees: Appeal and Error.** Attorney fees can be awarded against a party bringing an appeal that is without rational argument based on law and evidence.
3. **Constitutional Law: Jurisdiction: Legislature: Appeal and Error.** Jurisdiction is vested in an appellate court through the state Constitution and the Legislature, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1995).
4. **Constitutional Law: Supreme Court: Jurisdiction: Appeal and Error.** Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken.
6. ____: ____: ____. An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
7. **Judgments: Final Orders.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
8. **Rules of the Supreme Court: Motions to Dismiss: Final Orders.** An order overruling a pretrial motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1), (2), and (6) (rev. 2003) is not a final order.
9. **Attorney Fees: Words and Phrases.** As used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995) concerning allowance of an attorney fee, "frivolous" means a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.
10. **Attorney Fees: Costs.** No attorney fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Appeal dismissed.

George A. Sutera, of Sutera Law Office, for appellant.

Thomas O. Kelley, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Qwest Business Resources, Inc.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This appeal presents the first opportunity for a Nebraska appellate court to determine whether an order overruling a pretrial motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1), (2), and (6) (rev. 2003) is a final order. Because this appeal was taken from an order which is not final, we lack jurisdiction, and accordingly, we dismiss the appeal.

BACKGROUND

Qwest Business Resources, Inc. (Qwest), a Colorado corporation, commenced this action in the district court for Douglas County, Nebraska, against three defendants. As against appellee Headliners–1299 Farnam, LLC (1299), an Ohio limited liability company, Qwest alleged that in order for 1299 to operate a restaurant, Qwest leased certain real estate to 1299, which was then known as 1299 Farnam, LLC. Qwest also alleged that appellee Headliners Entertainment Group, Inc. (Headliners), a Delaware corporation, had "acquired" 1299 in 2005 and that in or about September 2005, Headliners changed the name of 1299 to include the reference to Headliners. Qwest alleged various breaches of the lease agreement and asserted claims against 1299 and Headliners for forcible entry and detainer, against 1299 for unpaid rents and other damages for breach of the lease, and against Headliners upon various theories including consolidation, merger, or express or implied agreement that Headliners was liable for 1299's debts and obligations. Qwest also named as a defendant appellee Retail Construction, LLC (Retail), an Ohio limited liability company, and asserted a claim against Retail based upon breach of a written guaranty of the lease to 1299.

On September 21, 2006, Headliners filed a motion to dismiss, citing rule 12(b)(1) and (2). However, in the body of the motion, Headliners specifically asserted that the district court lacked jurisdiction over the subject matter with regard to Headliners and that Qwest's complaint failed to state a claim upon which relief could be granted against Headliners.

By an order entered November 8, 2006, the district court denied the motion. Headliners appeals.

MOTION FOR SUMMARY DISMISSAL

Qwest has filed a motion for summary dismissal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7B(1) (rev. 2001). Qwest asserts that the order of the district court overruling Headliners' motion to dismiss was not a final order and that consequently, this court lacks jurisdiction of this appeal. Qwest also asserts that Headliners' appeal is frivolous and seeks attorney fees pursuant to Neb. Rev. Stat. § 25-824(2) (Reissue 1995).

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[2] Attorney fees can be awarded against a party bringing an appeal that is without rational argument based on law and evidence. *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999).

ANALYSIS

[3,4] Jurisdiction is vested in an appellate court through the state Constitution and the Legislature, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1995). *Nebraska Dept. of Health & Human Servs. v. Struss, supra.* Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute. *Nebraska Dept. of Health & Human Servs. v. Struss, supra.*

[5,6] For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken. *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). An appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). Qwest contends that the district court's order was nonfinal. Because Nebraska has only recently adopted rules of pleading similar to federal notice pleading procedures, the Nebraska appellate courts have not previously considered whether an order overruling a motion to

dismiss pursuant to rule 12(b) constitutes a final order. However, federal courts have addressed the issue.

In construing Nebraska's current pleading rules, the Nebraska Supreme Court has looked to federal cases interpreting similar federal rules. See, *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005). Although Headliners appears to rely on rules 12(b)(1) and (6), its motion also refers to rule 12(b)(2). For our purposes, we may disregard this uncertainty because federal case law holds that a denial of such motion is not appealable, for lack of a final order, as to all three grounds. See, *Catlin v. United States*, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945) (denial of motion to dismiss, even when motion is based upon jurisdictional grounds, is not immediately reviewable); *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006) (order denying motion to dismiss for lack of personal jurisdiction is not final order); *Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Cir. 2006) (normally, denial of motion to dismiss for failure to state claim is not final order). Although the U.S. Supreme Court—applying what has become known as the collateral order doctrine—has carved out a small class of trial court decisions that, though short of a final judgment, are immediately appealable, such decisions are appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Headliners does not contend that the collateral order doctrine applies in the case before us, and we now turn to Headliners' specific arguments.

First, Headliners cites decisions, such as *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006), setting forth standards of review applicable to orders *granting* motions to dismiss. Headliners then asserts, without any supporting citation, that "if this [c]ourt has authority to rule upon a grant of a [m]otion to [d]ismiss[,] conversely this [c]ourt should have authority to rule on a denial of the same." This notion flies in the face of the well-accepted rule that if an order is interlocutory, immediate appeal

from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. See *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

[7,8] Headliners next attempts to argue that an order denying a motion to dismiss falls within the definition of a final order, specifically, as "an order affecting a substantial right made in a special proceeding," see Neb. Rev. Stat. § 25-1902 (Reissue 1995). Once again, without any supporting authority for the particular proposition, Headliners contends that a motion to dismiss is a special proceeding. A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of § 25-1902. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003) (order overruling motion for default judgment). See, also, *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981) (order overruling motion for leave to file amended pleading). We conclude that the order overruling Headliners' motion to dismiss was a step or proceeding within the overall action and thus was not made in a special proceeding within the meaning of § 25-1902. An order overruling a pretrial motion to dismiss pursuant to rule 12(b)(1), (2), and (6) is not a final order. We therefore reject Headliners' arguments and determine that the order was not final. Consequently, we must dismiss the appeal. Before doing so, we turn to Qwest's request for attorney fees on appeal.

[9] Qwest also asserts that this court should, pursuant to § 25-824(2), award Qwest attorney fees related to this appeal, claiming that the appeal is frivolous. Section 25-824(2) requires that with certain exceptions, the court shall award as part of its judgment, and in addition to any other costs otherwise assessed, reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith. As used in § 25-824(2) concerning allowance of an attorney fee, "frivolous" means a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. See *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995).

[10] However, no attorney fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). While we are not persuaded by Headliners' arguments, given the absence of any prior Nebraska case addressing the finality of an order denying a motion to dismiss, we cannot conclude that Headliners' appeal was frivolous. We therefore determine that Qwest is not entitled to attorney fees.

CONCLUSION

Because an order denying a motion to dismiss made pursuant to rule 12(b)(1), (2), or (6) is not a final order, we lack jurisdiction and must dismiss the appeal. We also conclude that Headliners' contentions were not wholly without rational argument, and we decline to characterize Headliners' appeal as frivolous.

APPEAL DISMISSED.

JAMES WIDTFELDT, APPELLANT, V. TAX EQUALIZATION AND REVIEW COMMISSION AND HOLT COUNTY BOARD OF EQUALIZATION, APPELLEES.

728 N.W.2d 295

Filed March 6, 2007. No. A-06-1296.

1. **Taxation: Judgments: Appeal and Error.** Appellate review of a Tax Equalization and Review Commission decision shall be conducted for error on the record.
2. **Jurisdiction: Appeal and Error.** It is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter of an appeal.
3. **Administrative Law: Jurisdiction: Appeal and Error.** When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal.
4. **Taxation: Valuation: Real Estate.** For protests of real property in tax valuation cases, a protest shall be filed for each parcel.
5. **Taxation: Jurisdiction: Appeal and Error.** The Tax Equalization and Review Commission obtains exclusive jurisdiction over an appeal when (1) the commission has the power or authority to hear the appeal; (2) an appeal is timely filed; (3) the filing fee, if applicable, is timely received and thereafter paid; and (4) in the case of an appeal, a copy of the decision, order, determination, or action appealed from,

or other information that documents the decision, order, determination, or action appealed from, is timely filed.

6. **Taxation: Jurisdiction: Fees: Appeal and Error.** A filing fee must be timely received by the Tax Equalization and Review Commission in order for the commission to have jurisdiction over the appeal.
7. **Administrative Law: Statutes.** A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose.
8. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
9. **Administrative Law: Statutes.** In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.

Appeal from the Nebraska Tax Equalization and Review Commission. Appeal dismissed.

James Widtfeldt, pro se.

Steven A. Keetle for appellee Tax Equalization and Review Commission.

IRWIN, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

As we have explained on several previous occasions, we closely examine all cases in their initial stages to ensure that jurisdiction has been properly conferred and to quickly terminate appeals where we lack jurisdiction. See, e.g., *Widtfeldt v. Holt Cty. Bd. of Equal.*, 12 Neb. App. 499, 677 N.W.2d 521 (2004). Because James Widtfeldt failed to submit a separate filing fee with each appeal, the Tax Equalization and Review Commission (TERC) lacked jurisdiction over each appeal from the lower tribunal and we lack jurisdiction over Widtfeldt's attempt to appeal to this court.

BACKGROUND

On June 30, 2006, Widtfeldt filed at least 75 separate property valuation protests with the Holt County Board of Equalization (the Board) regarding tax year 2006 values placed on his properties. On July 24, the Board denied his protests, at least as to the 75 properties which pertain to the case before us. On August 21, Widtfeldt appealed the Board's denials to TERC. Widtfeldt filed a separate appeal form for each decision he appealed; he

consequently filed at least 75 separate appeals—one for each parcel of property at issue.

On October 17, 2006, TERC's legal counsel sent a letter to Widtfeldt explaining that TERC received Widtfeldt's appeals, but that "75 of these appeals" were incomplete because they were missing the required $25 filing fee. (We infer from the quoted language that at least one other appeal may have been complete.) One of the 75 appeals was also missing a copy of the final decision from which Widtfeldt was attempting to appeal. The letter informed Widtfeldt that because 75 of his appeals were incomplete, TERC was returning the incomplete appeals to him and TERC would be unable to process the appeals because the time for filing them had expired. The letter explained that the deadline for filing appeals was August 24. The letter also noted that the initial documents sent by Widtfeldt were postmarked August 22 and received by TERC on August 23 and that a second set of materials sent by Widtfeldt containing the above-mentioned missing copy of the final decision, but which did not complete the appeals, was postmarked August 24 and received by TERC on August 28.

On November 17, 2006, Widtfeldt filed a petition for review in this court pursuant to Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2006). He alleges in his petition that TERC should have allowed him to proceed on all of his appeals with one filing fee instead of requiring a filing fee for each appeal. He requests that we enter an order granting him permission to proceed on all of his appeals to TERC with one filing fee.

STANDARD OF REVIEW

[1,2] Appellate review of a TERC decision shall be conducted for error on the record. *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001). It is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter of an appeal. See *Washington Cty. Bd. of Equal. v. Rushmore Borglum*, 11 Neb. App. 377, 650 N.W.2d 504 (2002).

ANALYSIS

We begin by observing that Widtfeldt's petition for review filed with this court expressly invokes § 77-5019, which states: "Nothing

in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law." We are not presented, for example, with an action for writ of mandamus. Mandamus is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006). Thus, our jurisdiction relies solely upon the right of review conferred by § 77-5019, which jurisdiction in turn depends upon the existence of jurisdiction in the tribunal below.

[3] When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). We therefore examine the jurisdictional basis for Widtfeldt's 75 appeals before TERC, which examination requires us to review the particular statutes establishing the procedures before the Board and governing the right to appeal to TERC.

Widtfeldt's petition for review asserts that he should be allowed to proceed on all of his appeals although he submitted only one filing fee, because he owns all of the parcels of land at issue, all of the parcels are located in the same county, and there are similar grounds to appeal the Board's decision in each case. We conclude that Widtfeldt's position is not supported by the law.

[4] The law requires a protesting taxpayer to submit a separate protest for each parcel of real estate. Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2006) authorizes a taxpayer to challenge the value placed on his or her real property before the county board of equalization. "For protests of real property, a protest shall be filed for each parcel." *Id.* The record in the case before us shows 75 instances of such protests. In each instance, Widtfeldt submitted a separate protest form to the Board. A county board of equalization is then required to render a decision on the protest. See *id.* Each of the protest forms provides a place for the decision of the

county board of equalization to be recorded. In the instant case, the Board recorded its decision regarding each parcel in the designated place on the form submitted for that particular parcel.

[5] The statutes governing appeals from a county board of equalization to TERC now contemplate a separate appeal from each decision of the county board of equalization and require a separate filing fee for each appeal. Neb. Rev. Stat. § 77-5007 (Cum. Supp. 2006) generally confers authority to TERC to hear and determine appeals from any county board of equalization. Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2006) authorizes an appeal to TERC from "[a]ny action of the county board of equalization." Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2006) sets forth specific requirements which must be met before TERC acquires jurisdiction over such appeals and provides:

> (1) [TERC] obtains exclusive jurisdiction over an appeal . . . when:
>
> (a) [TERC] has the power or authority to hear the appeal . . . ;
>
> (b) An appeal . . . is timely filed;
>
> (c) The filing fee, if applicable, is timely received and thereafter paid; and
>
> (d) In the case of an appeal, a copy of the decision, order, determination, or action appealed from, or other information that documents the decision, order, determination, or action appealed from, is timely filed.
>
> Only the requirements of this subsection shall be deemed jurisdictional.
>
> . . . .
>
> (3) The filing fee for each appeal . . . filed with [TERC] is twenty-five dollars . . . .
>
> (4) The form and requirements for execution of an appeal . . . may be specified by [TERC] in its rules and regulations.

For an appeal from a decision of a county board of equalization to be timely, it must be filed with TERC "on or before August 24." § 77-1510.

Giving effect to the purpose and intent of the Legislature as ascertained from the entire language of the above statutes considered in their plain, ordinary, and popular sense, see *Creighton*

St. Joseph Hosp. v. Tax Eq. & Rev. Comm., 260 Neb. 905, 620 N.W.2d 90 (2000), we determine that a separate filing fee must accompany each appeal to TERC. If a fee is not timely submitted with the appeal, TERC will not have jurisdiction over the appeal.

[6] We recognize that § 77-5013 has been amended in two instances since the decision of the Nebraska Supreme Court in *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm., supra*. In that case, the court determined that § 77-5013 did not require that a filing fee be paid at the outset to confer jurisdiction upon TERC. The Supreme Court stated in its decision that if the Legislature intended for the $25 filing fee to be a jurisdictional requirement, it could have included jurisdictional language in § 77-5013. Because it did not, the Supreme Court refused to read additional requirements into the statute. However, when *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.* was decided, § 77-5013 contained none of the jurisdictional language that the current version sets forth. Since the Supreme Court issued its decision in *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, the Legislature has added jurisdictional language to § 77-5013. See 2001 Neb. Laws, L.B. 170, and 2004 Neb. Laws, L.B. 973. Clearly, the Legislature responded to the court's decision in *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.* and added language demonstrating its intent to make the requirements of § 77-5013(1) mandatory and jurisdictional. We hold that under the current version of § 77-5013, a filing fee must be timely received by TERC in order for TERC to have jurisdiction over the appeal.

[7-9] Regulations adopted by TERC also address the requirements for perfecting an appeal with TERC. Before discussing the regulations, we acknowledge that a legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Id.* In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *Id.*

Neb. Rev. Stat. § 77-5021 (Reissue 2003) grants TERC the power to adopt and promulgate rules and regulations to carry

out its constitutional or statutory purposes, powers, or authority. TERC has adopted several regulations that are relevant to the issues before us. One regulation states that a filing fee must accompany an appeal to TERC and that an appeal filed without a filing fee will not be accepted by TERC and will not be deemed perfected. See 442 Neb. Admin. Code, ch. 5, § 001.05 (2005). Another regulation provides that TERC lacks jurisdiction over appeals or petitions which are filed out of time or which otherwise fail to comply with § 77-5013. 442 Neb. Admin. Code, ch. 5, § 001.06 (2005). The regulations further support our determination that TERC lacked jurisdiction over Widtfeldt's appeals, and therefore, we also lack jurisdiction to hear Widtfeldt's claims.

CONCLUSION

The relevant statutes require a separate tax valuation protest for each parcel of real estate and a separate filing fee for each appeal from a county board of equalization decision to TERC. Because TERC did not timely receive the required filing fee in each of the 75 appeals, it lacked jurisdiction over the appeals. It necessarily follows that we lack jurisdiction over the appeal from TERC. We therefore dismiss Widtfeldt's appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY L. VOLCEK, APPELLANT.

729 N.W.2d 90

Filed March 13, 2007. Nos. A-06-568, A-06-569.

1. **Criminal Law: Sentences: Judgments.** In a criminal case, the judgment is the sentence.
2. **Constitutional Law: Statutes: Jurisdiction: Time: Appeal and Error.** The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.
3. **Sentences: Probation and Parole: Waiver: Final Orders: Appeal and Error.** Sentencing orders in which a defendant is sentenced to probation with one term of probation's being a jail term that may or may not ultimately be waived by the court are final, appealable orders.
4. **Convictions: Ordinances: Sentences: Judicial Notice: Appeal and Error.** When considering an assignment of error claiming the imposition of an excessive sentence

upon a conviction based on a municipal ordinance, an appellate court will not take judicial notice of the ordinance specifying the penalties for a violation unless the ordinance is made a part of the bill of exceptions or is included in the certified transcript prepared by the clerk of the county court.

5. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.
6. **Records: Ordinances: Appeal and Error.** Where no ordinance which specifies the penalties for a violation is in the record to review, the appellate courts do not address excessive sentence assignments of error.

Appeal from the District Court for Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE BARRETT, Judge. Appeal in No. A-06-568 dismissed. Judgment of District Court in No. A-06-569 affirmed.

Jeff T. Courtney for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jeffrey L. Volcek brings these appeals from the district court's affirmance of the sentences imposed by the county court for Douglas County in two cases concerning Volcek's violation of city ordinances concerning maintenance of real property. In case No. A-06-568, Volcek attempts to challenge the county court's failure to waive a 45-day jail sentence imposed in a probation order. We find Volcek's appeal regarding this sentence to be untimely, and we dismiss that appeal. In case No. A-06-569, Volcek challenges the county court's sentence of 45 days' imprisonment. We find no abuse of discretion by the county court, and we uphold the district court's affirmance of that sentence.

II. BACKGROUND

1. CASE NO. A-06-568

On January 26, 2005, the State filed a complaint in Douglas County Court charging Volcek with the violation of a number of

city ordinances concerning maintenance of real property, including allowing the growth of noxious weeds, failure to secure a building permit, failure to secure an occupancy certificate, and violation of zoning and parking ordinances. On August 25, Volcek entered pleas of guilty to two counts and the State dismissed the rest. Also on August 25, the county court sentenced Volcek to a term of 6 months' probation.

The probation order contained a provision requiring Volcek to serve a term of 45 days' imprisonment to begin on December 15, 2005, "unless waived by the Court." The probation order also set a hearing date on December 15 "for the purpose of determining whether said jail sentence should be waived." No appeal was taken from the probation order.

On December 15, 2005, the county court held a hearing at which the issue of whether the court would waive the 45-day jail sentence was addressed. At the conclusion of the hearing, the court declined to waive the jail sentence and ordered Volcek to serve 45 days in jail, as previously set forth in the August 25 probation order.

Volcek appealed to the district court, which affirmed on April 20, 2006. Volcek then brought the appeal docketed in this court as case No. A-06-568.

2. Case No. A-06-569

On September 29, 2005, the State filed a complaint in Douglas County Court charging Volcek with the violation of a number of city ordinances concerning maintenance of real property, including violations of parking and zoning ordinances, littering, and failure to secure a building permit. On December 15, Volcek entered a plea of guilty on one count and the State dismissed the rest. Also on December 15, the county court sentenced Volcek to a term of 45 days' imprisonment, to be served consecutively with the sentence in case No. A-06-568.

Volcek appealed to the district court, which affirmed on April 20, 2006. Volcek then brought the appeal docketed in this court as case No. A-06-569.

III. ASSIGNMENTS OF ERROR

In each case, Volcek's sole assignment of error is that the 45-day jail term imposed in that case is an excessive sentence.

IV. ANALYSIS

1. Case No. A-06-568

In case No. A-06-568, Volcek attempts to appeal from the district court's order upholding the county court's refusal to waive the 45-day jail term that was imposed as a term of Volcek's probation. Volcek argues that the imposition of 45 days' imprisonment is an excessive sentence. We find that Volcek's appeal on this issue is untimely because Volcek failed to appeal from the court's imposition of sentence.

[1,2] In a criminal case, the judgment is the sentence. *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Vela, supra.*

[3] It is clear that in Nebraska, sentencing orders in which a defendant is sentenced to probation with one term of probation's being a jail term that may or may not ultimately be waived by the court are final, appealable orders. See, *State v. Stott*, 255 Neb. 438, 586 N.W.2d 436 (1998); *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991); *State v. Charles*, 13 Neb. App. 305, 691 N.W.2d 567 (2005); *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), *disapproved on other grounds, State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *McDermott v. McDermott*, 8 Neb. App. 860, 602 N.W.2d 676 (1999). As such, the county court order sentencing Volcek to probation was a final, appealable order from which no appeal was taken.

Inasmuch as the probation order itself was a final, appealable order, it is apparent that the county court's later decision not to waive the term of incarceration is not itself an appealable order. First, we note that there is no authority in this state for allowing an appeal from a court's ultimate determination of whether to waive a jail term imposed as a term of probation. Second, we note

that a court's determination not to waive such a jail term does not affect a substantial right and does not fit within any of the three types of final, appealable orders set forth in § 25-1902.

A substantial right is an essential legal right, not a mere technical right. *State v. Vela, supra.* A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* In this case, the court's determination not to waive the jail term did not diminish a claim or defense otherwise available to Volcek and did not affect any substantive right that Volcek had prior to the order; Volcek did not have any substantive right to have the jail term waived, and such was merely within the discretion of the county court. See Neb. Rev. Stat. § 29-2263(2) (Cum. Supp. 2006) (court may modify, eliminate, or add terms of probation).

Further, it is clear that the court's determination not to waive the jail term did not in effect determine the action and prevent a judgment, as it actually came after the judgment and was not entered in a special proceeding. Additionally, the court's determination was not made on summary application after the judgment was rendered. Compare *State v. Maestas*, 11 Neb. App. 262, 647 N.W.2d 122 (2002). As such, in addition to not affecting a substantial right, the court's determination did not satisfy the other criteria to be considered in discerning a final, appealable order under § 25-1902.

Because Volcek failed to appeal from the sentencing order which first imposed the jail term as a term of probation, we find that Volcek failed to timely perfect an appeal challenging that term of probation. Accordingly, the district court lacked jurisdiction to hear Volcek's appeal in the case docketed in this court as case No. A-06-568, and we similarly lack jurisdiction. The appeal in case No. A-06-568 is dismissed.

2. Case No. A-06-569

In case No. A-06-569, Volcek asserts that the county court imposed an excessive sentence when sentencing him to 45 days in jail on a charge of littering, pursuant to a city of Omaha municipal ordinance. The record presented on appeal does not include a copy of the ordinance under which Volcek was sentenced, and the complaint filed in county court does not include any substantive

allegations concerning the appropriate sentencing range. As such, we are unable to review the sentence imposed.

[4-6] When considering an assignment of error claiming the imposition of an excessive sentence upon a conviction based on a municipal ordinance, the Nebraska Supreme Court has been clear that an appellate court will not take judicial notice of the ordinance specifying the penalties for a violation unless the ordinance is made a part of the bill of exceptions or is included in the certified transcript prepared by the clerk of the county court. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000). It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *Id.* Where no ordinance which specifies the penalties for a violation is in the record to review, the appellate courts do not address excessive sentence assignments of error. See *id.*

In this case, Volcek was convicted and sentenced pursuant to a municipal ordinance. The bill of exceptions does not include any copy of the ordinance under which Volcek was sentenced. No copy of the ordinance was requested to be included in the transcript. No copy of the ordinance appears anywhere in the record presented on appeal. As such, we cannot consider Volcek's assignment of error.

Additionally, we note that the complaint filed in the county court does not remedy the defect in the record in this case. In *State v. Dunn*, 14 Neb. App. 144, 705 N.W.2d 246 (2005), this court discussed the present state of the "ordinance rule" in Nebraska and recognized that with respect to sufficiency of the evidence claims, an appellate court can assume material allegations in a long-form criminal complaint containing substantive allegations reflect the substantive content of the ordinance and that the appellate court can review the evidence to determine its sufficiency to prove the matters alleged. Even assuming this same application of the ordinance rule would apply to sentencing matters, the complaint filed against Volcek in this case contains no substantive allegations concerning the applicable sentencing range.

V. CONCLUSION

We dismiss the appeal in case No. A-06-568 because Volcek failed to perfect a timely appeal from the sentencing order.

We affirm the district court's decision upholding the sentence imposed in case No. A-06-569, because Volcek failed to include the applicable municipal ordinance in the record on appeal.

APPEAL IN NO. A-06-568 DISMISSED.
JUDGMENT IN NO. A-06-569 AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BRIAN J. ATCHISON, APPELLANT.

730 N.W.2d 115

Filed March 13, 2007. No. A-06-703.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Criminal Law: Minors.** Pursuant to Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2004), a person is guilty of a Class IIIA felony where a person knowingly solicits, coaxes, entices, or lures (1) a child 16 years of age or younger or (2) a peace officer who is believed by such person to be a child 16 years of age or younger, by means of a computer as that term is defined in Neb. Rev. Stat. § 28-1343 (Reissue 1995), to engage in an act which would be in violation of Neb. Rev. Stat. §§ 28-319 (Reissue 1995), 28-320.01 (Cum. Supp. 2004), or 28-320(1) or (2) (Reissue 1995).
3. **Criminal Law: Evidence.** Evidence in a criminal case is viewed and construed most favorably to the State.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
5. ____: ____. The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
6. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
7. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable.
8. **Trial: Evidence: Appeal and Error.** A party is barred from asserting a different ground for his or her objection to the admission of evidence on appeal than was offered before the trier of fact.

9. ____: ____: ____. The duty rests on the defendant to object at trial to the admission of evidence and to state the specific ground of the objection if the specific ground is not apparent from the context in which the objection was made.
10. **Rules of Evidence: Words and Phrases.** For purposes of the balancing test required by Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), unfair prejudice means an undue tendency to suggest a decision on an improper basis.
11. **Trial: Evidence.** The admission of cumulative evidence rests within the discretion of the trial judge.
12. **Trial: Evidence: Appeal and Error.** Whether cumulative evidence constitutes reversible error depends upon the facts and circumstances of each case.
13. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
14. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
15. ____. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
16. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
17. ____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

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

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Brian J. Atchison, after a jury trial in the district court for Lancaster County, was convicted of enticement of a child for sexual purposes through the use of a computer and sentenced to a period of incarceration of 2 to 4 years. Atchison has appealed. We hold that (1) the evidence was sufficient to support his conviction, (2) evidence regarding an investigator's background and training in computer crimes was admissible, (3) evidence concerning the

investigator's explanations of certain phrases and abbreviations in the online typed conversations or "chats" was admissible, (4) the videotape of the events leading up to Atchison's arrest was admissible and not unfairly prejudicial, and (5) the sentence was not excessive.

I. FACTUAL BACKGROUND

On June 28, 2005, Edward Sexton, an investigator with the Lincoln Police Department, went "undercover" as a 15-year-old girl named "Tami" in an Internet chat room under the assumed "ID" of "tami9005." In order for Investigator Sexton to gain free access to the chat room, he had to create a "profile" with personal information. In the profile that Investigator Sexton created, he identified himself as a 15-year-old female student.

Investigator Sexton entered the chat room on June 28, 2005, and while he was in the chat room, Tami received an instant message from "Fat Lincoln Cock 4 the Ladies," later identified as Atchison, who was approximately 26 years old at the time. The instant message could not be seen by others in the chat room. As further background, we note that the instant messages, as reproduced hereinafter, contain "emoticons," which are symbols such as the well-known smiley faces. When the instant messages are saved and printed, the emoticons are translated as a word that is bracketed by exclamation marks, e.g., !Wink!, !Smug!, !Drooling!, !Blushing!

On June 28, 2005, Atchison sent Tami an instant message. The initial message from Atchison to Tami read as follows, which we quote because it sets the tone for the extremely graphic and sexually charged messages that he later sent (which we do not fully quote), even though Tami had told him she was "barely 15":

> "Tami, 'Sup sweetness? . . . You'll have to be so kind as to please pardon my bluntness and for being so forward, but I twas just wondering if there might be any slight chance of me being able to persuade thee into becoming interested into CUMing" . . . "up to my place for one hell of a great lay today??"

The online chat continued, during which Atchison told Tami that his name was "Brian," that his Web camera was on, and that he was 26 years old. Atchison showed a picture of his

penis to Tami at approximately 1:52 p.m. At approximately 2:04 p.m., Tami informed Atchison that she was "barely 15" and that she could not drive. Atchison asked whether she was from "www.pervertedjustice.com" and explained that such Web site involved a man who pretends to be a young girl to entrap "Perverts" and gets them arrested when they come over to the alleged young girl's house. Tami responded that she was not from that Web site, and Atchison responded, "Kewlz" and "So you're for real, then, 'eh??" Atchison continued to chat with Tami for over 20 minutes after he learned that she was 15 years old, and Atchison asked to come over to her home the next day when her mother would not be home.

On June 29 and July 1, 2, and 6, 2005, Atchison sent some instant messages and emoticons when Tami was online and offline, but Investigator Sexton did not respond. According to Investigator Sexton, whose testimony is detailed below, an offline message is a message that is received by the recipient's computer at a time when the recipient is not signed onto the chat room.

On July 7, 2005, Atchison sent Tami an offline message at 10:04 a.m. that directly and graphically solicited oral and vaginal sex and asked her to get back to him. Tami responded at 10:49 a.m. by writing "oh u would huh," and the online chat continued as follows:

> [Fat Lincoln Cock 4 the Ladies]: Oh Yeah !Devil!
> [Tami]: lol
> [Tami]: u gonna pick me up?
> [Fat Lincoln Cock 4 the Ladies]: Sure. Where at??
> [Tami]: u kno I cant drive
> [Fat Lincoln Cock 4 the Ladies]: I know.
> [Fat Lincoln Cock 4 the Ladies]: I got the car today !Wink!
> [Tami]: lol...
> [Tami]: u musta been readin my mind
> [Tami]: got up in the mood
> [Tami]: lol
> [Fat Lincoln Cock 4 the Ladies]: Aye !Smug! I try !Wink!
> [Fat Lincoln Cock 4 the Ladies]: Sweet !Wink!
> [Fat Lincoln Cock 4 the Ladies]: I aim to please !Wink!

[Tami]: lol

[Tami]: ok...guess we'll see

[Fat Lincoln Cock 4 the Ladies]: Yep.

[Tami]: i'm kinna in the area of 13 & van dorn

[Fat Lincoln Cock 4 the Ladies]: Is your mother not home?? !Wink!

[Tami]: nope

[Fat Lincoln Cock 4 the Ladies]: Sweet

[Tami]: but u aint commin here

[Fat Lincoln Cock 4 the Ladies]: 13th & Van Dorn??

[Fat Lincoln Cock 4 the Ladies]: Well I gotta cum pick you up somewhere, right?? !Smug!

[Tami]: ya

[Tami]: sorry...but i dont want u to know where i live yet

[Tami]: u unnerstand

[Fat Lincoln Cock 4 the Ladies]: Totally !Batting Eyelashes!

[Tami]: k

[Fat Lincoln Cock 4 the Ladies]: But I'll need a location to cum pick you up from....

The online chat continued until immediately before noon. While we do not repeat the entire chat here, we note that Atchison wrote that he was "ALWAYS Horny" and that he was "hoping that maybe you'd be feeling kinda frisky your own self." Later in the same chat, Tami asked, "u gots protection?" and Atchison responded, "Nope !Smug!" and explained that he was sterile as well as free from sexually transmitted diseases.

During the chat, Atchison and Tami agreed to meet at 12:30 p.m. in the "park lot" of "Vandorn Park" and then go to Atchison's home. Atchison described his car as a "2004 Yellow Dodge Neon" and said that he would wear his "presciption glasses," which Tami previously viewed by means of Atchison's Web camera and referred to as his "fancy sunglasses." Tami wrote that she would wear a black baseball hat. After Tami wrote that "i gotta go get ready..." at 11:18 a.m., Atchison wrote a final sexual comment leaving no doubt about his intentions and desires. Investigator Sexton, posing as Tami, sent his final instant message at 11:55 a.m., which message read: "shuttin off puter now."

Atchison continued to send instant messages, including the last message, which read: "Well I hope that I shall see you in a lil' bit !Batting Eyelashes!"

At approximately noon on July 7, 2005, Officer Tracy Graham was contacted by Investigator Sexton. Officer Graham is approximately 5 feet 4 inches tall and weighs 115 pounds, and she was asked to dress in a black baseball hat, a baggy T-shirt, jean shorts, and flip-flops. Officer Graham was told that she was supposed to be a 15-year-old girl even though she was 29 years old at that time. Officer Graham was shown the online picture of Atchison wearing his prescription sunglasses. Officer Graham met Atchison at the agreed-upon park. Investigator Sexton was also present along with other Lincoln police officers. Officer Graham wore a "wire" concealed in the baseball hat. Atchison made contact with Officer Graham posing as Tami and was arrested. The record contains a videotape of the meeting leading to the arrest.

II. PROCEDURAL BACKGROUND

An information was filed in the Lancaster County District Court on August 12, 2005, alleging that on or about July 7, Atchison

> did knowingly solicit, coax, entice, or lure a peace officer who is believed by such person to be a child sixteen (16) years of age or younger, by means of a computer as that term is defined in § 28-1343, to engage in an act which would be in violation of § 28-319 or § 28.320.01 or subsection (1) or (2) of §28-320.

At Atchison's arraignment on August 17, Atchison pled not guilty.

On April 10 through 12, 2006, the jury trial was held. Investigator Sexton testified to his training in computer and electronic crimes and then explained how in June 2005, he prepared a profile for a 15-year-old girl with an online identification of "tami9005." According to Investigator Sexton, he created the profile in order to "chat" in the chat rooms. On June 28, a user "ID" with the name of "Fat Lincoln Cock 4 the Ladies" sent an instant message to Tami, which could not be seen by anyone else in the chat room. Investigator Sexton stated that he could not save the initial message but that he printed it out. (We included

the initial message in its verbatim form in the previous section.) Investigator Sexton testified that he, as Tami, chatted for about an hour on June 28 in a one-on-one online chat with "Fat Lincoln Cock 4 the Ladies," who identified himself as "Brian."

At trial, Investigator Sexton explained that through software he installed on his computer, he could save and print the instant messages or "chats" into "DAT files," which were initially encrypted. Investigator Sexton testified that he had additional software which would decode the files but that he was not able to change what was in the DAT files. While the State introduced the decoded verbatim printouts of the online chats at trial, which printouts the district court received into evidence and allowed to be published to the jury, Investigator Sexton did not read the verbatim transcript of the chats aloud at trial. Rather, the jury read the transcript as displayed on a monitor in the courtroom and Investigator Sexton explained the meaning of certain words and abbreviations that are apparently commonly used in online chats. For example, according to Investigator Sexton, "UR" means "you are," "IDN" means "I don't know," and "lol" means "laugh out loud" or "lots of laughs." Investigator Sexton also explained that the verbatim printouts contain a record of the time (down to the second) of when an instant message is sent.

Investigator Sexton further testified that Atchison sent Tami messages or emoticons on June 29 and July 1, 2, and 6, 2005. Investigator Sexton stated that on July 7, he entered into an online chat with Atchison, after which Atchison drove to a park where he met Officer Graham, who posed as "Tami," and they arrested Atchison.

Officer Graham also testified at the trial, and she stated that Investigator Sexton contacted her to pose as a 15-year-old girl named "Tami" dressed as we earlier recounted. Officer Graham said that she viewed a picture of Atchison from his online exchange. Officer Graham related that Investigator Sexton drove her to the agreed-upon area of "17th and Otoe," where she walked northbound on "17th Street, 'til [she] got to Van Dorn." According to Officer Graham, she turned eastbound on Van Dorn Street and a man yelled "Tami" from across the street. Officer Graham testified that she asked if he was Brian, that Atchison indicated he was, and that she crossed the street toward him. Then Officer Graham

walked with Atchison, and she asked whether that was his "'vehicle over there'" and were they "'going to [his] car.'" According to Officer Graham, Atchison responded affirmatively to both questions. At trial, Officer Graham identified Atchison as the person who yelled out "Tami" and who had met her at the park.

In Atchison's trial testimony, he did not dispute that he was the one identified as "Fat Lincoln Cock 4 the Ladies" who chatted online with Tami beginning in June 2005 and he admitted that the printouts of the online chats which Investigator Sexton saved and printed were accurate. Atchison testified that he was disabled because of an accident that occurred in 1993 and that he moved to Lincoln with his wife in the spring of 2005. Atchison stated that he never looked at Tami's profile and that when he chatted with Tami on July 7, he did not remember that she was 15 years old. Atchison admitted that he was convicted of a felony in the last 10 years.

On April 12, 2006, the jury found Atchison guilty of "enticement of a child for sexual purposes through the use of a computer." On June 1, the district court sentenced Atchison to 2 to 4 years' imprisonment. Atchison now appeals.

III. ASSIGNMENTS OF ERROR

Atchison alleges, restated and reordered, that the district court erred by (1) finding that the evidence was sufficient to support the jury's verdict that he was guilty of enticement of a child for sexual purposes through the use of a computer; (2) admitting into evidence (a) Investigator Sexton's testimony regarding his background and training in computer crimes, (b) Investigator Sexton's comments concerning the online chats, and (c) over Atchison's objections, the videotape recording of Atchison meeting Officer Graham; and (3) imposing an excessive sentence.

IV. STANDARD OF REVIEW

We set forth the appropriate standards of review in the individual sections of our analysis.

V. ANALYSIS

1. Insufficient Evidence for Guilty Verdict

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for

an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

Atchison argues that there was insufficient evidence to support the jury's verdict that he was guilty of enticement of a child through the use of a computer. Atchison alleges that on July 7, 2005, he had forgotten Tami said during the June 28 chat she was 15 years old and that this possibility of not remembering was evidenced by the two messages he sent to "Tami" after he was "interviewed and lodged in jail." Brief for appellant at 19. Atchison argues that he is a "disabled man with interpersonal difficulties" who is lonely and that "[p]erhaps he is too focused on sexy chat while online" but that such "does not rise to the level of him seeking to entice children over the Internet." *Id.*

[2] Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2004) provides that a person is guilty of a Class IIIA felony where a person

> knowingly solicit[s], coax[es], entice[s], or lure[s] (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer as that term is defined in section 28-1343, to engage in [a sexual] act which would be in violation of section 28-319 or 28-320.01 or subsection (1) or (2) of section 28-320.

[3] Viewing the evidence at trial most favorably to the prosecution, as we must, see *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992), the following facts are clearly established: Atchison learned that Tami was barely 15 years old during his online chat with Investigator Sexton on June 28, 2005. After Atchison had knowledge that Tami was 15 years old, he proceeded to chat with Tami and asked Tami if he could come over to her home the next day when her mother was not home.

After the June 28, 2005, online chat, Atchison sent Tami instant messages and emoticons (some offline) on four separate days. Then on July 7, Atchison sent Tami an instant offline message at 10:04 a.m. that solicited oral and vaginal sex with Tami. Investigator Sexton, posing as Tami, wrote back at 10:49 a.m.; seconds later, Atchison acknowledged knowing that

Tami could not drive, and less than 2 minutes later, Atchison was asking if Tami's mother was home, to which Tami responded that she was not. During the July 7 online chat, Atchison asked whether the person conversing with him online was Tami, and Tami responded affirmatively. Tami then asked what Atchison's name was, and Atchison responded, "Brian." During the online chat that lasted from 10:49 a.m. until immediately before noon, Atchison wrote that he was "ALWAYS Horny," that he was hoping Tami was "feeling kinda frisky," that he did not have protection, that he was sterile, that he did not have any sexually transmitted diseases, and that he could not wait to perform oral sex on her. Atchison and Tami agreed to meet at 12:30 p.m. Atchison described his car as a "2004 Yellow Dodge Neon" and said that he would be wearing his prescription sunglasses. Tami said that she would be wearing a black baseball hat and that she was "5-5" and "125" pounds.

After finishing the online chat, Atchison drove in a yellow car to the agreed-upon location. Atchison got out of his yellow car. Atchison yelled "Tami" to Officer Graham, who was across the street from him and wearing a black baseball hat. Atchison indicated that he was "Brian." Officer Graham crossed the street, and Atchison and Officer Graham proceeded to walk together toward the yellow car.

During the search of Atchison's residence, the police officers located a computer as well as a Web camera, and the computer's hard drive contained portions of Atchison and Tami's online chats from June 28 and July 7, 2005. At trial, Atchison admitted to chatting online with Tami and that the printouts of the chats were accurate.

After a careful review of the evidence, we find that the jury could in fact find Atchison guilty beyond a reasonable doubt of enticement of a child for sexual purposes through the use of a computer. The evidence was such that the jury could easily reject the defense that he had forgotten that Tami was 15 years old. Accordingly, we find no merit to this assignment of error.

2. Evidentiary Objections

(a) Standard of Review

[4,5] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the

admissibility of evidence is reviewed for an abuse of discretion. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005). The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and prejudice under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

(b) Investigator Sexton's Background in Computers

Atchison alleges that the district court's allowance of testimony concerning Investigator Sexton's training in computers, computer crime forensics, and white-collar crime was "not relevant" to his "participation in the investigation of this case and had the effect of implying, if not establishing that Investigator Sexton is some sort of expert in the field of computers." Brief for appellant at 13-14. Atchison argues that an implication that Investigator Sexton is an expert in the field of computers is "unfairly prejudicial" to Atchison. *Id.* at 14. Atchison further argues that Investigator Sexton was not an expert, that his training was not relevant to "what happened . . . in June or July of 2005," and that the jury was "given the unfounded impression" that because of Investigator Sexton's training, "the charge had inherent merit solely because he worked the case." *Id.*

The record reflects that Investigator Sexton testified that in 1996, he received his first training in investigating crime on the Internet, and that he has continued to receive training in computer crimes, data recovery, and undercover work posing as a child on the Internet, as well as searching hard drives and investigating Internet crimes against children. While Atchison objected on numerous occasions to such testimony on relevancy grounds, all of which were overruled, Atchison did not object on any other ground.

[6,7] "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." § 27-401. Given our standard of review and given that "[j]udicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable," *State v. Jacob*, 253 Neb. 950, 971, 574 N.W.2d 117, 135 (1998),

we find that the district court did not abuse its discretion in allowing testimony about Investigator Sexton's background and training in computer crimes when the crime charged required the use of a computer and the evidence necessitated an understanding of computer files, data recovery, and online chat rooms, as well as instant messaging.

[8] Although Atchison argues in his brief that admittance of Investigator Sexton's testimony regarding his background and training in computer crimes was unfairly prejudicial, such objection was not made before the district court. See *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991) (party is barred from asserting different ground for his or her objection to admission of evidence on appeal than was offered before trier of fact). Therefore, we address the claim of unfair prejudice no further. This assignment of error is without merit.

(c) Investigator Sexton's Comments on Contents of Verbatim Printouts of Online Chats

The record reflects, and Atchison admits in his brief, that he did not object either to the admission of the exhibits containing the verbatim printouts of the chats on June 28 and July 7, 2005, or to their publication to the jury. Atchison contends that he "made an ongoing relevance objection to the [S]tate questioning Investigator Sexton regarding the content or meaning of selected portions of the chat text in the exhibits as they were being published to the jury." Brief for appellant at 15. However, the record does not support this contention.

The record reflects that in a bench conference, Atchison's counsel stated that "I don't want [Investigator Sexton] putting undue influence or emphasis on certain parts" of the verbatim printout of the June 28, 2005, chat. The district judge decided that Investigator Sexton could not read the transcript line by line. Rather, the district court decided that the transcript would be put on the courtroom monitor and the jury would be allowed to read it line by line and that the State would be allowed to ask specific questions about the meaning of certain abbreviations, phrases, and the time records of the chat, to which questions Atchison could make specific objections. After the bench conference, Atchison objected to having the document published to the jury. There was another bench conference, and Atchison's counsel agreed that

the jury would read the verbatim printout of the chat and that he would object to any specific questions the State made. Atchison's counsel then stated: "Yeah, so anything that [the State] asks [Investigator Sexton] to clarify, just note my objection. I won't raise individual ones as we go along." Atchison's counsel stated that because the printouts are being published, the jury could read it for themselves, and "[i]f they don't understand something, they don't understand something." The district court overruled Atchison's objection. When the State offered the exhibit containing the verbatim printout of the July 7 chat, Atchison's counsel took the same position as with the exhibit containing the verbatim printout of the June 28 chat, but did not elaborate any further. The record reflects that the exhibits of the verbatim printouts of the chats were not sent to the jury room during deliberations.

[9] The duty rests on the defendant to object at trial to the admission of evidence and to state the specific ground of the objection if the specific ground is not apparent from the context in which the objection was made. See *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). In this case, Atchison's counsel noted his objection to any question that the State would ask pertaining to the verbatim printouts of the online chats, and it appears that he was granted a continuing objection of sorts. However, whatever evidentiary grounds Atchison was relying on to support his objection were not clearly stated.

Nevertheless, the record suggests that the basis was probably that each printout "speaks for itself." But, the fact is that portions of the printouts required explanation for those unfamiliar with online chats, and Investigator Sexton was clearly qualified to provide those explanations. Thus, the implied grounds for the objection were, in any event, without merit.

(d) Videotape of Contact With Officer Graham

Atchison objected to the videotape of the meeting between Atchison and Officer Graham and his subsequent arrest on the grounds that the videotape was not relevant, was cumulative, and was prejudicial. The district court overruled the objection in part and sustained it in part. The district court received the videotape with the restriction that only the meeting and not the subsequent arrest would be shown to the jury. The district court did not allow the jury to review the videotape during deliberation.

The videotape of the meeting with Officer Graham posing as Tami shows Atchison's intent to connect with the 15-year-old girl whom he believed he had chatted with online earlier in the same day and to whom he had written sexually explicit messages, as we have set forth previously. In addition to the videotape demonstrating Atchison's intent to connect with a 15-year-old girl for sexual purposes, the videotape provided visual corroboration of the online chat wherein Atchison told "Tami" that he would be driving a yellow car and "Tami" told Atchison that she would be wearing a black baseball hat. Thus, the videotape establishes that Atchison's calling out to and walking with Tami was no accident. The district court did not abuse its discretion in finding that the videotape was relevant to the case.

[10] Moreover, while the evidence may well have been prejudicial to Atchison's defense, it cannot be said that it was unfairly so. For purposes of the balancing test required by rule 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis. See, *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995). We find that the videotape did not unfairly prejudice Atchison, because whether Atchison intended to meet with a 15-year-old girl for sexual purposes was a matter for the jury to consider, and the videotape certainly bears on that issue.

[11,12] With respect to the argument that the videotape was cumulative, the admission of cumulative evidence rests within the discretion of the trial judge. See *State v. Jackson*, 200 Neb. 827, 265 N.W.2d 850 (1978). Whether cumulative evidence constitutes reversible error depends upon the facts and circumstances of each case. See *id.* While the police officers testified to Atchison's meeting with Officer Graham, the videotape of the meeting was not prejudicially cumulative. Atchison's argument is really that the State introduced "too much" evidence of his crime, which argument we reject.

3. Excessive Sentence

[13-16] Atchison assigns as error that the sentence imposed by the district court was excessive. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). An abuse of discretion occurs when a

sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.* In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Here, the district court sentenced Atchison to incarceration of 2 to 4 years. Class IIIA felonies are punishable by up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006). Atchison's sentence is within the statutory limits.

[17] However, Atchison argues that the district court did not give proper weight and consideration to the factors set forth in *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001) (in imposing sentence, sentencing judge should consider defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for offense, nature of offense, and amount of violence involved in commission of crime). In particular, Atchison argues that the district court did not give proper consideration to his serious motorcycle accident and his resulting disabling injury, which caused him to become "'distant'" from his family. Brief for appellant at 22. On the contrary, the record demonstrates that the district court specifically considered Atchison's accident and head trauma, as well as the fact that "according to a 2000 psychological evaluation," the head trauma "exacerbated a history of conduct and personality disorders." The district court noted that the 2000 psychological evaluation described Atchison as "oriented in all dimensions." The district court considered additional factors, including the type of crime, the fact that the judge believed that Atchison thought he had done nothing wrong, and the fact that Atchison had had no contact with law enforcement since 1997, when he was convicted of a felony relating to damage of property. The district court also credited Atchison for 224 days served. Therefore, we find that the district court did not abuse its discretion.

VI. CONCLUSION

We conclude that the jury could in fact find Atchison guilty beyond a reasonable doubt of enticement of a child for sexual purposes through the use of a computer. We further find no merit to Atchison's evidentiary assignments of error or his allegation that his sentence was excessive.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

IN RE INTEREST OF VINCENT P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

730 N.W.2d 403

Filed March 13, 2007. No. A-06-786.

1. **Juvenile Courts: Minors.** The purpose of the juvenile code is to assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest.
2. ____: ____. The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who fall within it.
3. **Juvenile Courts: Parent and Child.** Once there has been the adjudication that a child is a juvenile within the meaning of the Nebraska Juvenile Code, the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law.

Appeal from the Juvenile Review Panel, CURTIS L. MASCHMAN, EDWARD D. STEENBURG, and CURTIS H. EVANS, Judges, on appeal thereto from the County Court for Cedar County, DOUGLAS LUEBE, Judge. Judgment of Juvenile Review Panel affirmed.

Jon Bruning, Attorney General, and Gail Steen, Special Assistant Attorney General, for appellant.

George L. Hirschbach, Cedar County Attorney, for appellee.

IRWIN and SIEVERS, Judges, and HANNON, Judge, Retired.

IRWIN, Judge.

I. INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals from an order of the juvenile review panel which affirmed a dispositional order entered by the county court for Cedar County, Nebraska, sitting as a juvenile court. The juvenile court declined DHHS' request that the court terminate its jurisdiction over the juvenile, Vincent P., and entered a dispositional order implementing various goals and requiring various services, including Vincent's enrollment and attendance in an "age-appropriate sex offender therapy program." On appeal, DHHS challenges both the juvenile court's decision not to terminate jurisdiction over Vincent and the court's inclusion of the requirement of sex offender therapy in the court's dispositional order. The record contains sufficient evidence supporting the juvenile court's holding that termination of jurisdiction would not be in Vincent's best interests and supporting the inclusion of sex offender therapy. We affirm.

II. BACKGROUND

On May 13, 2005, the juvenile court entered an order adjudicating Vincent to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) in that he had "'deport[ed] himself so as to injure or endanger seriously the morals or health of himself or others.'" The factual circumstances leading to Vincent's adjudication involved an allegation that Vincent had sexually assaulted a 5-year-old boy by placing Vincent's penis "'in [the victim's] buns.'" Vincent denied the allegation, but the court found that beyond a reasonable doubt, the allegation was true.

On June 6, 2005, Vincent appealed the adjudication to this court. This court affirmed the adjudication by memorandum opinion on January 6, 2006. See *In re Interest of Vincent P.*, 14 Neb. App. xviii (No. A-05-694, Jan. 6, 2006).

On March 6, 2006, an initial dispositional hearing was held. At the conclusion of that hearing, the juvenile court entered a dispositional order. In the order, the juvenile court specifically continued the dispositional hearing to a later date. The colloquy between the court and the attorneys representing the State and Vincent at the March 6 hearing indicated that the court requested

that an "independent person" evaluate Vincent before the court would proceed with implementing a case plan.

On May 1, 2006, the dispositional hearing continued. During the two stages of the dispositional hearing, the juvenile court received several exhibits offered by the State, including a psychological evaluation that predated the adjudication, a DHHS court report dated August 12, 2005, a DHHS case plan and progress report dated December 4, 2005, and a psychological evaluation dated April 4, 2006. Vincent's caseworker testified that DHHS was recommending "ending the ongoing case with [DHHS]." The caseworker testified that "no more services . . . could be offered for Vincent." The caseworker also acknowledged that Vincent "still denies any culpability or that he had sexual contact with [the victim]." In addition to opining that no further services could be offered and that termination of jurisdiction was appropriate, however, the caseworker acknowledged that she was not familiar with the evidence presented at the adjudication hearing and had not reviewed "records from the [adjudication] hearings."

The evidence presented to the juvenile court also included two letters authored by Vincent's then therapist, Dr. Maria P. Goede, a licensed mental health practitioner. Those letters indicated that Vincent had been attending therapy with Dr. Goede since August 2005, that Vincent had earned his diploma through the GED program by January 2006, and that Vincent was attending college-level classes, working toward a business degree. In both letters, however, Dr. Goede expressed a lack of understanding about why Vincent "was made a State Ward." Dr. Goede recommended terminating juvenile court jurisdiction.

In the April 4, 2006, psychological evaluation, the psychologist, Dr. Steven A. Westby, noted that Vincent "has consistently denied ever having any inappropriate contact with [the victim]" and that Vincent "adamantly denied having ever sexually offended." The psychologist concluded that "there was no indication of major risk factors for sexual offending aside from his denial of any previous offending[, which] would only be a risk factor if the assumption is made that he did in fact commit that offense." The psychologist noted that "any individual with a history of sexual offending is at some risk for such behaviors again in the future — particularly if they have not taken responsibility

for their actions, remain in denial, etc." The psychologist further concluded, "Regardless, it would be this examiner's recommendation that Vincent continue to participate in individual and/or family therapy services."

The record also contains an August 12, 2005, DHHS court report and a December 4, 2005, DHHS case plan and progress report. In the "Recommendations" section of the August 12 report, DHHS recommended that "[c]ustody of [Vincent] remain with [D]HHS for appropriate care and placement" and then, further on the same page, recommended that "custody of Vincent be returned to his parents." Inasmuch as Vincent was never physically placed outside of his parents' home, the latter statement appears to be a suggestion that legal custody be returned to the parents and that the court's jurisdiction be terminated. In the "Case Plan and Progress Report" section of the August 12 report, DHHS set forth a number of goals and tasks to be accomplished by December 15. One of those goals was that "Vincent will resolve his issues with sexual inappropriateness," and the related tasks included Vincent's participation in therapy.

In the December 14, 2005, case plan and progress report, DHHS again included as a goal that "Vincent will resolve his issues with sexual inappropriateness" and indicated that the goal was to be accomplished by June 15, 2006. That goal included related tasks, including Vincent's participation in therapy. DHHS noted that as of January 19, 2006, Vincent had been in therapy and his therapist had recommended dismissal of the juvenile court's jurisdiction over Vincent. The December 14, 2005, plan and report also noted that the permanency objective was "Family Preservation" and that the target date for such objective was December 15, 2006.

On May 17, 2006, the juvenile court entered a dispositional order. The court specifically held that "[b]y preponderance of the evidence, the case plan is disapproved and is not in the best interests of [Vincent]." It is apparent from reading the remainder of the dispositional order that the court was rejecting DHHS' recommendation that the court terminate its jurisdiction over Vincent. The court specifically noted that the evidence supporting termination of jurisdiction was all premised on Vincent's continued denial of the accusation that led to adjudication and on

evaluators' "supposition[s] of 'if' Vincent did what was alledged [sic] in the petition." Inasmuch as the court had already found the allegation true at adjudication and inasmuch as that finding was affirmed on appeal, the court found most persuasive the portion of the April 4, 2006, psychological evaluation wherein Dr. Westby indicated that continued participation in individual or family therapy "could continue to monitor [Vincent] for signs of problematic sexual boundary concerns and other areas related to sexual abuse." As such, the court declined to terminate jurisdiction.

In the dispositional order, the juvenile court adopted the "tasks, goals, and objectives" set forth in the December 4, 2005, DHHS case plan and progress report. In addition, the court ordered Vincent to enroll in an age-appropriate sex offender therapy program and ordered a termination of Dr. Goede's participation in Vincent's therapy because of a "preconceived bias attitude exhibited by [her]."

On May 30, 2006, DHHS filed a request for review by a juvenile review panel, pursuant to Neb. Rev. Stat. § 43-287.04 (Reissue 2004). On June 27, the review panel entered an order affirming the juvenile court's decision. The review panel found that DHHS "failed to prove by a preponderance of the evidence that the order entered was not in the best interest of [Vincent]." This appeal followed.

III. ASSIGNMENTS OF ERROR

DHHS has assigned three errors on appeal, which we consolidate for discussion to two. First, DHHS asserts that the juvenile court erred in not adopting DHHS' recommendation to terminate jurisdiction. Second, DHHS asserts that the juvenile court erred in ordering sex offender therapy for Vincent and removing Vincent's current therapist.

IV. ANALYSIS

1. Standard of Review

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict,

however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

2. TERMINATING JURISDICTION

DHHS first argues that the juvenile court erred in failing to adopt DHHS' recommendation that terminating jurisdiction over Vincent was in Vincent's best interests. DHHS argues that there was no evidence showing such recommendation not to be in Vincent's best interests, that "jurisdiction should terminate once the conditions that led to adjudication have been corrected," and that Vincent's progress in therapy had "effectively resolv[ed] the issues adjudicated." Brief for appellant at 6. We find no merit to this argument.

[1,2] The purpose of the juvenile code is to "assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest." Neb. Rev. Stat. § 43-246(1) (Reissue 2004). The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of juveniles who fall within it. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction. *In re Interest of R.A. and V.A., supra.*

Neb. Rev. Stat. § 43-285(2) (Reissue 2004) allows the court to order a proposed plan for the care, placement, and services which are to be provided for a juvenile adjudged as being within the ambit of § 43-247(3) and provides in pertinent part:

> If any other party . . . proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan. The court may modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests.

When the juvenile court enters a dispositional order that implements a different plan for the juvenile than proposed by DHHS, a party who believes that the court-ordered plan is not in the best interests of the juvenile can seek review of the plan by a juvenile review panel. See, Neb. Rev. Stat. § 43-287.01 (Reissue 2004); *In re Interest of Elizabeth S.*, 13 Neb. App. 673, 698 N.W.2d 252 (2005); *In re Interest of Tanisha P. et al.*, 9 Neb. App. 344, 611 N.W.2d 418 (2000); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998); *In re Interest of William H.*, 3 Neb. App. 869, 533 N.W.2d 670 (1995).

The law is that Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 2004) provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited review process specified in such statutes. *In re Interest of Elizabeth S., supra*; *In re Interest of Tanisha P. et al., supra*; *In re Interest of Laura O. & Joshua O., supra*. The expedited review process applies in cases where the contested dispositional order implements a different plan than the plan proposed by DHHS and where the appealing party has a belief that the court-ordered plan is not in the best interests of the juvenile. See *id.*

In this case, DHHS sought and obtained review of the juvenile court's dispositional order by a juvenile review panel. We note that the actual plan proffered by DHHS, the December 4, 2005, case plan and progress report, did not include any recommendation of DHHS that the court's jurisdiction over Vincent be terminated, did not include immediate termination of jurisdiction as a goal, and actually included a number of goals which DHHS indicated were to be accomplished by June 15, 2006, more than 3 months after the dispositional hearing at which the plan was received by the court. Nonetheless, we also recognize that the August 12, 2005, DHHS court report did include a recommendation that the court's jurisdiction over Vincent be terminated (although it also inexplicably contained a recommendation that custody of Vincent remain with DHHS), and the caseworker's testimony at the dispositional hearing makes it clear that DHHS was, in fact, urging termination of jurisdiction. As such, we conclude that DHHS properly invoked the expedited review process in this case. Compare *In re Interest of William H., supra*.

DHHS argues that "no evidence was offered to rebut the findings of two psychologists, a licensed mental health practitioner, and the case manager." Brief for appellant at 4. DHHS further argues that the failure to terminate jurisdiction in this case amounts to punishing Vincent "for exercising his rights against self-incrimination" by refusing to admit that he committed the adjudicated offense. *Id.* at 5. Finally, DHHS argues that Vincent's progress in therapy had "effectively resolv[ed] the issues adjudicated." *Id.* at 6. We find no merit to any of these arguments.

First, contrary to DHHS' assertions, there was evidence presented which supports the court's refusal to terminate jurisdiction over Vincent. Although DHHS points to the first psychological evaluation as evidence that Vincent is not at risk to reoffend, we note that that evaluation was actually completed prior to adjudication. In the more recent evaluation, completed the month prior to the dispositional order, Dr. Westby specifically indicated that Vincent is at risk for sexually offending once again if it is assumed that he is guilty of the offense which led to adjudication. Dr. Westby also specifically indicated that "[r]egardless [of whether Vincent did or did not commit the adjudicated offense], it would be this examiner's recommendation that Vincent continue to participate in individual and/or family therapy services" and that "[s]uch services could continue to monitor him for signs of problematic sexual boundary concerns and other areas related to sexual abuse."

Although Dr. Westby cited Vincent's failure to admit or take responsibility for the sexual assault that led to adjudication, the juvenile court's refusal to terminate jurisdiction in this case is not comparable to punishing Vincent for exercising his rights against self-incrimination. DHHS' reliance on *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998), is misplaced. In *In re Interest of Clifford M. et al.*, we held that a parent's parental rights could not be terminated because of the parent's refusal to make incriminating statements, which statements could have led to further criminal charges. In the present case, Vincent is not required to make incriminating statements and would not face further criminal charges based upon any statements made.

Finally, we find no merit to DHHS' assertion that the conditions which led to Vincent's adjudication have been resolved.

Vincent was adjudicated based on having sexually assaulted a 5-year-old boy. The dispositional order under discussion is the first dispositional order ever entered in this case. Although the record indicates that Vincent has been participating in therapy, the record also specifically indicates that Vincent would benefit from continued therapy and supervision. As such, we find no merit to any of DHHS' arguments or to this assignment of error.

3. Sex Offender Therapy

DHHS also asserts that the juvenile court erred in "ordering sex offender specific therapy for [Vincent] and ordering [that] therapy with [Dr.] Goede cease." Brief for appellant at 8. DHHS argues that it is unclear why the juvenile court ordered sex offender therapy and that the court lacked authority to specifically indicate that therapy with Dr. Goede should cease. We disagree on both accounts.

[3] The Nebraska Supreme Court has stated:

> [O]nce there has been the adjudication that a child is a juvenile within the meaning of the [Nebraska Juvenile Code], the foremost purpose or objective of the Nebraska Juvenile Code is promotion and protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parent(s) where continuation of such parental relationship is proper under the law.

In re Interest of J.S., A.C., and C.S., 227 Neb. 251, 263, 417 N.W.2d 147, 156 (1987). Once a juvenile has been adjudicated, the juvenile court has broad discretion as to his or her disposition. *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), *reversed in part on other grounds* 251 Neb. 614, 558 N.W.2d 548 (1997).

We cannot find the juvenile court's disposition in this case to be an abuse of discretion. We are unaware of any authority which supports the suggestion that ordering age-appropriate sex offender therapy for a juvenile who was adjudicated as having sexually assaulted a 5-year-old boy is an abuse of discretion. Dr. Westby specifically recommended individual or family therapy services to monitor Vincent for signs of problematic sexual boundary concerns. Recommending sex offender therapy for an adjudicated sex offender is not an abuse of discretion.

Additionally, we find no abuse of discretion by the court in ordering that Vincent's therapy with Dr. Goede be terminated. The record contains two letters from Dr. Goede in which she indicated that she had been providing therapy for Vincent. In each letter, she expressed an inability to understand why Vincent was "a State Ward." We do not find an abuse of discretion in the court's conclusion that such an inability to understand that an adjudicated sex offender should be under the jurisdiction of the juvenile court merited ending Vincent's treatment with her. This assignment of error is also without merit.

V. CONCLUSION

We find no merit to DHHS' assertions that the juvenile court should have terminated jurisdiction instead of entering an initial dispositional order concerning Vincent, who was adjudicated as having sexually assaulted a 5-year-old boy. The record supports the conclusion that Vincent will benefit from continued therapy and monitoring. Additionally, we find no merit to DHHS' assertion that the juvenile court had no basis on which to order age-appropriate sex offender therapy for an adjudicated sex offender. We affirm the order of the review panel affirming the dispositional order of the juvenile court.

AFFIRMED.

INBODY, Chief Judge, not participating.

STEVEN R. YENNEY, APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

729 N.W.2d 95

Filed March 20, 2007. No. A-05-695.

1. **Administrative Law: Motor Vehicles: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative license revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A 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.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on

the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Jurisdiction.** The sworn report of the arresting officer shall be received into the record by the hearing officer as the jurisdictional document of a license revocation hearing, and upon receipt of the sworn report, the order of revocation by the director of the Department of Motor Vehicles has prima facie validity.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs.** The Department of Motor Vehicles has made a prima facie case for license revocation once the department establishes that the arresting officer provided his or her sworn report containing the required recitations to the director of the department.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Drunk Driving: Blood, Breath, and Urine Tests.** Under Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004), the required recitations in the sworn report in an administrative license revocation proceeding are that (1) the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004)—reasonable grounds to believe such person was driving under the influence—and the reasons for such arrest, (2) the person was requested to submit to the required test, and (3) the person refused to submit to the required test.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Drunk Driving: Jurisdiction.** Including a statement in the sworn report in an administrative license revocation proceeding that the individual was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) does not provide a factual basis for the arrest, because such is a mere legal conclusion.
8. **Administrative Law: Evidence.** A sworn report which does not include information required by statute cannot be supplemented by evidence offered at a subsequent administrative license revocation hearing.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

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

Jon Bruning, Attorney General, Laura L. Neesen, and Melissa R. Vincent for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

The district court for Douglas County affirmed the ruling of the director of the Department of Motor Vehicles (the Department) that Steven R. Yenney's driving privileges should be revoked for 1 year under the administrative license revocation (ALR) statutes. We find that the Department did not make a prima facie case for

license revocation, and we therefore reverse, and remand with directions to reinstate Yenney's driver's license.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after midnight on December 1, 2004, Omaha Police Officers David Carlson and Larry Bakker found Yenney asleep behind the wheel of a vehicle in a gas station's parking lot. The officers had Yenney exit the vehicle. Officer Carlson detected a "strong" odor of alcohol and noticed that Yenney had trouble standing, was slow to respond to commands and instructions, appeared to have urinated on himself, and exhibited "all the signs of intoxication." Officer Carlson had Yenney perform several field sobriety tests. Yenney consented to taking the horizontal gaze nystagmus test, reciting the alphabet, and counting backward, but he refused to do any other field sobriety tests. Yenney refused to submit to a preliminary breath test. Officers Carlson and Bakker placed Yenney under arrest for suspicion of driving under the influence of alcohol (DUI). Yenney was transported to central police headquarters, where he refused to submit to a chemical test of his breath. Officer Bakker completed a "Notice/Sworn Report/Temporary License" (sworn report) form, which was also signed by Officer Carlson, and filed it with the Department on December 6. Yenney was given a temporary license, valid for 30 days from the date of notice under the ALR statutes. See Neb. Rev. Stat. § 60-498.01(5)(c) (Reissue 2004).

A petition for administrative hearing was received by the Department on December 7, 2004, and a hearing was scheduled for December 22. On December 22, an ALR hearing before a hearing officer for the Department was held to determine whether Yenney was operating or in the actual physical control of a motor vehicle while under the influence of alcohol in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). The hearing officer's report states that neither party requested the rules of evidence be applied and that the hearing proceeded informally.

At the beginning of the hearing, Yenney moved to dismiss for lack of jurisdiction because the reasons provided for arrest in the sworn report were deficient. Yenney argued, "They don't support an arrest for a DUI because they provide no indication that [Yenney] ever operated or was in a position to operate a motor

vehicle." The motion was overruled, and the hearing proceeded. As will be discussed below, an order was entered finding that Yenney was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1).

Officer Carlson gave sworn testimony at the ALR hearing. The key facts from his testimony have earlier been set forth above, and we do not repeat such. However, an additional piece of evidence was that Officer Carlson testified that while en route to central police headquarters, Yenney spontaneously told Officer Carlson that Yenney had been driving the vehicle and had stopped at the gas station to get a "pop." The sworn report signed by Officers Carlson and Bakker was received into evidence.

The hearing officer recommended that the director of the Department find (1) that the officer had probable cause to believe Yenney was operating or in the actual physical control of a motor vehicle in violation of § 60-6,196, (2) that Yenney was operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1), and (3) that Yenney refused a peace officer's lawful direction to submit to a chemical test. On December 28, 2004, the Department entered an order revoking Yenney's driver's license and/or operating privileges for 1 year, effective December 31.

On January 3, 2005, Yenney filed his "Petition for Review of Administrative License Revocation" in the district court for Douglas County. Yenney alleged that relief should be granted because the ALR order was arbitrary, contrary to law, and contrary to the Department's regulations governing the proceeding. The Department's order of revocation was stayed pending Yenney's appeal to the district court. A hearing on Yenney's petition for review was held on April 28. On May 2, the district court filed its order affirming the revocation of Yenney's operating privileges. Yenney timely appeals the district court's order.

ASSIGNMENTS OF ERROR

Yenney alleges that the district court erred in (1) finding that the Department properly overruled Yenney's motion to dismiss the administrative proceeding for lack of jurisdiction, (2) finding that the sworn report constituted prima facie evidence of

the validity of the order of revocation by the director of the Department; and (3) finding that the evidence established probable cause that Yenney operated a motor vehicle in violation of § 60-6,196.

STANDARD OF REVIEW

[1-3] Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's ALR statutes, are appealed under the Administrative Procedure Act (APA). *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). A final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Trackwell v. Nebraska Dept. of Admin. Servs.*, 8 Neb. App. 233, 591 N.W.2d 95 (1999). See Neb. Rev. Stat. § 84-918(3) (Reissue 1999). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Trackwell v. Nebraska Dept. of Admin. Servs., supra.*

ANALYSIS

[4-6] Yenney argues that the district court erred in finding that the Department properly overruled Yenney's motion to dismiss the administrative proceeding for lack of jurisdiction and in finding that the sworn report constituted prima facie evidence of the validity of the order of revocation by the director of the Department. "The sworn report of the arresting officer shall be received into the record by the Hearing Officer as the jurisdictional document of the hearing, and upon receipt of the sworn report, the [d]irector's order of revocation has prima facie validity." 247 Neb. Admin. Code, ch. 1, § 006.01 (2001). The Department makes a prima facie case for license revocation once it establishes that the arresting officer provided his or her sworn report containing the required recitations. See, *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002); *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). (Both *Morrissey v. Department of Motor Vehicles* and *McPherrin v. Conrad* have been disapproved, but only to the

extent that such cases suggest that a sworn report which does not include information required by statute may be supplemented by evidence offered at a subsequent hearing. See *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).) The required recitations in the sworn report are that (1) the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004)—reasonable grounds to believe such person was driving under the influence—and the reasons for such arrest, (2) the person was requested to submit to the required test, and (3) the person refused to submit to the required test. § 60-498.01(2).

[7] In the instant case, the officers' sworn report stated that Yenney was directed to submit to a chemical test and that he refused such test. The sworn report form also stated: "The undersigned officer(s) hereby swear(s) that the above-named individual was arrested pursuant to . . . § 60-6,197, and the reasons for the arrest are: passed out in front of [the gas] Station, near front doors. Signs of alcohol intoxication." (The underscored portion indicates the officers' comments handwritten on the blank lines provided on the form.) The Department argues that the foregoing provides reasonable grounds to believe that Yenney was *driving* under the influence, because one can infer by the reference to the DUI statute—§ 60-6,197—that he was in fact illegally driving a motor vehicle as prohibited by the provisions of that statute, i.e., he would not have been arrested if he were not driving with impermissible alcohol levels. In short, while the handwritten reasons for the arrest do not recite that Yenney was driving or in a vehicle or even near one, the State seeks to "bootstrap" such facts into the sworn report by the form's mere preprinted recitation of the fact he was arrested pursuant to the DUI statute. The reasons recited for the arrest merely state that he was passed out near the front doors of the gas station, which could mean that Yenney was passed out on the sidewalk or driveway rather than in a motor vehicle, and the stated reasons include no facts showing how he got there or allowing an inference that he drove there in a drunken condition. As a general proposition, we believe it fair to say that the ALR statutes and the proceedings thereunder have been tightly scrutinized by the appellate courts as evidenced by the discussion which follows. Therefore, we hold that including a statement in the sworn report that the individual was arrested

pursuant to § 60-6,197 does not provide a factual basis for the arrest, because such is a mere legal conclusion.

[8] However, the reasons for the arrest were in the record by way of Officer Carlson's testimony at the ALR hearing, such reasons being that he and Officer Bakker found Yenney asleep behind the wheel of a vehicle in a gas station's parking lot. And Officer Carlson also testified that while en route to central police headquarters, Yenney spontaneously told Officer Carlson that Yenney had been driving the vehicle and had stopped at the gas station to get a "pop." However, a sworn report which does not include information required by statute cannot be supplemented by evidence offered at a subsequent hearing. *Hahn v. Neth, supra.* Thus, the Department did not make a prima facie case for license revocation. Because the Department did not meet its burden of proof, Yenney's driver's license should not have been revoked. We reverse the revocation of Yenney's driver's license and remand the cause with directions that his driving privileges be restored.

CONCLUSION

For the reasons stated above, we find that the Department did not make a prima facie case for license revocation and that Yenney's driver's license should not have been revoked under the ALR statutes.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
ANSELM MCCRIMON, APPELLANT.

729 N.W.2d 682

Filed March 20, 2007. No. A-06-492.

1. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
2. **Probation and Parole: Child Support.** Requiring a probationer to pay child support is statutorily authorized under Neb. Rev. Stat. § 29-2262(2)(c) (Cum. Supp. 2004).
3. **Probation and Parole.** Once probation is imposed, the defendant's ability to pay must be considered before a court can revoke the probation and impose a jail term for violating a probation condition requiring payments.
4. **Sentences: Probation and Parole.** Before revoking probation for failure to make required payments, the sentencing court must find the probationer failed

to make sufficient bona fide efforts to make the required payments. If the failure is willful, probation can be revoked and a jail sentence imposed within the sentencing range allowed by law for the original offense. If the court finds the probationer made sufficient efforts to satisfy the probation conditions, the court can order imprisonment only if it finds alternative punishments are not adequate to satisfy the State's interests in punishment and deterrence.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Ann C. Addison-Wageman, of Wageman & Whitworth, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Anselm McCrimon appeals the sentence imposed following his plea of guilty to aiding and abetting a fraudulent insurance act. He asserts that the district court abused its discretion in imposing the following probation condition: "Effective June 1, 2006, and on the first day of each month thereafter, [McCrimon] shall make minimum child support payments of $200.00 per month toward child support arrearage. Failure to pay any monthly payment as required shall constitute a violation of probation." Because this term of the probation order is reasonable and statutorily authorized, we find no abuse of discretion by the trial court and affirm.

II. BACKGROUND

McCrimon was initially charged with one count of aiding and abetting insurance fraud, a Class III felony. The evidence indicated that McCrimon and his girlfriend filed a fraudulent insurance claim and that as a result, the insurance company involved suffered a loss of $6,296.75. In exchange for McCrimon's plea of guilty, the State agreed to reduce the charge of aiding and abetting insurance fraud to a Class I misdemeanor.

At the sentencing hearing, the court stated that it had reviewed the presentence investigation (PSI) report and that because

McCrimon had a prior criminal history, he would be sentenced to intensive supervision probation. The intensive supervision probation order contained the provision, "Effective June 1, 2006, and on the first day of each month thereafter, [McCrimon] shall make minimum child support payments of $200.00 per month toward child support arrearage. Failure to pay any monthly payment as required shall constitute a violation of probation." McCrimon timely filed this appeal.

III. ASSIGNMENTS OF ERROR

McCrimon asserts that the district court abused its discretion in imposing a term of probation that McCrimon make minimum monthly payments of $200 toward his child support arrearages. McCrimon further asserts that the district court erred in imposing the probation term that "[f]ailure to pay any monthly payment as required shall constitute a violation of probation."

IV. ANALYSIS

McCrimon challenges the trial court's imposed probation term requiring him to pay $200 toward his child support arrearages. Because the imposed probation term is reasonable and authorized by statute, we find that the trial court did not abuse its discretion in ordering McCrimon to make such payments.

[1] A sentence imposed within the statutory limits will not be disturbed upon appeal in the absence of an abuse of discretion by the trial court. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993). When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991). Neb. Rev. Stat. § 29-2262 (Cum. Supp. 2004) provides, in relevant part:

> (1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. . . .
>
> (2) The court may, as a condition of a sentence of probation, require the offender:
>
> . . . .
>
> (c) To meet his or her family responsibilities.

Courts in other jurisdictions have held that child support payments are a proper condition of probation for an adult criminal defendant where the criminal conviction is unrelated to the condition of support. See, *State v. Miller*, 283 Wis. 2d 465, 701 N.W.2d 47 (Wis. App. 2005); *Darby v. State*, 230 Ga. App. 32, 495 S.E.2d 146 (1997); *Brown v. U.S.*, 579 A.2d 1158 (D.C. 1990); *State v. Shaver*, 233 Mont. 438, 760 P.2d 1230 (1988), *modified on other grounds, State v. Licht*, 266 Mont. 123, 879 P.2d 670 (1994); *Ward v. State*, 511 So. 2d 1109 (Fla. App. 1987); *State v. Pettis*, 333 N.W.2d 717 (S.D. 1983).

[2] In the present case, the trial court imposed the probation condition that McCrimon make minimum child support payments of $200 per month toward his child support arrearages. Supporting one's child is unquestionably a family responsibility; therefore, we find that requiring a probationer to pay child support is statutorily authorized under § 29-2262(2)(c).

We now turn to whether the amount McCrimon is required to pay for child support is reasonable. We must make this determination because § 29-2262(1) requires that all probation terms be reasonable and because McCrimon argues that the $200-per-month requirement is not reasonable in that he was unable to pay such amount at the time of sentencing. We find no merit to this argument.

In the South Dakota case *State v. Pettis, supra*, the defendant pled guilty to one charge of marijuana distribution, and he was sentenced to 2 years' imprisonment. The execution of sentence was suspended on the condition that the defendant comply with the trial court's terms of probation, which required the defendant to pay a $2,000 fine and satisfy a $4,690.34 child support judgment within 90 days. Although the defendant's net worth was approximately $8,630, the South Dakota Supreme Court found no error in requiring the defendant to pay $6,690.34 in child support and fines, because "[t]he trial court individualized the sentence and conditions of probation to fit the crime." 333 N.W.2d at 720.

In the instant case, the PSI report indicates that although McCrimon is indebted to the State of Illinois for $10,000 regarding child support arrearages and is obligated to pay $500 per month toward those arrearages, he is not currently making

payments. The PSI report indicates that McCrimon was "quite evasive" regarding his present employment. He indicated that he is self-employed and makes approximately $500 per month fixing and selling items such as snowblowers, lawnmowers, and computer parts. He listed a "1985 Honda Goldwing" with an estimated value of $4,500 as his sole asset. The trial court acknowledged that it had reviewed the PSI report prior to imposing its sentence. Like the situation in *State v. Pettis, supra*, although the impact of the probation order in the instant case may be harsh, it is not unreasonable to expect McCrimon to pay his preexisting child support obligation when he currently has an income and some assets. Additionally, the impact of the probation term may help ensure that McCrimon maintains steady employment and fulfills his family responsibilities.

Finally, we address McCrimon's further assertion that the district court erred in imposing the probation term that "[f]ailure to pay any monthly payment as required shall constitute a violation of probation."

[3,4] Were McCrimon to be charged with violating his probation for failing to pay $200 per month toward his child support arrearages, he is not without a remedy if he is unable to pay because of a lack of resources. Once probation is imposed, the defendant's ability to pay must be considered before a court can revoke the probation and impose a jail term for violating a probation condition requiring payments. *State v. Englehart*, 231 Neb. 579, 437 N.W.2d 468 (1989). The sentencing court must find the probationer failed to make sufficient bona fide efforts to make the required payments. *Id.* If the failure is willful, probation can be revoked and a jail sentence imposed within the sentencing range allowed by law for the original offense. *Id.* If the court finds the probationer made sufficient efforts to satisfy the probation conditions, the court can order imprisonment only if it finds alternative punishments are not adequate to satisfy the State's interests in punishment and deterrence. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *State v. Englehart, supra*. See, also, *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987). As such, should McCrimon be unable to pay $200 per month in child support, the trial court cannot revoke his probation and impose a prison term until it finds that his failure

to pay is willful or that alternative punishments are not adequate to satisfy the State's interests in punishment and deterrence.

Because the imposed probation term is reasonable and statutorily authorized, we find that the trial court did not abuse its discretion.

V. CONCLUSION

We conclude that the district court did not abuse its discretion in imposing a probation term that requires McCrimon to pay $200 per month in child support and that provides that failure to pay constitutes a violation of probation.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL L. CERVANTES, APPELLANT.

729 N.W.2d 686

Filed April 3, 2007. Nos. A-06-852, A-06-878.

1. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel.
4. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** When using a prior conviction to enhance a sentence, the State has the burden to prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings.
5. **Pleas.** Before accepting a guilty plea, the trial court must determine, among other things, whether a factual basis for the plea exists.
6. ____. A factual basis for a plea of guilty may be established by inquiry of the prosecutor, interrogation of the defendant, or examination of the presentence report. The preferred procedure for ascertaining whether a factual basis exists to support a guilty plea is to inquire directly of the defendant.

Appeals from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

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

CARLSON, MOORE, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

In case No. A-06-852, Michael L. Cervantes pled no contest to a charge of possession of methamphetamine. In case No. A-06-878, Cervantes pled no contest to a charge of possession of methamphetamine (count I), which was enhanced as a habitual criminal (count II). In case No. A-06-852, Cervantes was sentenced to the Nebraska Department of Correctional Services for a term of 20 months' to 5 years' imprisonment. In case No. A-06-878, Cervantes was sentenced to the Nebraska Department of Correctional Services for a term of 10 to 15 years' imprisonment, to run concurrently with the sentence imposed in case No. A-06-852. The trial court specifically found that Cervantes was a habitual offender as described in Neb. Rev. Stat. § 29-2221 (Reissue 1995). Cervantes appeals. We affirm.

BACKGROUND

As stated in the State's brief, Cervantes entered into a plea agreement that encompassed each case as well as the dismissal or waiver of prosecution for other federal and state drug charges. The plea bargain included Cervantes' "admitting to the allegations . . . that would justify the Court finding that he is an habitual criminal." Before accepting Cervantes' plea of guilty to being a habitual criminal, the trial court obtained a factual basis for each of Cervantes' prior criminal convictions. Those facts will be set forth in detail later in this opinion.

ASSIGNMENTS OF ERROR

Cervantes assigns that the district court erred in (1) sentencing him as a habitual criminal, (2) finding that his prior convictions are valid, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1] A trial court is given discretion as to whether to accept a guilty plea; an appellate court will overturn that decision only where there is an abuse of discretion. *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Alba*, 270 Neb. 656, 707 N.W.2d 402 (2005).

ANALYSIS

Case No. A-06-852.

Cervantes cites no errors and makes no arguments in regard to case No. A-06-852. As a result, we find that the conviction and sentence on the charge of possession of a controlled substance (methamphetamine) is affirmed.

Case No. A-06-878.

As stated in the background section of this opinion, Cervantes entered pleas pursuant to a plea agreement as to counts I and II, possession of a controlled substance (methamphetamine), a Class IV felony, see Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2006), and habitual criminal, see § 29-2221 (penalty 10 to 60 years' imprisonment). Cervantes complains that the record does not show that he either had counsel or waived same on the prior convictions used to support the habitual criminal conviction. We disagree.

In reviewing the errors cited by Cervantes, it is clear that each one must fail if there was a valid plea to the habitual criminal count in case No. A-06-878. Specifically, Cervantes questions whether the court established a proper factual basis for his plea. If the plea passes muster, then the trial court did not err in finding that Cervantes' prior convictions were valid and the trial court did not err in sentencing Cervantes as a habitual criminal. Finally, in regard to an excessive sentence, Cervantes argues in his brief that the sentence in case No. A-06-878 was excessive because without the enhancement, the maximum penalty for possession of methamphetamine is 5 years' imprisonment. See § 28-416(3) and Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006).

Thus, this error, as with the others, is tied to the validity of the habitual criminal plea.

[3] In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel. *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005). See § 29-2221(1).

[4] Specifically, when using a prior conviction to enhance a sentence, the State has the burden to prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings. *Hall, supra.*

Initially, we note that Cervantes pled guilty to being a habitual criminal.

> THE COURT: If I got all that correctly, the plea agreement is that in exchange for [Cervantes'] entering pleas that leads to his convictions in case CR 06-57 and CR 06-58, and also in exchange for his admitting to the allegations in Count II that would justify the Court finding that he is an habitual criminal, that the State has agreed to dismiss case CR 06-57, to recommend concurrent sentencing in these matters.
>
> . . . .
>
> EXAMINATION BY THE COURT:
>
> [The court]: . . . [I]s that your understanding of the agreement?
>
> [Cervantes]: Yes.
>
> [The court]: Do you have any questions about that agreement?
>
> [Cervantes]: No.

[5,6] However, before accepting a guilty plea, the trial court must determine, among other things, whether a factual basis for the plea exists. *State v. Johnson*, 7 Neb. App. 723, 585 N.W.2d 486 (1998). A factual basis for a plea of guilty may be established by inquiry of the prosecutor, interrogation of the defendant, or

examination of the presentence report. *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996), *overruled on other grounds, State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). The preferred procedure for ascertaining whether a factual basis exists to support a guilty plea is to inquire directly of the defendant. *Id.*

The following cited portions of the record show that the trial court established a proper factual basis before accepting Cervantes' plea of guilty to being a habitual criminal.

> [The court]: In case CR 06-58, to the charge that on or about March 5th of 2006, in Buffalo County, Nebraska, that you did then and there knowingly or intentionally possess the controlled substance methamphetamine, what plea did you wish to enter?
>
> [Cervantes]: No contest.
>
> [The court]: Do you understand that if I accept pleas of no contest, that convictions will still be entered and that you'll be treated the same for sentencing as if you had pled guilty?
>
> [Cervantes]: Yes, I do.
>
> [The court]: Has anyone made any promises to you or threats against you which have either coerced you or induced you to enter your pleas against your will?
>
> [Cervantes]: No, sir.
>
> [The court]: . . . I want to ask you a few questions about Count II [habitual criminal] in case CR 06-58 although I suspect the State will be offering evidence at the time of the sentencing hearing.
>
> [Counsel for the State]: Yes, sir.
>
> EXAMINATION BY THE COURT:
>
> [The court]: In Count II, the State alleges that on March 8th of 2001, that you in this Court were — in case CR 01-1 were convicted of a Class III felony for theft and that you were subsequently on July 19th of that year sentenced by this Court to serve a term of 18 months to five years in the State of Nebraska Department of Corrections. And that you did begin the service of that sentence on July 20th. Do you agree that those events occurred and that conviction was entered?
>
> [Cervantes]: Yes.

[*The court*]: *And at that time and during those proceedings, were you represented by an attorney?*

[*Cervantes*]: *Yes, I was.*

[The court]: The State alleges that on August 7th of 1992, that in case 192-38 also in this Court that you were convicted of an offense of burglary and the offense of attempted burglary which were Class III and IV felonies. And that on the 14th day of May of 1992, you were sentenced by this Court to a term of one to three years to run concurrently to the State of Nebraska Department of Corrections and that you began the service of those sentences on May 15, 1992. Are you in agreement that those events occurred?

[Cervantes]: Yes, sir.

[*The court*]: *And during those proceedings, were you represented by an attorney?*

[*Cervantes*]: *Yes.*

[The court]: Finally, the State alleges that in April of 1987, in the case 10272 also in this Court, that you were convicted of the offense of unlawful distribution of a controlled substance being a Class III felony and a second count of unlawful distribution of a controlled substance as a Class III felony and that on May 28th you were sentenced by this Court to a term of one to three years on each count with 54 days credit for time served. The sentences to run concurrently, to serve that time with the Nebraska Department of Corrections and that you were committed to that institution on May 28, 1987. Do you agree with those events occurring?

[Cervantes]: Yes, I do.

[*The court*]: *And during those proceedings, were you represented by an attorney?*

[*Cervantes*]: *Yes, I was.*

(Emphasis supplied.)

After this examination of Cervantes, the court accepted Cervantes' plea to the habitual criminal charge as knowingly, voluntarily, and intelligently entered. Cervantes argues that this record is not sufficient to support his plea to the habitual criminal charge. In particular, he focuses on the term "during those

proceedings" referring to when he was represented by counsel. We disagree. The term "proceeding" is defined in Black's Law Dictionary 1241 (8th ed. 2004) as the "regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Therefore, we find that the fact of Cervantes' being represented on each prior conviction at the plea and sentencing is encompassed by the use in this record of "those proceedings." See *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

Given the record before us, we conclude that the court established a proper factual basis for Cervantes' plea, using the preferred method of direct inquiry of Cervantes. We conclude that the district court did not err in accepting Cervantes' plea of guilty to the habitual criminal charge and that the sentence imposed by the district court was not excessive.

CONCLUSION

After reviewing the record, we affirm Cervantes' convictions and sentences in regard to both cases Nos. A-06-852 and A-06-878 as to all counts.

AFFIRMED.

IN RE INTEREST OF TENEKO P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

730 N.W.2d 128

Filed April 3, 2007. No. A-06-1030.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Milo Alexander, Special Assistant Attorney General, for appellant.

No appearance for appellee.

CARLSON, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals from a detention order entered by the Douglas County Separate Juvenile Court, which order placed temporary custody of Teneko P. with the Office of Juvenile Services (OJS) within DHHS and provided that OJS pay for the costs of Teneko's placement. On appeal, DHHS claims that the court erred in placing Teneko with OJS prior to adjudication and in directing OJS to pay for Teneko's care and detention.

BACKGROUND

On August 14, 2006, the State filed a petition which alleged that Teneko was a child within the meaning of Neb. Rev. Stat. § 43-247(2) (Cum. Supp. 2006) in that he violated a law of the State of Nebraska and/or a municipal ordinance of the city of Omaha. Specifically, the petition alleged that on or about March 2006, Teneko subjected a minor child to sexual penetration, without the consent of the victim, or that Teneko knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of Teneko's conduct, in violation of Neb. Rev. Stat. § 28-319(1)(a) and (b) (Reissue 1995).

A detention hearing was held the same day, August 14, 2006. The State, Teneko and his counsel, and Teneko's parents were present. The State requested continued detention of Teneko. In an order entered August 16, the juvenile court found that the continued detention of Teneko was a matter of immediate and urgent necessity, for the protection of Teneko or the person or property of another, and that it would be contrary to Teneko's health and safety to be returned home. The juvenile court further

found that it would be in Teneko's best interests to be placed in the temporary custody of OJS until further order of the court and that the cost of care in excess of available insurance would be borne by DHHS. The court then ordered that Teneko be placed in the temporary custody of OJS and that Teneko be detained at the Douglas County Youth Center until further order of the court. The court also ordered that OJS might seek an appropriate placement of Teneko "that takes into account the present charge and that has no other children." The court then ordered Teneko's parents to pay the medical, dental, and hospital costs for Teneko to the extent that they had insurance to cover such costs; otherwise, the obligation would be that of OJS.

DHHS timely appeals from the detention order.

ASSIGNMENTS OF ERROR

On appeal, DHHS asserts that the court erred (1) in placing Teneko with OJS prior to adjudication and (2) in ordering OJS to pay the costs of Teneko's care and detention.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003); *In re Interest of Chelsey D.*, 14 Neb. App. 392, 707 N.W.2d 798 (2005).

ANALYSIS

DHHS argues that the court erred in committing Teneko to the custody of OJS, because Teneko had not yet been adjudicated. DHHS claims that there is no statutory authority which allows a juvenile court to commit a juvenile to OJS before a juvenile has been adjudicated. DHHS also claims that placing Teneko with DHHS was not permissible either, because the court found that Teneko required a "secure" detention placement, and DHHS argues that a juvenile may not be placed with DHHS prior to adjudication if the juvenile requires a secure placement. DHHS acknowledges that it would be responsible, generally speaking, for the costs of care for any juvenile placed in its custody; however, DHHS claims that because Teneko should not have been

placed with OJS or DHHS, DHHS is not liable for the costs of Teneko's care. DHHS asserts that rather, the juvenile court should have ordered Douglas County to be responsible for the costs of Teneko's care, because when the Nebraska Juvenile Code or the Health and Human Services, Office of Juvenile Services Act preclude placement with DHHS or OJS, the county is generally responsible for such costs.

The facts of this case are not in dispute, but, rather, we are presented with an issue of statutory interpretation. The question before us is whether the juvenile court was authorized to place Teneko in the temporary custody of OJS. This requires an examination of statutory provisions from the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2004 & Cum. Supp. 2006), and the Health and Human Services, Office of Juvenile Services Act, Neb. Rev. Stat. §§ 43-401 to 43-423 (Reissue 2004 & Cum. Supp. 2006), the relevant portions of which are provided below.

Relevant Statutes of Nebraska Juvenile Code.

Section 43-254 provides where a juvenile court may place or detain a juvenile before he or she is adjudicated, stating in relevant part:

> Pending the adjudication of any case, if it appears that the need for placement or further detention exists, the juvenile may be (1) placed or detained a reasonable period of time on order of the court in the temporary custody of either the person having charge of the juvenile or some other suitable person, (2) kept in some suitable place provided by the city or county authorities, (3) placed in any proper and accredited charitable institution, (4) placed in a state institution, except any adult correctional facility, when proper facilities are available and the only local facility is a city or county jail, at the expense of the committing county on a per diem basis as determined from time to time by the head of the particular institution, or (5) placed in the temporary care and custody of [DHHS] when it does not appear that there is any need for secure detention.

Section 43-290 describes who is responsible for the costs of care and treatment of a juvenile as well as the payment procedure, stating in relevant part:

> It is the purpose of this section to promote parental responsibility and to provide for the most equitable use and availability of public money.
>
> Pursuant to the petition filed by the county attorney in accordance with section 43-274, whenever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency, or when a juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by a parent for the juvenile at the same proceeding at which placement, study, or treatment is determined or at a separate proceeding. Such proceeding, which may occur prior to, at the same time as, or subsequent to adjudication, shall be in the nature of a disposition hearing.
>
> . . . .
>
> If the juvenile has been committed to the care and custody of [DHHS], the department shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent.
>
> If no provision is otherwise made by law for the support or payment for the study or treatment of the juvenile, compensation for the support, study, or treatment shall be paid, when approved by an order of the court, out of a fund which shall be appropriated by the county in which the petition is filed.

Relevant Statutes of Health and Human Services, Office of Juvenile Services Act.

Section 43-403 provides definitions for certain terms in the Health and Human Services, Office of Juvenile Services Act, including the following:

> (2) Committed means an order by a court committing a juvenile to the care and custody of [OJS] for treatment;
>
> . . . .
>
> (4) Evaluation means assessment of the juvenile's social, physical, psychological, and educational development and needs, including a recommendation as to an appropriate treatment plan;

. . . .

(6) Placed for evaluation means a placement with [OJS] or [DHHS] for purposes of an evaluation of the juvenile; and

(7) Treatment means type of supervision, care, confinement, and rehabilitative services for the juvenile.

Section 43-413 provides as follows:

(1) A court may, pursuant to section 43-281, place a juvenile with [OJS] or [DHHS] for an evaluation to aid the court in the disposition.

. . . .

(3) All juveniles shall be evaluated prior to commitment to [OJS]. The court shall not commit such juvenile to the temporary custody of [OJS] prior to disposition. The office may place a juvenile in residential or nonresidential community-based evaluation services for purposes of evaluation to assist the court in determining the initial level of treatment for the juvenile.

(4) During any period of detention or evaluation prior to disposition:

(a) Except as provided in subdivision (4)(b) of this section, the county in which the case is pending is responsible for all detention costs incurred before and after an evaluation period prior to disposition, the cost of delivering the juvenile to the facility or institution for an evaluation, and the cost of returning the juvenile to the court for disposition; and

(b) The state is responsible for (i) the costs incurred during an evaluation unless otherwise ordered by the court pursuant to section 43-290 and (ii) the preevaluation detention costs for any days over the first ten days from the date the evaluation is ordered by the court.

(5) [OJS] and [DHHS] are not responsible for predisposition costs except as provided in subdivision (4)(b) of this section.

Application of Relevant Statutes.

[2,3] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning

of statutory words which are plain, direct, and unambiguous. *McKenzie v. City of Omaha*, 14 Neb. App. 398, 708 N.W.2d 286 (2006). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001).

We note as an initial matter that although the juvenile court "placed" Teneko in the temporary custody of OJS, the proper language would have been to "commit" Teneko to the custody of OJS, and we read the court's order as though Teneko was committed to the temporary custody of OJS. See, § 43-403; *In re Interest of Marie E.*, 260 Neb. 984, 621 N.W.2d 65 (2000).

Pending adjudication, a juvenile court may place or detain a juvenile, as described in § 43-254. We note that a commitment to OJS is not specifically listed in § 43-254 as it is in the section of the juvenile code which provides placement options for juvenile violators or juveniles in need of special supervision after adjudication, see § 43-286(1)(b). We also note that the placement options in § 43-254 which discuss placing a juvenile in the temporary "custody" of another entity are found in subsection (1), stating that the juvenile may be placed in the temporary custody of either the person having charge of the juvenile or some other suitable person, or subsection (5), stating that the juvenile may be placed in the temporary care and custody of DHHS. Moreover, § 43-413(3) of the Health and Human Services, Office of Juvenile Services Act indicates that a juvenile shall not be committed to the temporary custody of OJS prior to disposition. Section 43-413(3) additionally states that a juvenile may not be committed to OJS until he or she has undergone an evaluation, and there is no indication from the record that Teneko had undergone such evaluation before the juvenile court committed him to the temporary custody of OJS. In view of these statutory provisions, we find that it was error for the court to place Teneko in the temporary custody of OJS.

We next address whether the court erred in ordering OJS to be responsible for the costs of Teneko's detention. Generally, DHHS is responsible for the support, study, or treatment costs

of a juvenile which the juvenile's parents cannot pay, when the juvenile has been placed in the care and custody of DHHS. See § 43-290. We have decided above that the court erred in placing Teneko in the custody of OJS. Moreover, it appears that the court could not have placed Teneko in the custody of DHHS such that DHHS might still be responsible for the costs of Teneko's detention. Section 43-254(5) provides that a juvenile court may place a juvenile in the temporary care and custody of DHHS prior to adjudication "when it does not appear that there is any need for secure detention." The juvenile court in this case ordered that Teneko continue to be detained in the Douglas County Youth Center and that OJS might seek a placement for Teneko "that takes into account the present charge and that has no other children," which order makes it appear that Teneko required secure detention. Thus, Teneko could not have been placed in the custody of DHHS such that DHHS would be responsible for the costs of Teneko's detention. The court erred in ordering OJS to pay the costs of Teneko's detention.

CONCLUSION

The juvenile court erred when it placed Teneko in the temporary custody of OJS and when it ordered OJS to pay for the costs of Teneko's detention. The juvenile court's order of detention is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

REGINA DAVIS ET AL., APPELLEES, V. FRATERNAL ORDER OF POLICE LODGE NO. 8 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.

731 N.W.2d 901

Filed April 10, 2007. No. A-04-1189.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court only on one or more of the following grounds: (1) if the commission acts without or in excess of its powers, (2) if the order of the commission was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

2. **Commission of Industrial Relations: Evidence: Appeal and Error.** The Commission of Industrial Relations' factual findings will be affirmed if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. ____: ____: ____. An appellate court will consider the fact that the Commission of Industrial Relations, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the commission's judgment as to credibility.
4. **Labor and Labor Relations: Statutes.** Where state statutory provisions are substantially similar to the National Labor Relations Act and the issue is not definitively settled in Nebraska, it is appropriate to look to the National Labor Relations Board decisions for guidance.
5. **Commission of Industrial Relations: Limitations of Actions.** Neb. Rev. Stat. § 48-825(1) (Reissue 2004) provides the procedure for parties to commence an action before the Commission of Industrial Relations based on practices prohibited by Neb. Rev. Stat. § 48-824 (Reissue 2004) and requires the filing of a complaint with the commission within 180 days after the alleged violation.
6. **Labor and Labor Relations: Limitations of Actions.** The limitation period for duty of fair representation claims begins to run when the cause of action accrues—when the employee discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.
7. **Discrimination: Limitations of Actions.** In cases of continuing conduct, the statute of limitations ordinarily runs from the occurrence of each discriminatory act.
8. **Limitations of Actions: Damages.** The continuing violation theory cannot be used to defeat a statute of limitations defense where there clearly is a discrete act which establishes damages accruing to the plaintiff.
9. **Limitations of Actions.** There is no continuing violation sufficient to delay the running of the statute of limitations if the conduct within the applicable limitations period is only unlawful in light of conduct outside of the limitations period.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Thomas M. White, C. Thomas White, and Amy S. Milligan, Senior Certified Law Student, of White & Wulff, for appellees.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

PER CURIAM.

I. INTRODUCTION

The Fraternal Order of Police Lodge No. 8 of Douglas County, Nebraska (FOP), appeals from the judgment of the Nebraska Commission of Industrial Relations (CIR) finding that the CIR

had jurisdiction over the claims of the parties who brought suit in this action (Appellees), finding that Appellees' claims were filed within the applicable statute of limitations, and granting Appellees relief on their claims that the FOP failed to properly represent the females among Appellees. On appeal, the FOP challenges the CIR's finding concerning jurisdiction, the CIR's finding concerning the statute of limitations, and the CIR's finding on the merits of Appellees' claims. We find that the CIR had jurisdiction over the claims. We find that the CIR did not err in finding a continuing violation of Appellees' rights and, accordingly, did not err in finding that the statute of limitations did not bar Appellees' claims. We also find no merit to the FOP's claims concerning the merits of Appellees' claims. As such, we affirm.

II. BACKGROUND

On October 31, 2003, Appellees—Regina Davis, Dawn Russell-Cummings, Danielle Matthews, Tina Meyers, Delores Simpson, Chantella Wallace, Jack Nelson, and Johnnie Mann—filed a complaint with the CIR. In their complaint, Appellees asserted that the females among Appellees and Mann were employed as correctional officers in a correctional facility in Douglas County and that Nelson was "employed as a Douglas County correctional officer and was a steward of the [FOP]." Appellees further alleged that the FOP "is an organization within the definition of Neb.Rev.Stat. Section 48-801 consisting of correction officers employed by Douglas County, Nebraska at its correctional facility and is the recognized bargaining agent of said correction officers," and they sought to invoke jurisdiction of the CIR pursuant to Neb. Rev. Stat. § 48-811 (Reissue 2004) based on allegations that the FOP had refused to fairly represent Appellees in collective bargaining and in matters of discipline and grievances.

Appellees alleged in their complaint that the FOP had engaged in prohibited practices in violation of Neb. Rev. Stat. § 48-824 (Reissue 2004), including refusing to fairly bargain with the employer, Douglas County, to seek rule changes concerning (1) using only female guards to supervise female prisoners, (2) denying seniority rights of female guards in bids for work shifts, vacation, overtime, and similar matters, and (3) providing adequate relief for female guards to address various sanitary needs;

actively opposing and harassing the females among Appellees in the females' efforts to obtain equal working conditions and opposing the females' attempts to secure changes in the terms and conditions of their employment; refusing to represent, and using the FOP's resources to actively oppose, Appellees' efforts to obtain equal terms and conditions of employment in lobbying before the Nebraska Legislature and Douglas County; and failing and refusing to advocate for female and minority members of the bargaining unit confronted with grievances and disciplinary matters. Appellees also alleged that the FOP failed and refused to make adequate disclosure to members of the bargaining unit concerning contract negotiations with Douglas County. Appellees additionally alleged that improper and unauthorized expenditures were being made from the FOP's funds. Appellee Nelson alleged that the FOP denied minority members of the bargaining unit representation in disciplinary matters, and he cited a specific incident wherein the FOP refused to assist in a disciplinary hearing where Nelson as an individual successfully represented the minority employee and, allegedly in retaliation, the FOP removed Nelson from the office of union steward. Finally, Appellees alleged that the acts of the FOP were ongoing and continuing within the 6 months immediately preceding Appellees' filing of their complaint.

On November 20, 2003, the FOP filed its answer to Appellees' complaint. The FOP denied the claims made by Appellees regarding prohibited practices. It further pled a number of affirmative defenses, including that the CIR lacked subject matter jurisdiction, that Appellees had failed to file their complaint within the applicable statute of limitations, and that Appellees had failed to set forth facts sufficient to state a cause of action. Accordingly, the FOP prayed that the complaint be dismissed.

On November 26, 2003, the FOP filed a motion to dismiss. In the motion, the FOP reasserted its claims concerning the CIR's subject matter jurisdiction, the statute of limitations, and the sufficiency of Appellees' allegations to state a cause of action. On December 18, after telephonic hearings were held on the motion, the CIR filed an order overruling the motion. The CIR found that it had jurisdiction, but "question[ed] its ability to render an appropriate and effective remedy."

Proceedings were had before the CIR beginning on April 27, 2004. Appellees and the FOP each presented testimony from witnesses and introduced several exhibits into evidence. Appellees presented testimony from numerous female correctional officers indicating that female officers had a difficult time receiving adequate restroom breaks and that female officers often received fewer preferential shifts and were often required to work more forced overtime hours than their male counterparts. Further, there was testimony from the females among Appellees indicating that they were unable to get time to address such issues at union meetings and that the union, the FOP, had not made any efforts to address the problems. Specific testimony and the contents of said exhibits will be discussed as necessary in the analysis section of our opinion.

On September 20, 2004, the CIR issued its order. The CIR determined that it had subject matter jurisdiction over Appellees' claims and that the applicable statute of limitations had not run on Appellees' fair representation claims because the claims indicated a continuing violation of their rights. On the merits of Appellees' claims, the CIR found that the FOP had failed to meet its duty of fair representation with regard to certain of Appellees' claims concerning refusing to fairly bargain with Douglas County to obtain rule changes concerning the use of only female guards to supervise female prisoners; the denial of seniority rights of female guards in bids for work shifts, vacation, forced overtime, and similar matters; and providing adequate relief for female guards to address various sanitary needs.

The CIR ordered the FOP to "cease and desist from any further discrimination in its representation of women," to "uphold its duty to fairly represent women whether or not they are members or non-members," and to "allow a fair opportunity for the women to present their issues to the union membership as a whole." Regarding Appellees' additional allegations, the CIR either dismissed the claims or found that the evidence presented by Appellees did not support the claims, including all allegations made by the males among Appellees. The FOP has timely appealed to this court, and no cross-appeal was filed by any of Appellees.

III. ASSIGNMENTS OF ERROR

The FOP asserts that the CIR erred when it found that it had subject matter jurisdiction over Appellees' allegations against the FOP, when it found that Appellees brought their action within the applicable statute of limitations, and when it found that the FOP had breached a duty of fair representation to the females among Appellees.

IV. ANALYSIS

1. Standard of Review

[1] Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court only on one or more of the following grounds: (1) if the CIR acts without or in excess of its powers, (2) if the order of the CIR was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[2,3] In an appeal from a CIR order regarding practices prohibited in § 48-824, the CIR's factual findings will be affirmed if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). This court will consider the fact that the CIR, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the CIR's judgment as to credibility. *Id.*

2. Jurisdiction

The FOP first alleges that the CIR lacked subject matter jurisdiction over the claims made by Appellees. We find that the CIR had jurisdiction over Appellees' claims because Appellees alleged that the FOP had engaged in practices prohibited by § 48-824. There is no merit to the FOP's claim to the contrary.

[4] As the CIR noted, where state statutory provisions are substantially similar to the National Labor Relations Act (NLRA) and the issue is not definitively settled in Nebraska, it is appropriate to look to the National Labor Relations Board (NLRB)

decisions for guidance. See *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999). The Nebraska Supreme Court has held that "'[d]ecisions under the NLRB . . . are helpful where there are similar provisions under the Nebraska statutes.'" *Id.* at 63, 595 N.W.2d at 250 (quoting *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979)).

Section 48-811 provides for the invocation of the CIR's jurisdiction:

> Except as provided in the State Employees Collective Bargaining Act, any employer, employee, or labor organization, or the Attorney General of Nebraska on his or her own initiative or by order of the Governor, when any industrial dispute exists between parties as set forth in section 48-810, may file a petition with the [CIR] invoking its jurisdiction. No adverse action by threat or harassment shall be taken against any employee because of any petition filing by such employee, and the employment status of such employee shall not be altered in any way pending disposition of the petition by the [CIR].

Further, § 48-824(1) provides that "[i]t is a prohibited practice for any employer, employee, employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining."

After fully examining the briefs of the parties and the order of the CIR, we conclude that the CIR was correct in determining that it "ha[d] the authority to determine prohibited practices with regard to the specific issue of the duty of fair representation." The CIR has jurisdiction over the prohibited practices discussed in § 48-824, and as noted earlier, § 48-824(1) provides that it is a prohibited practice for an employee organization to refuse to negotiate in good faith regarding mandatory topics of bargaining.

We give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). Topics such as forced overtime, employee safety, and seniority certainly fit under the broad umbrella of "mandatory

topics of bargaining." See § 48-824(1). Therefore, the CIR was correct in finding that it had subject matter jurisdiction in the instant case. This assignment of error is without merit.

3. Statute of Limitations

The FOP next alleges that the CIR committed error when it found that Appellees' claims were not barred by the applicable statute of limitations. Specifically, the FOP claims that Appellees' claims do not comply with the limitations set forth in Neb. Rev. Stat. § 48-825(1) (Reissue 2004). We disagree with the FOP and agree with the finding of the CIR that Appellees' claims were not barred by the statute of limitations, because the FOP's conduct as alleged in Appellees' claims constituted a continuing violation of their rights.

[5,6] Section 48-825(1) provides the procedure for parties to commence an action before the CIR based on practices prohibited by § 48-824. Section 48-825(1) requires the filing of a complaint with the CIR within 180 days "after the alleged violation." As the CIR noted, the limitation period for duty of fair representation claims begins to run when the cause of action accrues—when the employee discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. See, *Galindo v. Stoody Co.*, 793 F.2d 1502 (9th Cir. 1986); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Farr v. H.K. Porter Co. Inc.*, 727 F.2d 502 (5th Cir. 1984).

[7-9] In cases of continuing conduct, however, the statute of limitations ordinarily runs from the occurrence of each discriminatory act. See *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99 (1st Cir. 1979). As the CIR noted, courts have accepted the continuing violation theory in the duty of fair representation context in cases where the union has engaged in sex- or race-based discrimination. See, *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Jamison v. Olga Coal Company*, 335 F. Supp. 454 (S.D. W. Va. 1971). The continuing violation theory, however, cannot be used to defeat a statute of limitations defense where there clearly is a discrete act which establishes damages accruing to the plaintiff. See, *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), *abrogated on other grounds, Patterson v. McLean Credit Union*, 491 U.S. 164, 109

S. Ct. 2363, 105 L. Ed. 2d 132 (1989); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977). There is no continuing violation sufficient to delay the running of the statute of limitations if the conduct within the applicable limitations period is only unlawful in light of conduct outside of the limitations period. See *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910 (7th Cir. 1999) (construing similar limitations period under NLRA).

The primary issue to be resolved concerning the statute of limitations in this case is whether Appellees' claims of gender-based discrimination by the FOP's failure to fairly represent them describe acts which constitute continuing violations sufficient to delay the running of the statute of limitations. The evidence indicates that as far back as 2000, the females among Appellees were experiencing difficulties with the FOP's representation of them, and that since that time, they had attempted to get the FOP to address these issues. The evidence also indicates, however, that these matters continued and were ongoing through the time of the hearing before the CIR. Because Appellees did not file a complaint with the CIR until October 31, 2003, the complaint was clearly filed outside the 180-day limitations period based on the onset of the alleged discrimination. If, however, the FOP's actions and inactions constitute a continuing violation of Appellees' rights, the statute of limitations would not bar the claims.

As noted earlier, decisions of the NLRB provide guidance and are helpful to the CIR in resolving issues where there are similar state statutory provisions. *Operating Engrs. Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003). The NLRA provides a 6-month statute of limitations for NLRB proceedings, while § 48-825(1) provides a 180-day statute of limitations for CIR proceedings; accordingly, the provisions are similar and NLRB cases can provide guidance. The Seventh Circuit has explained that under the NLRA, a continuing violation exists where there are unlawful acts by the union occurring within the limitations period, but no continuing violation exists if the conduct within the limitations period is unlawful only in light of conduct occurring outside of the limitations period. See *Christiansen v. APV Crepaco, Inc., supra.*

We agree with the CIR that the facts of the present case are comparable to the facts of *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973). In *Marlowe v. Fisher Body*, an employee alleged ongoing discrimination by the union itself in the course of an ongoing conspiracy with the employer. The alleged conspiracy between the union and the employer was one to establish and preserve a seniority system limiting employment and promotional opportunities of Jewish employees, and the allegedly discriminatory acts by the union had occurred within the limitations period. On those facts, the appellate court found that is was "not necessary to determine whether the 'continuing violation doctrine' applie[d]," although the employee had alleged an ongoing pattern of illegal activity which included illegal acts by the union occurring within the limitations period. *Id.* at 1063. Nevertheless, the union's continuing illegal activity was not illegal only in light of the union's first discrete failure to fairly represent the employee, but was a continuing course of illegal conduct.

Similarly, in the present case, the females among Appellees demonstrated that the FOP has continually engaged in illegal activity which is illegal in and of itself, not only in light of a discrete act occurring outside of the limitations period. For that reason, the CIR correctly relied on *Marlowe v. Fisher Body, supra*, and correctly found that Appellees have demonstrated a continuing violation.

In the instant case, Davis testified that as far back as 2000, female officers were having difficulty receiving adequate restroom breaks, and that since 2000, she had attempted to get the FOP to address this issue. She discussed a meeting with the FOP's executive board in which a group of female officers approached the FOP for help in changing their work conditions and rules. The evidence indicates that the FOP did nothing to address these issues and that the FOP's failure to represent the females among Appellees was ongoing through the time of the hearing before the CIR.

It further appears from the record that the issues facing the females among Appellees occurred as a result of Neb. Rev. Stat. § 47-111 (Reissue 2004). The testimony at trial indicates that the issues complained of by the females, including inadequate bathroom breaks and mandatory overtime, occurred as a result of this

statute. The evidence presented to the CIR demonstrated that even through the time of the hearing, the FOP had failed to represent the females among Appellees in seeking changes to this statute and had actively opposed efforts to address the females' concerns.

On January 3, 2003, a memorandum was sent to all correctional staff from the chief deputy for the Douglas County Department of Corrections. This memorandum indicated that the department intended to request a change in § 47-111, in order to alleviate the problems faced by the females among Appellees. However, on January 29, another memorandum was presented to all correctional employees from the chief deputy notifying all employees that the FOP was "'adamantly' opposed to the attempted change in [§ 47-111] and 'will do whatever [it] can' to make sure it does not happen." The January 29 memorandum further provided that "[a]t the conclusion of [a] meeting" between FOP representatives, their attorney, a sheriff, the chief deputy, a county attorney, and others, "it was decided that this issue would not be pursued." The memorandum stated, "The meeting took place on January 9, 2003 and there has been no further attempt on the part of Administration to change the statute."

As the CIR found, Appellees presented evidence establishing a continuing pattern of gender-based discrimination by the FOP. Additionally, the CIR found evidence indicating that the FOP and Douglas County were, at the time of the hearing and the CIR's order, in negotiations for the next 2-year contract for the years 2003 to 2005. At the time of that hearing and order, the FOP continued to have the ability to negotiate issues that are mandatory subjects of bargaining, such as the issues complained of by the females among Appellees concerning employee safety, seniority, and forced overtime. This ongoing conduct by the FOP constituted unlawful acts occurring within the limitations period and was not illegal only in light of other conduct occurring outside of the limitations period. See *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910 (7th Cir. 1999). Therefore, as the CIR found, there was a continuing violation of the females' rights and the statute of limitations was not a bar to their claims.

A further understanding of why the CIR was correct in finding a continuing violation can be achieved by contrasting the facts of

the present case with the facts of *Christiansen v. APV Crepaco, Inc., supra*, in which the court found no continuing violation because the actions of the union were unlawful only in light of conduct outside of the limitations period. In *Christiansen*, an employee brought a fair representation claim based on the union's failure to pursue a grievance on behalf of the employee. That grievance was based on the employee's undertaking of additional training and not receiving a previously negotiated increase in pay in light of the additional training. On those facts, the appellate court found that the union's conduct, failing to pursue a grievance, was unlawful only in light of a discrete act occurring outside of the limitations period, the employer's failure to increase the employee's pay after a specific completion of additional training. All continuing failures to pursue a grievance on behalf of the employee were unlawful only in light of that single discrete conduct that occurred outside of the limitations period.

In contrast, the facts of the present case do not indicate that the FOP's failure to fairly represent the females among Appellees is unlawful only in light of a single discrete action occurring outside of the limitations period. Rather, the FOP's failure to fairly represent the females is an ongoing illegal activity in and of itself and was ongoing and continuing through the time of the CIR hearing. In this regard, the facts of the present case are more comparable to the facts of *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973), the case relied upon by the CIR.

Finally, the ramifications of finding Appellees' claims barred by the statute of limitations further demonstrate why these claims are not barred by the statute of limitations. In *Christiansen v. APV Crepaco, Inc., supra*, the employee was seeking relief for a single discrete action—the employer's failure to provide a negotiated pay increase attendant to additional training. Although the "effects" of that failure continued into the future, there was not an ongoing illegal activity that would be allowed to continue by barring the employee's claim. In the present case, the practical effect of finding that the ongoing illegal activity by the FOP is not a continuing violation would be to bar Appellees from ever seeking to stop the FOP's gender-based discrimination; any claim based on the FOP's failure to represent and seek rule changes would be barred, and the FOP would, in essence, be given free license to

continue discriminating in this fashion in perpetuity. Such further demonstrates why the FOP's actions constitute an ongoing violation, unlike the union's actions in *Christiansen v. APV Crepaco, Inc., supra*. This assignment of error is without merit.

4. Breach of Duty

Finally, the FOP alleges that the CIR erred in finding that the FOP breached a duty of fair representation to the females among Appellees. Considering the whole record, we conclude that a trier of fact could reasonably conclude that the CIR's finding is supported by a preponderance of the competent evidence, and we give weight to the CIR's judgment as to credibility of the witnesses appearing before the CIR.

As recounted above, the females among Appellees presented evidence indicating that the FOP was refusing to fairly represent the females in seeking rule changes concerning their safety and welfare, seniority, and forced overtime. Considering the whole record, and giving weight to the CIR's judgment concerning the credibility of the various witnesses appearing at the hearing, we affirm the CIR's factual finding concerning the FOP's breach of its duty of fair representation. This assignment of error is without merit.

V. CONCLUSION

We find that the CIR correctly concluded that it had subject matter jurisdiction over Appellees' claims. We determine that the CIR's conclusion that Appellees' claims were not barred by the statute of limitations was correct. We also affirm the CIR's factual finding concerning the FOP's breach of its duty of fair representation. As such, we affirm the decision of the CIR.

Affirmed.

Inbody, Chief Judge, dissenting.

While I agree with the majority that the CIR had subject matter jurisdiction over the appellees' claims, I must respectfully dissent from the portion of the majority opinion affirming the CIR's finding that the appellees' claims were not barred by the applicable statute of limitations.

In its order, the CIR noted that like the issue of subject matter jurisdiction, "[t]he issue of the statute of limitations under any

duty of fair representation in Nebraska is one of first impression." The CIR found as follows:

> The limitation period for duty of fair representation claims begins to run when the cause of action accrues. Many federal courts have determined that accrual occurs when the employee discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. . . . However, in the instant case, the [appellees] allege that [the FOP] has committed continuing violations that have occurred for years in the past and have continued up until the filing of this [complaint] and in certain instances still occur. . . .
>
> In the instant case, the [appellees] have presented a significant amount of evidence that establishes a clear and continuing pattern of activity on the part of the [FOP]. Furthermore, the [FOP] and Douglas County are currently in negotiations for their next two-year contract for the years of 2003 to 2005. The parties' current contract expired in July of 2003 and they are operating under a contract continuation clause in the 2001 to 2003 contract. The [FOP] continues to have the ability to negotiate any issues that are mandatory subjects of bargaining. Therefore, no cause of action has accrued with regard to any negotiable issues. Furthermore, the issues are ongoing. The evidence presented at trial, like in *Marlowe*[*v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973)], clearly established that the [FOP's] actions or lack thereof have continuously occurred over the [appellees'] employment . . . and up to and including the present time or after the filing of the original complaint. Therefore, we find that the remaining [appellees'] allegations are not barred by any expiration of the statute of limitations under NEB. REV. STAT. § 48-825(1).

The CIR found that the FOP had continually failed to address the female appellees' claims and that this constituted "a clear and continuing pattern of activity on the part of the [FOP]." However, in its brief, the FOP claims that the CIR's finding of a continuing violation "fails to cite even one overt act on the part of the [FOP] that occurred during the statutory period." Brief for appellant at 32. Further, in its order, the CIR did note, when dealing with the

merits of the appellees' claims, that the appellees "did not prove that the [FOP] was actively opposing or harassing [the] female [appellees] in their efforts to obtain equal working conditions and any attempt to secure changes in the terms and the conditions of their employment." The CIR further noted that "[i]nstead, most of the evidence surrounds the [FOP's] *inaction*, as opposed to any active opposition or harassing efforts." (Emphasis supplied.) Also, the only claim of the appellees sustained by the CIR was that the FOP had "refus[ed] to fairly bargain with the employer, Douglas County, in the matter of rule changes."

Decisions of the NLRB provide guidance and are helpful to the CIR in resolving issues where there are similar state statutory provisions. *International Union of Operating Engineers Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003). The NLRA provides a 6-month statute of limitations, while § 48-825(1) provides that a party must commence an action in the CIR by filing a complaint with the commission within 180 days after the alleged violation. Therefore, the provisions are similar.

In cases governed by the NLRA's 6-month statute of limitations, the statute of limitations begins running when the employee should reasonably have known of the union's alleged breach. *Scott v. United Auto.(UAW Union), Local 879*, 242 F.3d 837 (8th Cir. 2001).

> A continuing violation requires unlawful acts to occur within the limitations period. *See Local No. 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 422, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960) ("*Bryan Manufacturing*"). As the Supreme Court has explained, there is no continuing violation sufficient to delay the statute of limitations if the conduct within the six month period is only unlawful in light of conduct outside of the six month period.

Christiansen v. APV Crepaco, Inc., 178 F.3d 910, 915 (7th Cir. 1999). Continued union inactivity after an initial failure to respond to a grievance request does not constitute a continuing violation of the duty of fair representation. *Id.* Even though a plaintiff continues to request a union's assistance during the limitations period, the union's inactivity with respect to the grievance was not an unfair labor practice if the inactivity was unfair only

by reason of circumstances existing at or before the start of the limitations period. See *id.* Under those circumstances, the union's conduct cannot be used to revive a time-barred claim. *Id.* Both *Scott v. United Auto.(UAW Union), Local 879* and *Christiansen v. APV Crepaco, Inc.* involved claims made against a union allegedly breaching the duty of fair representation, as does the case at bar.

In this case, Davis testified that female officers were having difficulty receiving adequate restroom breaks since 2000 and that she had attempted to get the FOP to address that issue. She discussed a meeting with the FOP executive board in which a group of male and female officers approached the FOP for help in changing their work conditions and rules, but she claimed that after the meeting, the FOP did nothing to address that issue.

It further appears from the record that the issues facing the female appellees occurred as a result of § 47-111. The testimony at trial indicates that the issues complained of by the female appellees, including inadequate bathroom breaks and mandatory overtime, occurred as a result of this statute.

As noted in the majority opinion, on January 3, 2003, a memorandum was sent to all correctional staff by the chief deputy for the Douglas County Department of Corrections indicating that the department intended to request a change in § 47-111, in order to alleviate the problems faced by the female appellees. On January 9, a meeting was held between, among others, representatives of the FOP, the department, and the county attorney's office. At this meeting, possible changes to § 47-111 were discussed. Then, on January 29, another memorandum was presented to all correctional employees from the chief deputy. In the latter memorandum, the chief deputy notified all employees that the FOP was opposed to attempting to change § 47-111 and that it was decided that the department would make no further effort to change the statute.

Based on the record, it appears to me that the female appellees either were aware, or should reasonably have been aware, as of January 29, 2003, of the FOP's position that it would not attempt to secure a change in § 47-111. While it is true that the FOP continued to refuse to secure a change in the statute from that day forward, the continued inactivity of the FOP does not constitute

a continuing violation. The 6-month statute of limitations began to run, at the latest, on January 29. This would have given the appellees until August 1 to file a complaint with the CIR. The appellees did not file their petition with the CIR until October 31. Thus, I believe that the appellees' claims regarding the FOP's refusal to attempt to change § 47-111 were time barred and that the CIR's finding that the appellees' claims were not barred by the applicable statute of limitations was contrary to law. While I sympathize with the female appellees, and although I am not happy with this result, I do believe that the result is correct under the law. Therefore, I would remand the cause to the CIR for entry of an order consistent with this dissent.

STATE OF NEBRASKA, APPELLEE, V.
FREDERICK C. WHITE, JR., APPELLANT,
732 N.W.2d 677

Filed April 17, 2007. No. A-06-794.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Motions to Suppress: Judgments: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Investigative Stops: Probable Cause.** In determining whether an investigatory stop as defined in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is lawful, the examination must focus on whether there was objective justification for detention, which involves more than an unparticularized suspicion or hunch.
5. **Criminal Law: Eyewitnesses: Words and Phrases.** A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement.

6. **Criminal Law: Eyewitnesses: Presumptions.** An untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
7. **Criminal Law: Investigative Stops: Eyewitnesses: Probable Cause.** While the heart of the citizen informant doctrine is indicia of the citizen's reliability, the ultimate test of the legality of an investigatory stop is that it be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity.
8. **Investigative Stops: Probable Cause.** It is the totality of the circumstances which determines whether reasonable suspicion to conduct an investigatory stop exists, and acts, even if innocent when viewed separately, may warrant further investigation when viewed together.
9. **Rules of Evidence: Witnesses: Prior Convictions: Time.** Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1995), provides that for the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.
10. **Rules of Evidence: Witnesses: Prior Convictions.** While Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1995), clearly allows a witness' credibility to be attacked with previous convictions, the rule does not include pending charges.
11. **Trial: Witnesses: Testimony: Appeal and Error.** It is not error to exclude evidence of pending criminal charges offered to attack a witness' credibility when sufficient evidence of past criminal convictions has previously been admitted which reflect upon the truth and veracity of the witness.
12. **Effectiveness of Counsel: Proof.** To establish that he or she was denied effective assistance of counsel, a defendant must show that counsel was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
13. ____: ____. To establish that he or she was denied effective assistance of counsel, a defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
14. ____: ____. The two-prong test for an ineffective assistance of counsel claim need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Peter K. Blakeslee for appellant.

Jon Bruning, Attorney General, Kimberly A. Klein, and Jonathan Brandt, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Frederick C. White, Jr., appeals from the decision of the district court for Lancaster County which, after a jury trial, found White guilty of one count of burglary and found that White was a habitual criminal. The district court sentenced White to 12 to 14 years' imprisonment, with 516 days' credit for time served. The primary issue is the legality of a police officer's stop of White's vehicle based largely on a citizen's report of what we shall call "suspicious activity."

FACTUAL AND PROCEDURAL BACKGROUND

On July 27, 2005, the State filed an amended information charging White with burglary, a Class III felony, and being a habitual criminal.

On May 10, 2005, White filed a motion to suppress any and all evidence taken from him, his vehicle, his living quarters, or any other place in which White had an expectation of privacy. White alleged, summarized and restated, that (1) the items of evidence were taken without any valid or legal consent to search; (2) there was no probable cause for the search or seizure of any of said evidence; (3) the search for and seizure of the items of evidence violated White's rights under the applicable provisions of the U.S. Constitution as well as the Nebraska Constitution and statutes; (4) there was no probable cause for his arrest and that thus, the search and seizure was not incident to a lawful arrest; and (5) said search and seizure was not conducted pursuant to a lawfully issued warrant. A hearing on the motion to suppress was held on May 26.

At the suppression hearing, Lincoln police officer Steven Wiese testified that on January 18, 2005, he stopped a vehicle driven by White for speeding. The vehicle had two other occupants, later identified as Brian Sears and Joseph Mohlman. Wiese issued White warnings for speeding, no valid registration, and no insurance, and then Wiese sent White on his way. Wiese then saw a Jeep Cherokee occupied by two females parked behind his cruiser. Wiese testified that the women, later identified as Shonna Jordan and Paula Graybill, said that the occupants of White's vehicle were seen running from Jordan's apartment building "wearing masks" and that the men were not recognized as belonging at the

apartment building. The women in the Jeep reported they had followed the vehicle to the point of the traffic stop. Jordan and Wiese agreed in their testimony that this conversation lasted 30 seconds or less. During the suppression hearing, and later at trial, there were inconsistencies in the testimony of both Wiese and Jordan as to exactly what Wiese was told regarding what the men were wearing on their heads when seen by Jordan. The conflict comes down to whether Jordan had said that the men were wearing "hats," "hoods," or "masks." Based on what Wiese had been told, he immediately got back into his cruiser and stopped White's vehicle again. White had driven less than two blocks from the first stop and was stopped at a red light.

Wiese approached the driver's side of White's vehicle, asked the occupants to place their hands where he could see them, and then radioed for backup. Wiese testified that at that point, he was concerned that a crime had occurred or was going to occur. A Sergeant Scheinost and Officers David Domeier and Lisa Rose arrived within 2 to 5 minutes. Then Wiese had each occupant exit the vehicle individually so they could be separated. Sears, who was in the front passenger seat, was asked to exit the vehicle first. As Sears was exiting the vehicle, Wiese observed a glass or plastic test tube with white residue—what Wiese thought was a "meth pipe." While walking Sears back to the police cruiser, Wiese asked Sears where he had been that evening, and Sears said he was trying to find an apartment of an acquaintance. After a pat-down search, Sears was placed in Wiese's police cruiser. Wiese had White get out of the vehicle and placed him in Scheinost's police cruiser, and Wiese then had the third passenger, Mohlman, get out of the rear seat of the vehicle and turned him over to Rose. White and Mohlman were also patted down, but not by Wiese.

Wiese asked Domeier to go back to the apartment complex and look around. Wiese testified that at this point, Jordan told Domeier that she lived in a four-plex with a common stairwell and that while talking on her cellular telephone with Graybill, Jordan heard a door close, which she thought to be the door to the laundry room. She looked and saw three men running out of the apartment building from the laundry room. Jordan and Graybill met near Jordan's apartment within minutes; got into Jordan's Jeep; attempted to locate the three men, which they did within a

short amount of time; and then proceeded to follow the vehicle to the point of the traffic stop by Wiese. During the time the two women followed the vehicle, they saw it hit a parked car, causing minor damage, but White did not stop. This "hit-and-run accident" was not reported to Wiese before the second stop.

Wiese testified that he searched White's vehicle incident to the arrest of Sears for possession of the pipe, which was believed to be drug paraphernalia. On the front passenger seat where Sears had been seated, Wiese found a pile of clothes, including a sweatshirt, a stocking cap, and gloves. In the hat and gloves, Wiese found two baggies containing a white crystalline substance that he believed to be methamphetamine. A field pretest of such substance was positive for methamphetamine. On the floor of the rear driver's side where Mohlman had been seated, Wiese found a gray "NBC" bank bag, which contained deposit slips, U.S. currency, and checks made out to "Pockets of Enthusiasm."

As the search of the vehicle was proceeding, there was a message over the police radio that there had been a report of a burglary at Jordan's apartment complex, from which the three men were seen running. Officer Court Cleland then went to the apartment complex to investigate. The woman who reported the burglary, Melanie Wolfe, was brought from the apartment complex to the scene of the second stop of White's vehicle, and she identified the bank bag found therein as hers. Some police officers had searched Mohlman by that time and found some envelopes containing cash and some "needle-nose pliers" on his person. Rose testified that Wolfe identified the envelopes and pliers as hers. A search warrant was obtained for the search of the trunk of the vehicle, and several items that Wolfe had reported missing from her apartment were found in the trunk.

In an order filed July 20, 2005, the district court overruled White's motion to suppress. The district court held that "[t]he citizen's report of this suspicious activity does constitute reasonable cause for the investigative detention" and that "the court having considered the totality of the circumstances . . . there was probable cause for the [search] and [arrest] of [White]." White's motion to reconsider the motion to suppress was overruled. The trial judge found that Wiese had been told that the men were wearing masks.

After the first trial ended in a mistrial because of a "hung jury" at 11-1 for conviction, the jury in the second trial found White guilty of burglary. White filed a motion for a new trial, which was denied by the district court. After a hearing on June 22, 2006, the district court found that White was a habitual criminal and sentenced him to 12 to 14 years' imprisonment, with 516 days' credit for time served. White now appeals.

ASSIGNMENTS OF ERROR

White alleges that (1) the district court erred in overruling his motion to suppress evidence; (2) the district court erred in rejecting his offer of proof and refusing to allow him to cross-examine State's witness Jordan about her pending felony charges; and (3) his second trial counsel provided ineffective assistance of counsel when counsel failed to provide details of Jordan's pending felony charges and to provide the available legal authority requested by the trial judge to support White's contention that he should be allowed to cross-examine Jordan about those charges, claiming that he therefore should be granted a new trial.

STANDARD OF REVIEW

The standard of review applicable to each assignment of error will be set forth in the analysis of each assignment.

ANALYSIS

Suppression of Evidence.

[1,2] White argues that the trial court erred in overruling his motion for suppression of the evidence found in his vehicle, and we note that this objection was properly preserved at trial for appellate review. A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.* When reviewing a trial court's ruling on a motion to

suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Brown*, 13 Neb. App. 359, 693 N.W.2d 559 (2005).

[3] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

White argues that the officers did not have reasonable suspicion based on articulable facts that he committed a crime, was committing a crime, or was about to commit a crime, and that thus, they had no justification for the second stop of his vehicle and the subsequent warrantless arrest and search.

[4] Wiese readily concedes that after he made the second stop of White's vehicle, the occupants of White's vehicle were not "free to leave." But, there was clearly no probable cause to arrest them for the burglary of Wolfe's apartment or for drug offenses, because at that point there simply was no information available to Wiese that a burglary had even occurred or that drugs were in the vehicle. Thus, if the stop was lawful, it was lawful only as a *Terry* stop—a point which the State conceded during oral argument. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Accordingly, under *Terry*, our examination must focus on whether there was "objective justification for detention," which involves more than an "unparticularized suspicion or 'hunch.'" *State v. Ellingson*, 13 Neb. App. 931, 942, 703 N.W.2d 273, 283 (2005). Therefore, we closely examine the information that Wiese had in hand at the time of the second stop, and in doing so, we bear in mind that our standard of review for reasonable suspicion for a *Terry* stop is de novo, but we review the trial court's factual findings for clear error. See *State v. Allen, supra.*

At the moment that Wiese made the second stop, he had the following pieces of information: First, he had previously stopped the vehicle for speeding. Second, he had been told in a rather frantic and urgent 30-second conversation with Jordan and Graybill that the occupants of the vehicle had been seen running from an apartment building where one of the women lived and that the

men were not recognized as belonging there. Third, the occupants of White's vehicle were wearing "something" on their heads. We say "something" because the record is contradictory and unclear, in the testimony of both Wiese and Jordan, whether Jordon told Wiese that they were wearing "hats," "hoods," or "masks." However, in this regard, we note that the trial court's ruling on the motion for suppression found that Wiese had been told they were "wearing masks." This is a factual determination to which we give deference under our standard of review, because the trial judge saw the witnesses testify. As noted earlier, the evidence from the suppression hearing and the trial is in considerable conflict regarding what Wiese was told about what the men were wearing on their heads. We will not repeat such testimony, because it is sufficient to say that on this disputed point, the trial court made a factual finding that Wiese was told that they were "wearing masks." While the evidence on this point admittedly is in conflict, after our review of the evidence, we are unable to conclude that the trial judge's factual finding was clearly erroneous. Thus, our analysis of the basis for the second stop proceeds with the factual finding that Wiese was told that the men running from the apartment building were "wearing masks."

[5,6] Because Wiese was acting upon information gained from the women in the Jeep, this factual scenario clearly implicates the doctrine of a citizen informant. A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *State v. Marcus*, 265 Neb. 910, 660 N.W.2d 837 (2003). The legal effect is that an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. *Id.* But, witnessing the actual commission of a crime is not the only indicia of the citizen's reliability. In *State v. Bridge*, 234 Neb. 781, 783, 452 N.W.2d 542, 545 (1990), the Supreme Court said:

> "An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity." *State v. Ege*, 227 Neb. 824, 826, 420 N.W.2d 305, 308 (1988) (citing *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)).

> The factual basis for the stop need not be the officer's personal observations alone, but may arise from information provided by another person. *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *State v. Ege, supra*. When the information providing the factual basis for the stop is furnished by another person, it must contain sufficient indicia of reliability. *State v. Ege, supra*. A detailed eyewitness report of a crime by an informant provides its own indicia of reliability because a citizen informant who has personally observed the commission of a crime is presumed to be reliable. *State v. Ege, supra*.

[7] The two women in the Jeep who made the report to Wiese clearly had not personally observed the commission of a crime, because running from an apartment building, even when wearing masks, and being unrecognized by a resident of that building is not the commission of a crime. While the heart of the citizen informant doctrine is indicia of the citizen's reliability, the ultimate test of the legality of an investigatory stop is that it be "justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity." See *State v. Ege*, 227 Neb. 824, 826, 420 N.W.2d 305, 308 (1988).

State v. Ege, supra, is instructive because it involves a report of suspicious activity (although not so designated by the court) from a citizen who openly approached a police officer—just as the two women in the Jeep did in the instant case. In *Ege*, an officer of the Omaha Police Department was in her cruiser, parked next to a gas station, and attending to some paperwork when an employee of the gas station approached her, identified himself, and directed the officer's attention to a green car in a parking lot across the street. The employee told the officer that the driver of the car had just driven up over the curb near the front door of the station, that the driver entered the station to purchase some chewing gum, and that the driver smelled strongly of alcohol. The officer drove across the street to follow the vehicle. She observed the car start and stop three or four times in the parking lot, and although she followed the car for a short distance without observing any moving violations, she nonetheless stopped the car. The officer noted a strong odor of alcohol on the driver's breath and

also noticed slurred speech. The driver failed a field sobriety test, and an Intoxilyzer test later showed his blood-alcohol content was 0.149 percent.

The *Ege* court rejected the contention that the stop was illegal, reasoning as follows:

> Here, there was a face-to-face confrontation between the informant and the officer. The informant identified himself by name and, in doing so, positioned himself to be held accountable for his intervention. By giving his name, the informant presumably knew that the police could arrest him for giving a false report. See Neb. Rev. Stat. § 28-907 (Reissue 1985). The informant's knowledge was based upon his observation of the defendant's driving his car over a curb, as well as on his face-to-face encounter with the defendant. Clearly, the informant in this case was of the most reliable type.
>
> The description and reported location of the vehicle could not have been more accurate, since the informant was able to point directly to the car. Although [the police officer] did not observe any traffic violations, she did observe the defendant's vehicle move erratically in the parking lot. There was, apparently, little time between the informant's report and the subsequent stop of the defendant's vehicle. We conclude on these facts that the stop was legal.

227 Neb. at 827-28, 420 N.W.2d at 308.

The *Ege* case is obviously very similar to the instant case in its fundamental premises. In the instant case, the women admittedly did not provide their names to Wiese at the time of the report, but their vehicle was readily identifiable by the license plate, plus they followed Wiese's directions to "stay where they're at" and after the stop provided additional information and their identities. Their contact with Wiese was made immediately following the events Jordan had witnessed and was conveyed with a sense of urgency after they saw Wiese let White go. The accuracy of the women's report is supported by the facts that they identified the vehicle Wiese had stopped as the one they observed; that the vehicle contained three men, and Jordan had observed two men wearing masks hurrying away from the apartment building and entering the vehicle in which a third person was waiting in the front passenger seat; that while following the vehicle, Jordan

observed three men in it; and that Wiese shortly thereafter stopped the driver of the vehicle for speeding.

However, it cannot be said that Jordan witnessed the commission of a crime, just as the informant in *State v. Ege, supra*, only encountered a possible drunk driver. Driving over a curb while smelling of alcohol is not a crime—unless one has had too much to drink. Similarly, fleeing an apartment building is not a crime unless one has committed a crime there. Accordingly, while Jordan witnessed only suspicious activity, as did the informant in *Ege*, Jordan was a reliable informant by the nature and circumstances of her report. Thus, her report was entitled to be treated as reliable and credible by Wiese.

We now turn to the requirements for a *Terry* stop:

> Limited investigatory stops are permissible only upon a reasonable suspicion, supported by specific and articulable facts, that the person is, was, or is about to be engaged in criminal activity. . . . *Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.* . . . Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.

State v. Ellingson, 13 Neb. App. 931, 942, 703 N.W.2d 273, 283 (2005) (citations omitted) (emphasis supplied). See, also, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[8] Consequently, we look for specific and articulable facts the officer had in hand that are more than an unparticularized hunch of involvement in criminal activity. Wiese was entitled to treat Jordan's report as reliable, including that the vehicle's occupants had just run from her apartment building wearing masks and that she did not recognize them. Wiese had stopped the driver of the vehicle for speeding within a short distance of the apartment complex that the vehicle's occupants were seen running from. It is the totality of the circumstances which determines whether reasonable suspicion to conduct an investigatory stop exists, and acts, even if innocent when viewed separately, may warrant further investigation when viewed together. See *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995). Wiese had a reliable

report of events that had just been observed, which events could indicate that a crime had just been committed and that the vehicle's occupants were fleeing from their misdeed. Additionally, Wiese was aware of the proximity of the first stop to the apartment complex, the obviously suspicious nature of the behavior observed, the urgency of the women's report, and the speeding. Such awareness gave Wiese a reasonably objective suspicion that criminal activity was afoot, and he was entitled under the *Terry* doctrine to make a brief stop to confirm or dispel his suspicions. To do that, he removed passenger Sears from the vehicle once backup arrived in order to ask him about his whereabouts, and Sears' account that he was looking for a friend at an apartment complex did nothing to damage the citizen report—and may have enhanced it. After getting Sears out of the vehicle, Wiese immediately observed what he thought to be a "meth pipe" on the floorboard, which provided further suspicion that criminal activity was going on as well as grounds to search the vehicle for narcotics. That search turned up two baggies containing a white crystal-like substance which Wiese thought was methamphetamine and which field-tested positive for such. The search of the passenger compartment incident to Sears' arrest for possession of drugs turned up the NBC bank bag containing what turned out to be fruits of the burglary of Wolfe's apartment, which burglary was confirmed via police radio shortly after the discovery of the NBC bank bag. After giving deference to the trial judge's factual finding that it was reported the men were wearing masks, we make an independent determination as required under the applicable standard of review that the second stop was a lawful investigative *Terry* stop and that the evidence of the crime gained from such stop was not subject to suppression. This assignment of error is without merit.

Offer of Proof and Cross-Examination of Jordan.

White argues that the trial court erred in rejecting his offer of proof and refusing to allow him to cross-examine State's witness Jordan about her pending felony charges.

On cross-examination, Jordan testified that in the last 10 years, she had been convicted of two felonies and two crimes of dishonesty. White's attorney and the State then stipulated that Jordan

had two prior felony convictions, plus two misdemeanors for crimes involving dishonesty.

[9] White's counsel and the State then approached the bench, and in a conversation with opposing counsel and the court, White's counsel advised the court that he intended to question Jordan regarding felony charges which were then pending against Jordan. The trial judge refused to allow such questioning unless counsel could provide some authority for doing so, because the judge believed that questioning was not within Neb. Evid. R. 609, which states in part:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.

Neb. Rev. Stat. § 27-609 (Reissue 1995). White's counsel admitted that the pending charges were not convictions as required by rule 609, but stated that such charges gave Jordan a reason to want to ingratiate herself with the State by testifying in a way that she thought would help convict White. However, the prosecutor informed the court that Jordan was testifying under subpoena and that no plea agreement had been made, or offered, concerning her pending charges. White's counsel then attempted to make an offer of proof by reciting that if asked, Jordan would say she had pending felony charges in Lancaster County, and that she probably thought testifying against White would benefit her in her pending cases, which White's counsel said would be a motive to testify falsely in the instant case. The offer of proof was made during a bench discussion between counsel and the court. The trial court rejected the offer of proof and refused to allow questioning regarding Jordan's pending charges.

[10,11] While rule 609 clearly allows a witness' credibility to be attacked with previous convictions, the rule does not include pending charges. Furthermore, the Nebraska Supreme Court has refused to allow testimony relating to the credibility of the witness when "'sufficient evidence was admitted which reflected upon the truth and veracity of the complaining witness.'" *State v.*

Lewis, 241 Neb. 334, 345, 488 N.W.2d 518, 526 (1992) (quoting *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980)). In *Lewis*, the defendant attempted to offer evidence of a witness' pending forgery charge in order to show that the witness was biased in favor of the State because the witness was seeking leniency on such charge, the same notion that White's attorney had in mind in the instant case. However, in *Lewis*, evidence had already been adduced that the witness had four prior felony convictions, including one for a crime of dishonesty. Further evidence showed that the witness had previously entered into a plea bargain with the county attorney to reduce one felony count, with habitual criminal sentencing enhancement, to a misdemeanor. The Supreme Court found that such evidence sufficiently reflected on the witness' veracity and that refusing to admit further evidence regarding a pending forgery charge upon which the witness might seek leniency was not an abuse of discretion.

In the instant case, abundant evidence of criminal history was admitted upon which the jury, if so inclined, could find Jordan's veracity wanting. During a bench discussion, the State told White's counsel and the court that no plea deal had been offered to Jordan and that she was testifying under subpoena. Such assertions were not challenged by questioning Jordan outside the presence of the jury to establish that there was a plea agreement or even that she personally held some expectation that her testimony would produce a favorable disposition of her pending charges. We see little, if anything, to distinguish this case from *Lewis* such that we could say that the trial court abused its discretion in rejecting the cross-examination of Jordan.

We note that White refers us to *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), for the proposition that it is error for the trial court to deny cross-examination for bias in a criminal case. However, as White himself points out, *Quintana* involved a witness' release after arrest for terroristic threats, without being charged, shortly before the defendant's trial. In *Quintana*, the Supreme Court noted that as a component of the defendant's right to confront the witness, he was entitled to present these circumstances to the jury so that it could decide whether the witness' testimony was biased by a personal desire to curry favor with law enforcement authorities regarding the offense for which he

was arrested but not yet charged. However, for our purposes, it is most important that the *Quintana* court found that the harmless error doctrine applies to a confrontation clause violation, citing *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). In *Quintana*, the Nebraska Supreme Court quoted from *Delaware v. Van Arsdall, supra*, as follows:

> "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

261 Neb. at 49, 621 N.W.2d at 132.

In any event, even if we assume that the restriction on cross-examination of Jordan was erroneous, it was harmless error, and to so conclude, we only need to consider the "overall strength of the prosecution's case." There was overwhelming evidence of White's guilt of the burglary. White was observed at the scene, followed from the scene to his first traffic stop, and then stopped again within seconds, at which point the burglary victim's distinctive bank bag was found in White's vehicle. Such evidence leaves little if any doubt that White was involved in the burglary. Thus, even if we assume there was a confrontation clause violation in the restriction on cross-examination of Jordan, such was quite obviously harmless error. This assignment of error is without merit.

Ineffective Assistance of Counsel.

White argues that trial counsel provided ineffective assistance of counsel. The Nebraska Supreme Court has held:

> [I]n order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of

> ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.

State v. Williams, 259 Neb. 234, 239, 609 N.W.2d 313, 318 (2000).

[12-14] The Nebraska Supreme Court has adopted a two-prong test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). To establish that he or she was denied effective assistance of counsel, the defendant must show that counsel was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *Strickland v. Washington, supra*. Second, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *id*. The two-prong test for an ineffective assistance of counsel claim need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *State v. Williams, supra*.

"Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question." *State v. Molina*, 271 Neb. 488, 532, 713 N.W.2d 412, 449 (2006). "When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal." *Id*.

Specifically, White argues that second trial counsel provided ineffective assistance of counsel when counsel failed to provide details of Jordan's pending felony charges and to provide the available legal authority requested by the trial judge to support White's contention that he should be allowed to cross-examine Jordan about those charges. As discussed above, there was overwhelming evidence of White's guilt which is demonstrated by

two facts—there was a break-in at Wolfe's apartment and her distinctive bank bag was found in White's vehicle. Because any restriction upon the cross-examination of Jordan regarding her pending criminal charges was harmless error, it follows that White could not have been prejudiced by any steps his trial counsel did not take which might have succeeded in convincing the trial court to allow the proposed cross-examination. See *State v. Williams, supra*. This assignment is without merit.

CONCLUSION

For the reasons stated above, we affirm White's conviction and sentence.

AFFIRMED.

TARA PEREZ AND KEVIN STOKES, APPELLANTS, V.
CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

731 N.W.2d 604

Filed April 24, 2007. No. A-05-460.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages.** Pursuant to Neb. Rev. Stat. § 13-911(1) (Reissue 1997), in case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
4. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 13-911(5) (Reissue 1997), for purposes of § 13-911, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

5. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** An officer's merely following a vehicle in order to provide information to other officers as to the vehicle's location does not constitute a vehicular pursuit.
6. **Motor Vehicles: Proximate Cause: Evidence.** The issue of proximate cause in the context of a vehicular pursuit case cannot be reduced to a rigid formula involving time and distance.
7. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.

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

Jay L. Welch, Thomas M. Locher, and Matthew D. Hammes, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellants.

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

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Tara Perez and Kevin Stokes (Kevin) appeal from the decision of the district court for Douglas County which dismissed their claims for damages against the City of Omaha (the City). This lawsuit involves an automobile accident on November 30, 2000, between a vehicle driven by Dale Stokes (Dale) and a vehicle driven by Brenda Pasko. The issues were whether a police vehicular pursuit pursuant to Neb. Rev. Stat. § 13-911 (Reissue 1997) occurred and, if so, whether Dale, the driver of one of the vehicles involved, knew or should have known about any such pursuit and whether any such pursuit was the proximate cause of Perez' and Kevin's injuries, thus entitling them to recover under § 13-911. We affirm the trial court's finding that a pursuit as defined under § 13-911 did not occur, and thus, we affirm the dismissal of the action.

FACTUAL AND PROCEDURAL BACKGROUND

Perez and Kevin filed a "Petition at Law" on October 22, 2002. It was stipulated that Perez and Kevin satisfied the requirements of the Political Subdivisions Tort Claims Act. In the petition, Perez and Kevin alleged the following: Shortly after midnight on the morning of November 30, 2000, Perez and

Kevin were passengers in a motor vehicle driven by Dale, now deceased, who was Perez' brother and Kevin's nephew. In the vicinity of 24th Street and St. Mary's Avenue in Omaha, members of the Omaha Police Department began a vehicular pursuit of Dale's vehicle that continued south on 24th Street to Martha Street, west on Martha to 28th Street, and north on 28th Street to Leavenworth Street, where Dale's vehicle collided with another vehicle and various fixed objects. At all times during such vehicular pursuit, Dale should have been, and indeed was, aware of an active attempt by a law enforcement officer of the City operating a motor vehicle to apprehend one or more occupants of Dale's vehicle. Dale resisted apprehension by maintaining or increasing the speed of his vehicle, ignoring the officer, and attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions. The resulting collision caused the immediate death of Dale and injuries to Perez and Kevin.

Perez alleged that she was physically and emotionally incapable of leaving Dale's vehicle before the collision and that as a direct and proximate result of the collision, she suffered various injuries, including the traumatic amputation of her right arm that has and will produce a variety of damages over her lifetime.

Kevin alleged that being aware of the vehicular pursuit, he asked to vacate Dale's vehicle, but that Dale declined to bring his vehicle to a halt because of the vehicular pursuit that had started. So, believing that there was less risk of vacating Dale's vehicle early in the vehicular pursuit before it reached maximum speed, Kevin exited the vehicle. Kevin alleged that rather than risk the alleged usual result of a vehicular pursuit, such as grave injury or death, he elected to leave the moving vehicle and sustained injuries, including a fractured pelvis. The petition alleged that the City was liable to Perez and Kevin under § 13-911, the strict liability statute for injuries and damages to innocent third parties caused by police motor vehicle pursuits.

By the time of this trial, the parties had stipulated that Perez and Kevin were innocent third parties under the statute, but the City specifically denied that Perez' and Kevin's injuries were proximately caused by a vehicular pursuit. The City also alleged a number of affirmative defenses, which we need not detail.

A trial was held in early January 2005, limited to the issue of liability. Perez and Kevin's case was consolidated with a case also brought under § 13-911 by Pasko and Allie Kuhn for their injuries sustained when Dale's vehicle struck Pasko's vehicle. We have this same day decided the appeal brought by Pasko and Kuhn from the trial court's dismissal of their case, in a separate memorandum opinion in our case No. A-05-461.

In an order filed March 11, 2005, the trial court made the following findings, which we quote in considerable detail, given the applicable standard of review:

> 3. Under the [Political Subdivisions Tort Claims] Act, a vehicular pursuit is defined as "an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions." Neb. Rev. Stat. § 13-911(5) (Reissue 1997). Thus, in order to prevail, [Perez and Kevin] must prove the following three elements: (1) that there was an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another vehicle; (2) that the driver was or should have been aware of such attempt; and (3) that the driver was resisting apprehension by maintaining or increasing speed, ignoring the officer, or attempting to allude [sic] the officer while driving at speeds in excess of those reasonable and proper under the conditions.
>
> . . . .
>
> 5. Regarding the first factor under Section 13-911, the Court finds that [Perez and Kevin] have failed to prove that [the involved police officer] was making an active attempt to apprehend the occupants of Dale's truck. Evidence at trial indicated that [the officer] began following Dale's truck after observing the truck cut across the sidewalk and into a parking lot in what appeared to the officer to be an attempt to pass two cars. By the time [the officer] turned her cruiser around to follow Dale, his truck was approximately

5 blocks away, and was already turning westward onto Poppleton.

6. The Court finds [the officer's] testimony credible that at the beginning of the alleged pursuit she concluded that she could not catch up to the truck and was therefore following the truck in order to monitor its progress. The Court finds support for this finding in light of the fact that along the entire route, [the officer] maintained at least a three-block distance between herself and the truck. While it is undisputed that [the officer] activated her [cruiser's] overhead lights, the Court finds that the act of turning off the lights after only four seconds is inconsistent with a finding of an active attempt to apprehend.

7. Furthermore, [the officer] did not radio the police department to inform them that she was "in pursuit," as required by standard police operating procedure, and did not activate the cruiser's siren. Instead, she made a radio broadcast noting the location and movement of Dale's truck and stating that she was "attempting to catch up."

8. While [the officer] did drive at a speed sufficient to stay close to Dale, her speed was insufficient to decrease the distance between them even though her vehicle was capable of matching or exceeding the speed of the truck.

. . . .

10. Accordingly, the Court concludes that the distance maintained between [the officer's] cruiser and Dale's truck, the failure to close the distance between the two cars when [the officer's] cruiser was capable of performing such a maneuver, the activation of the cruiser's overhead lights for only four seconds, the failure to activate the siren and failure to radio in a "pursuit" demonstrates a lack of active attempt to apprehend as required by Section 13-911.

11. The Court also finds that [Perez and Kevin] have failed to prove that Dale was or should have been aware of the pursuing officer's attempt to apprehend the individual. Due to Dale's death resulting from the accident, the Court must look to evidence presented at trial to determine whether [Perez and Kevin] have satisfied this second factor.

12. As a preliminary matter, the Court finds that Dale's assertion made before the truck reached 24th Street that police were behind him was factually inaccurate and erroneously based upon seeing [a] Corrections Center employee . . . behind him. The Court further finds that there were no police officers following or pursuing Dale's truck before the truck reached 24th Street.

13. In between leaving the parking lot on 24th Street and the collision at 28th and St. Mary's, Perez testified that Dale never mentioned that police were following him and failed to indicate any awareness of or concern about any headlights or police cruiser that he might have been able to see behind him. Instead, Dale told Perez to relax, and that he was going to get her home. Based upon the evidence submitted at trial, the Court concludes that Dale did not see [the officer] or her [cruiser's] mounted lights behind him.

14. In addition, and as noted above, [the officer] maintained several blocks distance from Dale at all times. At night, when the events in question occurred, it is reasonable to conclude that [the officer's] cruiser looked like any other vehicle on the road. Given the Court's finding above that there was no active attempt to apprehend Dale, taken together with the distance between the two vehicles and the lack of evidence supporting the notion that Dale saw [the officer's cruiser's] lights or was aware of police behind him, the Court concludes that Dale was not and could not have been aware of any alleged active attempt of [the officer] to apprehend him.

15. Finally, the Court finds that [Perez and Kevin] have failed to prove that Dale was resisting apprehension by maintaining or increasing his speed, ignoring the officer, or attempting to allude [sic] the officer while driving at speeds in excess of those reasonable and proper under the conditions. Evidence at trial demonstrated that both Dale and [the officer] were driving in excess of the posted speed limit along the three-street route and that Dale ran the traffic signal at 28th and St. Mary's at a high rate of speed. However, in light of the Court's finding above that (1) [the officer] was not attempting to apprehend Dale and (2) Dale was not

aware of [the officer's] presence behind him, the Court cannot conclude that Dale was resisting apprehension.

16. Even if [the officer] had been actively attempting to apprehend Dale and he was aware of such attempt, evidence offered at trial establishes that Dale was driving fast and erratically from the beginning of the drive, well before [the officer] began following the truck. While [Perez and Kevin] contend that [the officer's] speed evidences [her] active pursuit of Dale and Dale's subsequent attempt to resist apprehension, the Court notes that [the officer] never drove faster than Dale and actually drove slower than Dale along 28th Street. Accordingly, the Court finds that [Perez and Kevin] have failed to satisfy the third prong of Section 13-911's definition of a vehicular pursuit.

17. Because [Perez and Kevin] have failed to satisfy all three prongs of Section 13-911's definition of a vehicular pursuit, the Court concludes that a vehicular pursuit did not occur.

18. Assuming arguendo that a vehicle pursuit did occur, the Court also concludes that [the officer's] actions were not the proximate cause of [Perez' and Kevin's] injuries. The Nebraska Supreme Court has held that "in order for a city to be liable for injuries under § 13-911, the first requirement is that the act of the police in pursuing a fleeing motorist be such that without it the injury would not have occurred, commonly known as the "but for" rule, and the second requirement is that the injury be the natural and probable result of that act and without an efficient intervening cause." Mid Century Ins. Co. v. City of Omaha, 242 Neb. 126, 132-33, 494 N.W.2d 320, 324(1992) (internal citations omitted). "The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact." Id. at 133, 494 N.W.2d at 324.

19. As a preliminary matter, the Court finds that a vehicular pursuit was not the proximate cause of Kevin's injuries since there were no police following or pursuing Dale's truck at or before Kevin exited the truck at the parking lot on 24th Street. Therefore, recovery against [the City] on behalf of . . . Kevin . . . is hereby denied.

> 20. As for [Perez], the Court finds that the proximate cause of [her] injuries was the independent acts of Dale . . . . Evidence at trial indicated that Dale was driving erratically and in excess of the posted speed limit prior to [the officer's] becoming involved in the alleged pursuit. Evidence further established that Dale became agitated after seeing [a] Corrections Center employee . . . behind him, based upon his erroneous belief that [such person] was a police officer. As noted above, although [the officer] activated her [cruiser's] mounted lights for a few seconds, [Perez and Kevin] have failed to establish that Dale saw the lights or was aware of her presence behind him. Moreover, when Dale ran the red light and collided with Pasko's vehicle, [the officer] was several blocks behind him and was driving at a slower rate of speed. Therefore, the Court concludes that Dale's reckless driving, at an excessive speed and in violation of a traffic signal, was the proximate cause of Perez['] injuries.
>
> 21. In addition, Section 13-911 imposes liability only "[i]n case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer ... during vehicular pursuit[.]" Neb. Rev. Stat. § 13-911(1) (Reissue 1997)(emphasis added). Because there was no vehicular pursuit, [Perez and Kevin] are not entitled to recover under Section 13-911.

The district court entered judgment in favor of the City and against Perez and Kevin, and the case was dismissed. Perez and Kevin timely appeal the order of the district court.

ASSIGNMENTS OF ERROR

Perez and Kevin assert that the district court erred in (1) its interpretation and application of the "'vehicular pursuit'" element of § 13-911; (2) its interpretation and application of the "'proximate cause'" element of § 13-911; (3) its interpretation and application of the element of § 13-911 relating to whether a fleeing vehicle operator "'should have known'" and is charged with and presumed to have known of the vehicular pursuit; (4) its findings of fact and conclusions of law, and such findings and conclusions should be set aside; (5) its admitting into evidence

the Omaha Police Department's investigation into the pursuit, by its not precluding the evidence by sustaining Perez and Kevin's motion in limine and objections to preclude the offering of evidence immaterial and irrelevant to the action, and in its finding the testimony of one of Officer Debra Prososki's superiors to be "'persuasive'" while at the same time determining the Omaha Police Department's investigation was not conclusive of whether a pursuit occurred; and (6) its not finding the testimony from Prososki not credible as a matter of law. In summary, Perez and Kevin contend that the trial judge made the wrong decision for any number of reasons, and this is the core issue we address.

STANDARD OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

ANALYSIS

[3,4] Section 13-911 provides:

> (1) In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.
>
> . . . .
>
> (5) For purposes of this section, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle

> is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

Late in the evening on November 29, 2000, and into the early morning of November 30, Perez, Kevin, and Dale had been at a bar "celebrating." The three left the bar in Dale's pickup truck and were headed for home, after dropping off Perez' aunt at her house.

Brent Craft, an employee of the Douglas County Department of Corrections, testified that sometime after 11 or 11:30 p.m., he left the Douglas County jail at 17th and Leavenworth Streets, where he worked. At that point, Craft, who was in his uniform and driving his pickup truck, encountered the pickup that would later be identified as Dale's. Dale was two vehicles ahead, but Craft and Dale were following the same route, traveling west on Jackson Street and then merging onto St. Mary's Avenue. Dale's pickup turned south on 24th Street, but Craft kept going west on St. Mary's. Craft testified that as he was traveling through the intersection at 24th Street and St. Mary's, he continued to watch Dale's pickup. Craft said that Dale's pickup sped up while completing the turn and swerved left and that the passenger came out of the pickup in a somersault motion. Dale's pickup continued to travel southbound on 24th Street. Craft continued a few blocks further on St. Mary's and then looped around to go back to check on the passenger who had somersaulted out of Dale's pickup and who turned out to be Kevin. Craft testified that he never saw a police officer following Dale, and clearly, Craft was not a police officer attempting to apprehend Dale.

Perez and Kevin each testified that while they were riding with Dale that night, Dale's attitude changed suddenly and Dale said that a police officer was behind him, that he was not going to stop, and that he would run if lights came on. Both Perez and Kevin testified that they did not hear sirens or see flashing police lights—although, neither turned around to look because each thought such action would draw more attention if an officer was behind them. Kevin testified that he exited the pickup, which was still moving, in the parking lot at 24th Street and St. Mary's

Avenue. Perez said that she did see flashing lights when Kevin got out of the pickup in the parking lot and that a car she thought was a police vehicle was right behind them in the parking lot. Despite the foregoing testimony, Perez said that she never saw any emergency flashing lights or heard any sirens between the time Kevin exited Dale's pickup at 24th Street and St. Mary's and the time of the collision at 28th and Leavenworth Streets.

Prososki testified that when she first saw Dale's vehicle, it was southbound on 24th Street, approaching Leavenworth Street, and she was northbound on 24th Street, approaching Leavenworth and getting ready to turn eastbound onto Leavenworth on her way to central headquarters. Prososki was coming to a stop at 24th Street and Leavenworth when she saw Dale's vehicle "jump" onto the sidewalk in the parking lot on the northwest corner of 24th Street and Leavenworth. Prososki said that at the time she observed Dale's vehicle, she was going approximately 5 miles per hour, and her best estimate was that Dale's vehicle was going 50 to 60 miles per hour.

Prososki testified that she turned around and headed southbound on 24th Street to follow Dale's vehicle, but she did not turn on the cruiser's overhead emergency lights or siren at that time. Prososki observed Dale's vehicle turn westbound on Poppleton Avenue, and she also turned westbound on Poppleton. Prososki testified that her maximum driving speed between Leavenworth Street and Poppleton was approximately 40 miles per hour and that the speed limit was 35 miles per hour. She turned on the cruiser's overhead emergency lights (which are red, white, and blue) immediately upon making the turn at 24th Street and Poppleton and left them on for approximately 5 seconds, but Dale's vehicle was in her sight for only 2 of those 5 seconds. When she turned on her cruiser's overhead emergency lights, the cruiser's video camera was automatically activated, including a digital clock that is imprinted on the film with seconds visible. Thus, from this point to the crash, there is a videotape of the view from Prososki's cruiser—which videotape we have studied. Prososki testified that she turned her cruiser's overhead emergency lights off because she did not think she could catch up to Dale's vehicle and that she also thought if she turned the lights off, Dale might try to hide in the neighborhood and she would

come across the vehicle. Prososki said she thought the vehicle might be stolen. At approximately 25th Avenue and Poppleton, Prososki radioed that a truck was traveling at a high rate of speed but that she had not gotten close enough to get license plate information. Both Dale and Prososki continued westbound on Poppleton until 28th Street, at which point Dale turned northbound on 28th Street and Prososki followed. At the intersection of 28th Street and St. Mary's Avenue, Dale's vehicle collided with Pasko's vehicle, in which Kuhn was a passenger.

Prososki testified that during the entire time she followed Dale's vehicle, she never used her cruiser's siren and only used its overhead emergency lights for 5 seconds—a fact verified by the videotape. She further testified that she momentarily lost sight of Dale's vehicle several times due to the hills on the streets they were traveling.

A dispatch transcript was received into evidence in which Prososki stated, "I'm attempting to catch up to a vehicle it's northbound 28th Street from Poppleton. It's a dark colored pickup. I'm not close enough to it yet to see anything else." Prososki testified as follows:

> Q. [by Kevin's attorney] Were you still attempting to close the distance between yourself and [Dale's] pickup truck as you were westbound on Poppleton and again northbound on 28th?
>
> A. I don't know. I guess that's a fair statement.
>
> Q. That you were attempting to close the distance?
>
> A. I wasn't — I don't think I was actually doing it, or I would have went a lot faster. I mean, the car is capable of 100, but —

She also testified that she was about five blocks behind Dale's vehicle. Prososki testified that when she said "'I'm attempting to catch up to a vehicle,'" she meant that she was trying to figure out what the vehicle was doing so that she could give more information to the other officers.

[5] An officer's merely following a vehicle in order to provide information to other officers as to the vehicle's location does not constitute a vehicular pursuit. See *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003). In *Lalley*, summary judgment granted in favor of the City by the trial court on the basis that

there was no police pursuit was affirmed on appeal. The evidence in *Lalley* was that the officer following a Nissan which collided with an innocent third party was driving an unmarked vehicle without lights or a siren, that such vehicle was prohibited by police department policy from engaging in pursuit, and that the officer never exceeded the speed limit, while the Nissan was traveling at times up to 70 miles per hour on city streets. While following the Nissan, the officer had been told by supervisors over the radio not to pursue the Nissan. The testimony was that the purpose of following the Nissan was to provide information to other officers as to the Nissan's location.

[6,7] In the instant case, a considerable portion of the evidence in the record focuses on time, distance, and speed—from which conflicting arguments are advanced inferring either that Prososki was pursuing Dale's pickup or that she was not engaged in vehicular pursuit as such term is defined in § 13-911. In *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006), the police officer had turned off his cruiser's overhead emergency lights approximately 30 seconds before the speeding vehicle he had been chasing collided with the vehicle occupied by the innocent third party. An award in favor of the innocent third party was upheld by the Supreme Court, which rejected the City's argument that the pursuit could not have been the proximate cause when the officer had broken off pursuit a half mile before the collision. The *Staley* court said that the "issue of proximate cause in the context of a vehicular pursuit case can[not] be reduced to a rigid formula involving time and distance." 271 Neb. at 550, 713 N.W.2d at 466. Perez and Kevin's argument in the instant case, when reduced to its essence, is that "time and distance" calculations in the evidence show a police pursuit, because Prososki's cruiser's speed increased and, at times, Prososki closed the distance between her cruiser and Dale's pickup. But, such argument ignores the many other facts and their meaning as well articulated by the trial judge's decision which we have extensively set forth, in addition to the cautionary holding of *Staley* discussed above. The *Staley* court said that the question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.

In the present case, the trial court found that there was not a vehicular pursuit within the meaning of § 13-911, and we have earlier quoted such finding and the factual conclusions reached by the trial court in arriving at such ultimate conclusion. While the evidence arguably supports the conclusion that Prososki was "pursuing" Dale's pickup as that term is commonly used in everyday language, a police pursuit as defined in the statute involves multiple elements and, thus, is a much more nuanced matter than simply deciding whether one vehicle is trying to "catch up" to, or maintain sight of, another. Therefore, bearing in mind the detailed factual determinations of the trial court and viewing the evidence in the light most favorable to the City, see *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004), we agree with the district court that Prososki's actions did not amount to an "active attempt" to apprehend one or more occupants of Dale's vehicle and that thus, there was not a vehicular pursuit pursuant to § 13-911.

Finally, even if we were to assume a vehicular pursuit did occur, Prososki's actions were not the proximate cause of Perez' and Kevin's injuries. In *Mid Century Ins. Co. v. City of Omaha*, 242 Neb. 126, 494 N.W.2d 320 (1992), the Nebraska Supreme Court affirmed a district court's ruling that an officer's pursuit was not the proximate cause of an accident. In that case, Lee Williams' vehicle was stopped in relation to an assault at a nightclub and Williams was put into the back of Officer Joseph Vaccaro's police cruiser while Vaccaro checked Williams' identity. While Williams was in the back of the cruiser, Vaccaro was advised by the police dispatcher that there had been an assault and a hit-and-run accident in the area of the nightclub and that Williams should be brought back there. Williams, who heard the broadcast, said, "'Fuck it, I'm leaving.'" 242 Neb. at 130, 494 N.W.2d at 323. Williams got into his own car, and when Vaccaro tried to reach in and take the keys away from Williams, Williams started the car and began moving forward while holding onto Vaccaro's hand and dragging him three or four steps. Williams then let go of Vaccaro and took off. Vaccaro radioed that Williams got away and gave the direction Williams was driving.

Officer Michael McGowen, who knew about the alleged assault and heard Vaccaro's broadcast, thought the broadcast

referred to a vehicle he had previously seen at a gas station and began heading in that direction. While driving, McGowen saw a car he knew to be Williams' car coming toward him. McGowen attempted to use the left front of his police cruiser to strike the left rear of Williams' car in order to cause Williams' car to spin around, but McGowen missed. McGowen then got his cruiser turned around, and he headed in Williams' direction. McGowen lost sight of Williams due to a hill on the road, so McGowen accelerated to 65 miles per hour, and when McGowen reached the top of the hill, he determined that he could not get close enough for a pursuit. McGowen took his foot off the accelerator and then witnessed a collision a few blocks away between Williams' car and another car. There was a factual issue as to whether McGowen had his cruiser's red lights on. The Nebraska Supreme Court said:

> The evidence of the involvement of McGowen in this matter, whom the trial court found to be in pursuit of Williams, was his knowledge gained from the radio broadcasts and his observation of Williams' car for the first time, proceeding toward him several blocks away at a speed of well over 75 or 80 miles per hour, estimated at 90 miles per hour as they crossed paths. There is nothing in the record to establish that McGowen's presence in the vicinity had anything at all to do with Williams' fantastic trip.
>
> True, McGowen attempted to stop Williams by ramming him. However, there is no evidence that such action altered in the slightest the speed or direction of travel of Williams. Williams was out of sight of McGowen in a matter of seconds, and the accident occurred a matter of seconds after McGowen next spotted Williams and had given up any chase he might have intended to undertake.
>
> Other than the fact that Williams knew he was in trouble for leaving the scene when he was wanted back at [the nightclub], he cannot be heard to say that he knew he would be pursued.
>
> By the same token, by the time Williams could have been aware of McGowen's involvement in this episode, if in fact Williams was aware, he was already following a course of

> undiminished breakneck speed which would inevitably lead to the accident seconds later.

Mid Century Ins. Co. v. City of Omaha, 242 Neb. 126, 132, 494 N.W.2d 320, 324 (1992). Thus, the Nebraska Supreme Court affirmed the district court's ruling that McGowen's pursuit was not the proximate cause of the accident.

Likewise, Prososki was not the proximate cause of the collision in the instant case. At best, we can speculate that when Dale initially thought he was being followed by a police officer, he was really being followed by Craft, an employee of the Douglas County Department of Corrections, who was not a police officer and who was driving his own pickup. When Prososki observed Dale's vehicle, it was already "jump[ing]" onto the sidewalk in a parking lot and traveling at an excessive speed. She never turned on her cruiser's siren, and its overhead emergency lights were on for 5 seconds, as evidenced by the videotape. We note that during such 5 seconds in the videotape, Dale's faraway taillights are only visible for 2 seconds—a fact to which Prososki testified. Additionally, the brief moments when Prososki had her cruiser's overhead emergency lights on occurred just when she turned onto Poppleton Avenue, and the crash occurred a considerable distance from that location. Like the officer in *Mid Century Ins. Co., supra*, by the time Prososki became involved in the instant case, Dale had already embarked on a reckless course of conduct, and in fact, Dale was out of Prososki's vision and vice versa at the time he ran the red traffic light and his vehicle hit Pasko's vehicle. Therefore, even if there was pursuit by Prososki, it was only in the same sense as in *Mid Century Ins. Co.*, and such was not the cause of Perez' injuries, which were caused by Dale's reckless and unlawful driving. At most, Dale could have seen only 2 seconds of flashing police cruiser lights and, thereafter, merely headlights in the distance behind him, visible at times, which were not closing the gap on him in any substantial way. As for Kevin's injuries, the vehicular pursuit was not the proximate cause of Kevin's injuries, because no police officer was even following, let alone pursuing, Dale's truck when Kevin "exited" the truck and sustained his injuries.

Because we have found that a pursuit pursuant to § 13-911 did not occur and that even if it did, any such pursuit was not the

proximate cause of Perez' and Kevin's injuries, we do not need to address the remaining assignments of error. See *Harper v. Clarke*, 14 Neb. App. 649, 713 N.W.2d 502 (2006) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

CONCLUSION

For the reasons stated above, we affirm the trial court's finding that a pursuit pursuant to § 13-911 did not occur and that even if it did, any pursuit was not the proximate cause of Perez' and Kevin's injuries. Therefore, Perez and Kevin are not entitled to recover damages under § 13-911.

AFFIRMED.

STACY LYNN KRAMER, APPELLANT, V.
GREGORY ALAN KRAMER, APPELLEE.

731 N.W.2d 615

Filed May 1, 2007. No. A-05-499.

1. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
2. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Affirmed.

Steven M. Delaney, Tessa P. Hermanson, and, on brief, Janis J. Winterhof, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Matthew Hanson, of Hanson, Hroch & Kuntz, for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Stacy Lynn Kramer appeals from an order denying her application to modify a decree that dissolved her marriage to Gregory

Alan Kramer (Greg). On appeal, Stacy challenges the trial court's denial of her application to modify Greg's child support obligation and the trial court's use of a joint physical custody worksheet in denying her application. We find that the trial court did not err in denying Stacy's modification application because she failed to show that a material change of circumstances occurred subsequently to the entry of the original decree. We affirm.

II. BACKGROUND

On November 3, 2003, the district court entered a decree dissolving the marriage between Stacy and Greg. In the decree, the trial court awarded the parties joint legal custody of their son, Garrett, born September 16, 2000. The court awarded Stacy physical custody, subject to Greg's reasonable rights of parenting time. The court determined that Greg would have visitation every other weekend, from Friday after school to Monday at 8 a.m.; every Tuesday and Thursday, from after school to 8 p.m.; two 2-week periods each summer; and alternating holidays. A joint physical custody worksheet was entered into evidence as an exhibit. Based upon the parties' stipulated agreement, the worksheet indicated that Greg would have 144 days with Garrett and Stacy would have 221 days with Garrett. The worksheet set forth Greg's child support obligation as $111.58. The trial court did not complete a child support worksheet; nor did the trial court address the child support worksheet submitted as an exhibit. The trial court ordered Greg to pay $103 per month in child support. Neither party appealed from the decree.

On August 5, 2004, Stacy filed an application to modify the decree. She asserted in her application that there was a material change of circumstances because Greg did not have Garrett for the number of days out of the year determined by the original decree. She also asserted in her application that the trial court erred in using "sp[l]it custody" calculations. She requested that Greg be ordered to pay $476 per month in child support.

At trial, Stacy testified that the visitation schedule currently followed by the parties differs "[v]ery little" from the one specified in the original decree. Both Stacy and Greg testified that Greg was currently spending more time with Garrett due to a change in his work schedule. Neither party submitted any evidence regarding any other change that had occurred subsequently

to the original decree. On February 15, 2005, the trial court issued an order denying Stacy's application. The court found that Stacy failed to show a material change of circumstances, stating, "If anything, [Stacy] has proven that the increase in visitation should decrease the child support calculation." On February 24, Stacy filed a motion for a new trial. The trial court overruled Stacy's motion, and this appeal timely followed.

III. ASSIGNMENTS OF ERROR

Stacy has assigned two errors on appeal. First, Stacy asserts that the district court erred in refusing to grant her application for modification of child support. Second, Stacy asserts that the district court erred in improperly applying the Nebraska Child Support Guidelines.

IV. ANALYSIS

1. Standard of Review

Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

2. Modification of Child Support

Stacy challenges the trial court's failure to grant her application to modify Greg's child support obligation. She argues that the trial court erroneously applied a joint physical custody worksheet when denying her application and that "the factual evidence demonstrated the parties did not have a joint custody arrangement." We note that Stacy fails to argue that any material change of circumstances has occurred since the entry of the original decree. As such, we find no merit to her first assigned error.

[1,2] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification

which was not contemplated when the prior order was entered. *Gallner v. Hoffman, supra*; *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Gallner v. Hoffman, supra*; *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, and whether the change is temporary or permanent. *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000); *Rauch v. Rauch, supra*.

In the instant case, Stacy fails to argue that any change of material circumstances occurred since the entry of the original decree. She fails to argue that there has been any financial change or that Garrett's needs have changed since the entry of the original decree. Further, the evidence adduced at trial clearly indicates that Greg currently spends *more* time with Garrett since the entry of the original decree.

The thrust of Stacy's second claim on appeal is that the trial court erred in using a joint physical custody worksheet when determining Greg's child support in the original decree and when denying Stacy's application for modification.

We cannot reach the issue of whether the trial court erroneously applied a joint physical custody worksheet in the modification order, because Stacy has failed to first show that a material change of circumstances occurred subsequently to the entry of the original decree.

In *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000), the trial court erroneously used a joint physical custody worksheet in calculating the parties' child support after finding that the father had custody of the child only 39 percent of the time. However, neither party appealed from that order. Subsequently, the mother filed a petition for a modification of child support due to a material change in the parties' income. The district court applied the joint physical custody worksheet, instead of the sole custody worksheet, because "it did not find a material

change in circumstances with regard to the amount of time that each party spent with the children." *Id.* at 455, 613 N.W.2d at 822. The district court stated that "while the court may have erred in ordering child support based on joint custody at the previous modification, it was not going to revisit that issue, because it was not appealed after the previous order of August 20, 1998, was entered." *Id.* The mother appealed the trial court's application of the joint physical custody worksheet. We found that the trial court abused its discretion in failing to use the child support calculation on the sole custody worksheet, because there was no dispute that a material change of circumstances had occurred and the facts failed to indicate that there was a joint physical custody arrangement between the parents.

Unlike the court in the instant case, the district court in *Pool* found that the mother had in fact shown that a material change of circumstances had occurred. As a result, the only issue on appeal concerned *how* the trial court applied the child support guidelines, *not* whether modification of the order was even warranted. *Pool* is distinguishable from the instant case because there has been no showing, or even an allegation in the pleadings except in Stacy's application for modification of the decree, that a material change of circumstances occurred. Accordingly, because Stacy has failed to show any material change of circumstances, we find no abuse of discretion by the trial court in denying her application to modify Greg's child support obligation.

V. CONCLUSION

We conclude that the district court did not err in denying Stacy's application to modify the district court's original decree because Stacy failed to show a material change of circumstances subsequent to the entry of the original decree.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY L. JACKSON, APPELLANT.

730 N.W.2d 827

Filed May 1, 2007. No. A-05-892.

1. **Postconviction: Costs.** Neb. Rev. Stat. § 29-3001 (Reissue 1995) specifies that proceedings under the provisions of the Nebraska Postconviction Act shall be civil in nature and that costs shall be taxed as in habeas corpus cases.
2. **Habeas Corpus: Fees.** Neb. Rev. Stat. § 29-2824 (Reissue 1995) specifies that in habeas corpus cases, the fees of the clerk, sheriff, and witnesses in the case shall be taxed by the court.
3. **Postconviction: Fees: Costs.** Neb. Rev. Stat. § 29-2824 (Reissue 1995) specifies that no person or officer shall have the right to demand the payment in advance of any fees which such person or officer may be entitled to in habeas corpus cases. Read together with Neb. Rev. Stat. § 29-3001 (Reissue 1995), the provisions of § 29-2824 support a district court's conclusion that prepayment of fees and costs is not required in postconviction cases.
4. **Fees.** Neb. Rev. Stat. § 33-106 (Reissue 2004) indicates the mandatory nature of filing fees associated with proceedings brought in the district court.
5. **Judgments: Costs: Final Orders: Appeal and Error.** Costs are considered part of the judgment, and where an order is appealed from when an issue of costs is unresolved, a portion of the judgment is unresolved and the order from which the appeal is taken is not final.
6. **Judgments: Costs: Final Orders.** Where the trial court enters an order concerning an aspect of costs but does not enter an underlying judgment, the award of costs is not a final, appealable order.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

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

Anthony L. Jackson, pro se.

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

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Anthony L. Jackson appeals from the district court's dismissal, without an evidentiary hearing, of Jackson's second motion for postconviction relief. On appeal, Jackson asserts that the court

erred in denying an evidentiary hearing and in denying postconviction relief. We find that Jackson's second motion for postconviction relief did not show on its face that the basis relied upon for relief was not available at the time of Jackson's prior motion for postconviction relief. As such, we affirm.

II. BACKGROUND

On May 20, 2003, Jackson was found guilty of burglary and being a habitual criminal. Jackson had entered a plea of guilty to the burglary charge, and the State presented evidence to demonstrate that Jackson was a habitual criminal. On July 21, the district court for Lancaster County, Nebraska, sentenced Jackson to 20 to 40 years' imprisonment.

On December 22, 2003, Jackson filed a motion for postconviction relief. In that motion, Jackson alleged that his trial counsel had been ineffective for not determining that Jackson's "criminal record" was, for unexplained reasons, insufficient to support a habitual criminal charge. Jackson alleged that his counsel was ineffective in investigation of Jackson's criminal record and in advising Jackson to plead guilty to the burglary charge. Jackson also alleged that no direct appeal was filed and that his plea was invalid.

On March 11, 2004, the district court entered an order denying Jackson's motion for postconviction relief, without granting an evidentiary hearing. The court noted that Jackson had failed to plead any factual allegations concerning his prior criminal record and concerning why any portion of it was insufficient to support the habitual criminal conviction, and it further noted that the State had adduced evidence to prove that Jackson was a habitual criminal prior to his sentencing.

Jackson appealed the district court's denial of his motion for postconviction relief to this court. On June 14, 2005, this court affirmed the district court's denial of postconviction relief.

On June 24, 2005, Jackson filed a second motion for postconviction relief. In his second motion, Jackson alleged that his trial and appellate counsel—although there was no appeal from his conviction—had been ineffective concerning various issues related to Jackson's mental competency. Jackson also alleged prosecutorial misconduct and alleged that the State had withheld exculpatory evidence, although he did not indicate what such

evidence was. Jackson further made allegations concerning the validity of his plea and the subject matter jurisdiction of the trial court.

On June 27, 2005, the district court entered an order denying Jackson's second motion for postconviction relief, without an evidentiary hearing. In that order, the district court specifically denied a request by Jackson for in forma pauperis status at the district court level of this postconviction action, finding that no prepayment of costs was required in postconviction proceedings and that in forma pauperis status was, accordingly, unnecessary. The district court then found that Jackson's second motion for postconviction relief did not show on its face that the basis relied upon for relief was not available at the time of Jackson's prior motion for postconviction relief. As such, the district court dismissed Jackson's second motion for postconviction relief.

On July 1, 2005, Jackson filed a motion for reconsideration. On July 5, the district court denied the motion. This appeal followed.

III. ASSIGNMENTS OF ERROR

Jackson has assigned two errors on appeal, which we consolidate for discussion to one: The district court erred in denying Jackson's second motion for postconviction relief without granting an evidentiary hearing.

IV. ANALYSIS

1. Final, Appealable Order

Before addressing whether there is any merit to Jackson's appeal, we feel compelled to address a jurisdictional issue that arose as this case was pending before us on appeal. See *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006) (duty of appellate court to determine whether it has jurisdiction over matter before it). The jurisdictional issue concerns whether the district court's order denying Jackson in forma pauperis status at the district court level and dismissing his second motion for postconviction relief is a final, appealable order, because it failed to direct the payment of costs, including the statutorily required filing fee. We conclude that the order is a final, appealable order, although the court's denial of in forma pauperis status should not

be construed to suggest that no filing fee is required in postconviction proceedings.

As noted above, on June 27, 2005, the district court denied Jackson's request to proceed in forma pauperis at the district court level, finding that in forma pauperis status was not required because the prepayment of costs is not required in postconviction proceedings. In the same order, the district court held that Jackson's second motion for postconviction relief was procedurally barred and dismissed the motion. In that order, the court did not make any order concerning the payment of costs, including the statutorily required filing fee, beyond recognizing that such costs are not subject to a requirement of prepayment in postconviction proceedings.

[1-3] Neb. Rev. Stat. § 29-3001 (Reissue 1995) specifies that "[p]roceedings under the provisions of [the Nebraska Postconviction Act] shall be civil in nature" and that "[c]osts shall be taxed as in habeas corpus cases." Neb. Rev. Stat. § 29-2824 (Reissue 1995) specifies that in habeas corpus cases, "the fees of the clerk, sheriff, and witnesses in the case" shall be "taxed by the [court]." Section 29-2824 also specifies that "no person or officer shall have the right to demand the payment in advance of any fees which such person or officer may be entitled to" in habeas corpus cases. Read together, these provisions support the district court's conclusion that prepayment of fees and costs is not required in postconviction cases.

However, these provisions also indicate that such fees and costs are to be taxed by the court, not completely waived on the basis of the proceeding's being one for habeas or postconviction relief. Section 29-2824 further indicates that the court is to tax fees and costs in habeas (and, accordingly, postconviction) cases "as part of the original costs in the case" when the applicant is held to bail or remanded to custody by the judge and that the costs shall be "taxed to the state, and paid out by the county treasury of the proper county," when the applicant is wholly discharged as a result of the habeas (or postconviction) action.

[4] Neb. Rev. Stat. § 33-106 (Reissue 2004) indicates the mandatory nature of filing fees associated with proceedings brought in the district court. Section 33-106 also enumerates the various fees owed to the clerk of the district court upon the

commencement of a proceeding in district court. We are aware of no provision of law which makes these fees not required in habeas or postconviction proceedings; although the provisions discussed above specify that the fees are to be taxed as costs in habeas (and, accordingly, postconviction) actions and that prepayment cannot be required, they do not suggest that the fees are altogether unrequired.

In the present case, the district court's order properly recognized that prepayment of costs is not required in postconviction proceedings. The court failed, however, to tax those costs upon resolution of the proceeding. The court entered an order denying in forma pauperis status, but did so not on the basis of Jackson's not actually qualifying for in forma pauperis status, but, rather, on the basis of prepayment of costs' not being required. The result of the court's order is that an outstanding statutory obligation to tax costs has been left unresolved.

[5,6] The Nebraska Supreme Court has held that costs are considered part of the judgment and that where an order is appealed from when an issue of costs is unresolved, a portion of the judgment is unresolved and the order from which the appeal is taken is not final. See *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006). Similarly, where the trial court enters an order concerning an aspect of costs but does not enter an underlying judgment, the award of costs is not a final, appealable order. See *id.*

The present case, however, presents a different situation because postconviction proceedings are special proceedings. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Id.* Pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995), an order affecting a substantial right made during a special proceeding is one of the three types of final orders that may be reviewed on appeal. See *State v. Silvers, supra.* A substantial right is an essential legal right, not a mere technical right. *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.*

The order in the present case clearly affected a substantial right. The order held that Jackson's claim was procedurally barred and dismissed his claim entirely. Because the order affected a substantial right and was made in a special proceeding, the order is a final, appealable order under § 25-1902 and is properly reviewed by this court. This is true notwithstanding that the district court has yet to properly comply with the requirements to tax costs, including the statutorily required filing fee, associated with Jackson's second motion for postconviction relief.

2. Denial of Postconviction Relief

With respect to the merits of his appeal, Jackson asserts that the district court erred in denying his second motion for postconviction relief without granting him an evidentiary hearing. He argues that he has "set fourth [sic] several reasons upon which [h]e believed he should be entitled to Postconviction relief." Brief for appellant at 7. Because this is Jackson's second motion for postconviction relief, and because the face of the motion does not show that Jackson is asserting issues which were not available at the time of his prior motion for postconviction relief, we find Jackson's claims to be procedurally barred.

[7] With respect to procedural default, the Nebraska Supreme Court has stated that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006). The Supreme Court has further stated that an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis for relief was not available at the time the movant filed the prior motion. *Id.* The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id.* See, also, § 29-3001.

Jackson's second motion for postconviction relief included a number of allegations about the alleged ineffectiveness of his counsel, as well as allegations of prosecutorial misconduct and allegations concerning the validity of his plea. It is clear from the face of Jackson's second motion that the basis for all of his allegations is alleged conduct by counsel and the prosecutor occurring prior to Jackson's plea to the burglary charge in May

2003. There is nothing on the face of the second motion which affirmatively shows that any of the bases for relief were not available at the time Jackson filed his prior motion for postconviction relief in December 2003. Indeed, the face of the second motion suggests that all bases for relief now being alleged were, in fact, available at the time of the prior motion. As such, it was appropriate for the district court to dismiss the second motion without granting an evidentiary hearing. See *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002).

V. CONCLUSION

We find no merit to Jackson's appeal. Jackson's second motion for postconviction relief was procedurally barred, and the district court did not err in dismissing it without granting an evidentiary hearing.

AFFIRMED.

SACK LUMBER COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. FRANCES E. GOOSIC, APPELLEE.

732 N.W.2d 690

Filed May 8, 2007. No. A-05-621.

1. **Negotiable Instruments: Principal and Surety.** If an instrument is issued for value given for the benefit of a party to the instrument (accommodated party) and another party to the instrument (accommodation party) signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party for accommodation.
2. **Negotiable Instruments: Principal and Surety: Words and Phrases.** An accommodation party is a surety and, by lending its name to the maker of a note, in a sense, guarantees that in the event of default by the principal obligor, the accommodation party will be liable.
3. **Negotiable Instruments: Principal and Surety: Intent.** The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument.
4. **Negotiable Instruments: Principal and Surety.** Whether a person is an accommodation party is a question of fact.
5. **Principal and Surety.** A person receiving only an indirect benefit from a transaction can qualify as an accommodation party.
6. **Legislature: Statutes: Presumptions: Intent.** It will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto.

7. **Judgments: Appeal and Error.** In rendering judgment as the finder of fact, the trial court resolves credibility issues and weighs the evidence in the same manner as a jury, and its factual findings have the same effect as a jury verdict.

Appeal from the District Court for Saline County: PAUL W. KORSLUND, Judge. Affirmed.

Bradley T. Kalkwarf, of Kalkwarf & Smith, for appellant.

Douglas D. DeLair, of DeLair & DeLair, for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

INTRODUCTION

Sack Lumber Company (Sack Lumber) appeals from the judgment of the district court for Saline County, Nebraska, after a bench trial, dismissing Sack Lumber's petition against Frances E. Goosic based upon a promissory note which she signed. We conclude that (1) one who receives only an indirect benefit from a value of a transaction is not disqualified from treatment as an accommodation party and (2) the district court was not clearly wrong when it accorded Frances the status of an accommodation party. We therefore affirm.

BACKGROUND

Donald D. Goosic, Frances' husband, was engaged in business as a building contractor, and under the name of Homestead Builders, Donald maintained an open account with Sack Lumber. Frances' name was not on the account. Donald obtained building materials from Sack Lumber to construct a house on "spec," i.e., without a prearranged purchaser. Donald charged the materials using the Homestead Builders account. Later, Donald "got behind in his payments." In order to sell the house and to induce Sack Lumber to execute a construction lien waiver, on December 30, 1994, Donald and Frances signed a promissory note to Sack Lumber for $43,000, the outstanding balance on the Homestead Builders account. Although Frances had never applied for an account with Sack Lumber, after the signing of the note, Sack Lumber's office manager opened a new account in the names of both Donald and Frances. This account was not a revolving or

open account, but was used merely to account on the books of Sack Lumber for the promissory note.

By its terms, the note was due on October 17, 1995. Donald made payments on the note from October 1995 to October 2000. In approximately March 2001, Donald filed a bankruptcy action. Frances was not listed as a party to Donald's bankruptcy action. Sack Lumber received notice of Donald's bankruptcy. Although the date of Donald's death does not appear in the record, the parties stipulated that Donald is deceased.

In May 2002, Sack Lumber sued Frances, seeking a monetary judgment for the principal and interest due on the promissory note. On January 18, 2005, the matter was tried to the district court without a jury. On April 18, the district court entered its judgment, setting forth extensive findings of fact and legal analysis. We limit our summary to the issue pertinent to this appeal. In that regard, the district court concluded that Frances was an accommodation party and was not liable as a joint maker of the note. The court dismissed Sack Lumber's petition with prejudice. Sack Lumber timely appeals.

ASSIGNMENT OF ERROR

Sack Lumber assigns only that the district court erred in determining that Frances was an accommodation party on the promissory note.

STANDARD OF REVIEW

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. The appellate court does not reweigh the evidence but considers the judgment in a 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. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

At oral argument, counsel for both parties agreed that the determination whether Frances is an accommodation party is

dispositive: If she is, the statute of limitations bars Sack Lumber's claim; if not, Donald's payments on the note tolled the statute and Frances is liable on the instrument. We begin by quoting the statute defining an accommodation party.

[1-4] Neb. U.C.C. § 3-419(a) (Reissue 2001) provides:

> If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation".

An accommodation party is a surety and, by lending its name to the maker of a note, in a sense, guarantees that in the event of default by the principal obligor, the accommodation party will be liable. *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument. *Id.* Whether a person is an accommodation party is a question of fact. *In re Heritage Organization, L.L.C.*, 354 B.R. 407 (N.D. Tex. 2006); § 3-419, comment 3.

Sack Lumber first argues that the district court used the wrong standard to determine whether Frances was an accommodation party, in that the court considered only whether she directly benefited, and not whether she indirectly benefited, by signing the promissory note. Sack Lumber relies upon language from old cases, such as *First Trust Co. v. Anderson*, 135 Neb. 397, 281 N.W. 796 (1938), which stated that one who is to be an accommodation maker of a promissory note must not receive any benefit or consideration directly or indirectly by way of the transaction of which the note was a part and that the transaction must be one primarily for the benefit of the payee. Sack Lumber's reliance on that language is misplaced in light of a subsequent statutory amendment.

[5] In the initial codification of Nebraska's Uniform Commercial Code, the code provision governing an accommodation party did not modify or affect the precode law on this point. See Neb. U.C.C. § 3-415 (Reissue 1964). However, as a result of the 1991 amendments to the Uniform Commercial

Code, providing the definitions of § 3-419(a), quoted above, a person receiving only an indirect benefit from a transaction can qualify as an accommodation party. Comment 1 to § 3-419 recognizes that § 3-419(a) distinguishes between direct and indirect benefits.

[6] It will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). To the extent that the old cases cited by Sack Lumber conflict with the current statute, they are no longer controlling. We now turn to Sack Lumber's principal argument that Frances does not qualify as an accommodation party. Although Sack Lumber argues, in part, that Frances indirectly benefited from the transaction, in light of the controlling legal standard, we disregard that part of its argument.

Sack Lumber mainly contends that Frances does not qualify as an accommodation party because she directly benefited from the transaction. Sack Lumber relies heavily on Frances' statement referring to Homestead Builders as "*our* construction company," which she immediately corrected to "*the* construction company." (Emphasis supplied.) She testified that the use of the word "our" was a slip of the tongue. Frances also testified that she did not think there was any income from Homestead Builders, that she was the one "holding the family together," and that she was "paying the bills out of [her] income." While she admitted that Donald probably had contributed some income to the family over "all these years," she also testified that Donald "made more debt than he made . . . money." Donald and Frances' joint income tax returns for 1999 through 2001 were received into evidence. In each instance, the return shows a loss relating to business income reportable on schedule C.

[7] The district court concluded that Homestead Builders was solely Donald's business, that Donald alone filed for bankruptcy, that Frances did not review the tax returns prepared by Donald, and that even though Frances was a grantor on the deed conveying the "spec" house, Frances had her own job and never used the checking account of Homestead Builders. In rendering judgment as the finder of fact, the trial court resolves credibility

issues and weighs the evidence in the same manner as a jury, and its factual findings have the same effect as a jury verdict. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). Sack Lumber's argument merely invites us to reweigh issues of credibility, which we decline to do.

CONCLUSION

Under current commercial law, one can be an accommodation party where one receives only an indirect benefit of the value given for an instrument. Because competent evidence exists in the record to support the district court's factual finding that Frances was not a direct beneficiary of the value given by Sack Lumber for the instrument, the district court's determination that Frances was an accommodation party was not clearly erroneous. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

IN RE INTEREST OF JESSE D., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JESSE D., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF JUVENILE SERVICES, APPELLANT.

732 N.W.2d 694

Filed May 8, 2007. No. A-06-925.

1. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Juvenile Courts: Time: Notice: Fees: Appeal and Error.** To perfect an appeal from a juvenile court to an appellate court, the appealing party must, within 30 days after the rendition of such judgment, (1) file a notice of appeal with the juvenile court and (2) deposit with the clerk of the juvenile court the docket fee required by law.
3. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.

Appeal from the County Court for Thurston County: DOUGLAS LUEBE, Judge. Appeal dismissed.

Jon Bruning, Attorney General, and B. Gail Steen, Special Assistant Attorney General, for appellant.

Albert E. Maul, Thurston County Attorney, Steven S. Chase, and Raynette Sibert for appellee State of Nebraska.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

INBODY, Chief Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services, Office of Juvenile Services (OJS), appeals from the order of the Thurston County Court, sitting in its capacity as a juvenile court, refusing to terminate jurisdiction over Jesse D. For the reasons set forth herein, we dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

In June 2006, OJS recommended that the Thurston County Court terminate its jurisdiction over Jesse. On July 20, the Thurston County Court denied OJS' request to terminate jurisdiction. The State timely filed its notice of appeal and attempted to pay the docket fee by credit card. However, the Thurston County Court does not have the capability of accepting payments by credit card. A note was included in the transcript from Thurston County's clerk magistrate, which note states, in part:

> [A]n error was made by neglecting to advise . . . Counsel for [OJS] that the Thurston County Court does not have the ability to accept payment of filing fees via credit card . . . .
>
> Upon being advised of said error, the Clerk Magistrate has now collected the filing fee and is re-submitting the . . . clerk's certificate with pleadings to the Nebraska Court of Appeals with this statement of error.

The docket fee was paid on August 24.

ASSIGNMENTS OF ERROR

OJS contends that the county court, sitting in its capacity as a juvenile court, erred in failing to recognize that OJS had discharged the juvenile and in ordering further disposition instead of terminating jurisdiction.

ANALYSIS

[1] Before addressing OJS' assigned errors, we must first consider whether we have jurisdiction over this appeal. It is the

duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

[2] Our statutory law states, and our case law holds, that

> to perfect an appeal from a juvenile court to an appellate court, the appealing party must, within 30 days after the rendition of such judgment, (1) file a notice of appeal with the juvenile court and (2) deposit with the clerk of the juvenile court the docket fee required by law.

In re Interest of Kayla F. et al., 13 Neb. App. 679, 682, 698 N.W.2d 468, 471 (2005). See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006).

Section 25-1912(4) states in part:

> [A]n appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

In the instant case, OJS attempted to pay the required docket fee by credit card, but the Thurston County Court was not equipped to accept credit card payments. "Each county court may accept credit cards as a means of payment for any money due the court" but is not required to do so. Neb. Rev. Stat. § 25-2710 (Reissue 1995). Courts are also not required to accept payment of fees for fax transmissions by credit card. See Neb. Ct. R. for Use of Fax Machines in State Cts. 7 (rev. 2000) ("[a]t the receiving court's option, the fee for a fax transmission may be paid by credit card").

Further, the county court magistrate did not advise OJS that the court did not accept credit cards as payment. However, the magistrate was not required to do so. Neb. Ct. R. for Use of Fax Machines in State Cts. 9 (rev. 2000) provides, in part:

> The sender bears all risk in a fax transmission. Electronic transmission of a document by means of a fax machine does not constitute filing; filing is complete only after the

> receiving clerk's acceptance for filing in compliance with applicable statutes and these rules. . . . Any fax transmission containing an error that prevents filing may be disregarded by a clerk, but shall be retained for 10 days and thereafter disposed of unless within 10 days of the fax transmission the sender shall have requested judicial review of the rejection for filing. If a clerk rejects a filing in a pending proceeding, the clerk's rejection shall be noted on the docket of the court in which the proceeding is pending. A clerk is not required to acknowledge that a fax transmission has been received or accepted for filing.

[3] Although OJS may have believed that payment of the docket fee had been accepted, OJS, as the sender, bore the risk of the fax transmission. Although we have no doubt that OJS acted in good faith in attempting to pay the required docket fee by credit card, there does not exist a "good faith" exception to the requirement of timely payment of the docket fee in order for this court to acquire jurisdiction. "'When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.'" *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 632, 544 N.W.2d 509, 512 (1996) (quoting *Friedman v. State*, 183 Neb. 9, 157 N.W.2d 855 (1968)).

The simple fact is that although OJS attempted to tender payment of the docket fee during the 30 days after the entry of the county court's order, the docket fee was not actually paid until August 24, 2006, which was more than 30 days after entry of the county court's order. Since OJS did not pay the required docket fee within 30 days after the county court's order and said payment is a jurisdictional requirement, this court lacks jurisdiction over this appeal. Consequently, this appeal must be dismissed for lack of jurisdiction.

APPEAL DISMISSED.

ROBERT LEWIS HERTZEL III, BY AND THROUGH ROBIN JOPLIN, HIS MOTHER AND NEXT BEST FRIEND, APPELLANT, V. THE PALMYRA SCHOOL DISTRICT, DISTRICT OR1, APPELLEE.

733 N.W.2d 578

Filed May 15, 2007. No. A-05-711.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
4. ____: ____. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion.
5. **Courts: Schools and School Districts: Negligence.** Nebraska courts treat claims against school districts for lack of supervision as standard negligence actions.
6. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
7. **Schools and School Districts: Negligence.** A school and its employees owe students some duty of care.
8. **Negligence.** The proper standard of care regarding negligent supervision is whether the defendant acted as a reasonably prudent person would in a similar circumstance.
9. **Principal and Agent: Master and Servant: Negligence: Liability.** The law imputes to the principal or master responsibility for the negligent acts of his or her agent or servant done in obedience to the express orders or directions of the master, or within the scope of the employee's authority or employment in the master's business, and if those acts cause injury to third persons, the law holds the principal or master liable therefor.
10. **Negligence: Liability.** Restatement (Second) of Torts §§ 315, 319, and 320 (1965) relate to the duty to control a third person to prevent such person from harming another and, in essence, condition liability upon the actor's knowledge and opportunity to control such third person; however, these sections speak in terms of when the actor knows or should know some information.

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

Mark T. Bestul and Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Randall L. Goyette and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

Robert Lewis Hertzel III, by and through Robin Joplin, his mother and next best friend, appeals from the decision of the district court for Lancaster County which granted summary judgment in favor of the Palmyra School District, District OR1 (PSD). Hertzel's claim was that while he was a kindergartner at Bennet Elementary School, PSD was negligent in failing to protect him from bodily harm caused by another kindergartner, who will be referred to as John Doe to protect his identity, and in failing to control the conduct of John Doe, when PSD knew or should have known that John Doe was likely to cause bodily harm to others if he was not controlled. We find that genuine issues of material facts exist, and we therefore reverse the district court's award of summary judgment and remand the cause for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

During the spring semester of the 1996-97 school year, Hertzel and another student, John Doe, were kindergartners at Bennet Elementary School, part of PSD. There were two alleged incidents of John Doe inappropriately touching Hertzel in the bathroom at school. The first incident allegedly occurred in February or March 1997, and the second incident occurred on the last day of the 1996-97 school year, although such exact date does not appear in our record.

On October 21, 2002, Hertzel filed a petition alleging that in April and May 1997, he was a kindergartner at Bennet Elementary School and was molested by another kindergartner

in the bathroom of the school during the course of regular school hours. Hertzel alleged that a proximate cause of the molestation was the negligence of PSD in failing to properly supervise the students at the elementary school and/or failing to control the student responsible for the molestation. Hertzel alleged that prior to the molestation, PSD knew or should have known that the molesting student was a danger to other students. Hertzel alleged that as a result of the molestation, he suffered and will continue to suffer "disability, mental anguish, pain and suffering and will be caused to incur healthcare expenses."

In its answer filed on November 22, 2002, PSD denied the allegations in Hertzel's petition. Furthermore, PSD alleged that (1) Hertzel failed to state a cause of action; (2) to the extent Hertzel seeks health care expenses or any other form of recovery on behalf of Joplin, Hertzel's mother, such claim is barred by the failure to either timely file a notice as required by the Political Subdivisions Tort Claims Act or comply with the notice requirement of the act; (3) to the extent that Hertzel claims medical bills or any recovery on behalf of Joplin, Hertzel's claim is barred by the statute of limitations; and (4) PSD is immune from liability because (a) the claim is based on a discretionary function as defined in Neb. Rev. Stat. § 13-910(1) (Reissue 1997) and/or (b) the claim arises out of an alleged assault or battery as referred to in § 13-910(7). In its grant of summary judgment, the district court did not address the Political Subdivisions Tort Claims Act, the statute of limitations, or the immunity defenses raised by PSD.

On March 24, 2004, PSD filed a motion for summary judgment alleging that the pleadings, affidavits, and depositions show there are no material issues of fact and that thus, they are entitled to judgment as a matter of law.

A hearing on the motion for summary judgment was held on May 4, 2005. At that hearing, PSD offered into evidence the depositions of John Doe's mother and Joplin and the affidavits of Gail Prokop (the boys' kindergarten teacher) and Dwight Thiemann (the principal at Bennet Elementary School during the 1996-97 school year). All exhibits were received into evidence without objection.

During Joplin's deposition, she testified that John Doe was Hertzel's best friend in kindergarten, although the two boys did not socialize outside of school. In February or March 1997, Hertzel's babysitter told Joplin that Hertzel told her that he had been touched in the bathroom at school on his private area. Joplin testified that she called the school guidance counselor to report the incident and that the counselor told Joplin kids "explore," it was "normal," there was nothing to be worried about, and Joplin should not make an issue out of it. On the last day of school in the spring of 1997, Hertzel's babysitter told Joplin that Hertzel told her John Doe inappropriately touched him again that day at school. Joplin testified that she again called the school and talked to the guidance counselor, who then had her talk to the principal. Joplin was told by the principal that she needed to talk to PSD, because both he and the counselor were no longer going to be working at the school, and that the information would be passed on to the next principal.

Joplin testified that she called Child Protective Services (CPS) after the second incident but that Hertzel would not talk to the CPS worker. CPS had a police officer, a Deputy Kotschwar, come out, and Hertzel did talk to him. Joplin said that Deputy Kotschwar told her that Hertzel said he had been touched on numerous occasions. In Joplin's testimony, she does not say Deputy Kotschwar told her that Hertzel said he was touched by John Doe, although that is certainly implied in her testimony about the conversation with Deputy Kotschwar. Joplin testified that she also called John Doe's mother after the second incident and that John Doe's mother told her John Doe was in counseling for a non-school-related incident. John Doe's mother also told Joplin that John Doe admitted to touching Hertzel. Joplin testified that she had never talked to Hertzel about what happened and that her information came from Hertzel's babysitter and Deputy Kotschwar.

During John Doe's mother's deposition, she testified that John Doe started getting counseling on May 9, 1997, after he initiated some inappropriate contact with his daycare provider's young son. It was after such date that Joplin contacted John Doe's mother about the incident between John Doe and Hertzel. It

was not until after she was contacted by Joplin that John Doe's mother informed the school that John Doe was in counseling.

In the affidavit of Prokop, the kindergarten teacher, she stated:

> 4. At no time prior to the 1996-1997 school year, or during the 1996-1997 school year was it reported to me by any school official, parent, or governmental agency or official or any other person that John Doe had in the past sexually molested children, or had exhibited any behavior which would indicate that he might molest or otherwise have sexually inappropriate contact with other students. In short, at no time before the 1996-1997 school year, or at any time during that school year, were there any facts of any type which put me on notice that John Doe presented a risk of any type to any student.
>
> 5. . . . There was nothing in John Doe's behavior during the 1996-1997 school year which in any way indicated to me that he might abuse children or act inappropriately around them or inappropriately touch them. At no time during the 1996-1997 school year did . . . Hertzel, or any other student, report to me that John Doe had inappropriately touched [Hertzel] or made inappropriate comments, or done anything to indicate that [John Doe] might do so.
>
> 6. The first time I learned that a claim had been made that John Doe had acted inappropriately towards . . . Hertzel did not occur until the start of the 1997-1998 school year when . . . Hertzel's report of inappropriate touching was told to me by Steve Robb, who at the time was the Elementary School Principal with [PSD].

In the affidavit of Thiemann, the Bennet Elementary School principal during the 1996-97 school year, he stated:

> 4. It was not until after the conclusion of the 1996-97 school year in a social setting I heard a rumor that . . . Hertzel had reported to somebody that he had been molested or inappropriately sexually touched by another student. . . .
>
> 5. At no time during the 1996-97 school year was it reported to me by . . . Hertzel, his mother, father, any teacher, administrative official, or governmental worker

or any other person that . . . Hertzel had reported that he had been inappropriately sexually touched by John Doe. Additionally, at no time during the 1996-97 school year was it reported to me by any parent, teacher, administrative official, governmental official or agency or any other person that John Doe had himself been abused, or was at risk of abusing other students.

6. During the term of my employment and still to date, I was not aware of any records or documentation of any type relating to any claims or reports made by . . . Hertzel, nor were there any records of reports in any way relating to any claim that John Doe had molested other students, or was at a risk for doing so.

In its order dated May 16, 2005, the district court granted PSD's motion for summary judgment. Among the district court's findings were the following: (1) Thiemann, the principal at Bennet Elementary School, was unaware of any records or documentation of any type relating to any claims or reports made by Hertzel or relating to any claim that John Doe had inappropriately touched other students or presented a risk for doing so; (2) there was nothing in John Doe's behavior during the 1996-97 school year which indicated to Prokop, the kindergarten teacher, that he might abuse children or act inappropriately around them or inappropriately touch them; (3) John Doe's mother did not notify the school that John Doe was in counseling due to inappropriate behavior (which occurred at his daycare provider's house in April or May 1997) until sometime after she learned of the incident which occurred on the last day of the 1996-97 school year involving her son and Hertzel; (4) at no time during the 1996-97 school year was it reported to Prokop that John Doe had in the past touched other children inappropriately or had exhibited behaviors which would indicate that he might inappropriately touch or otherwise have sexually inappropriate contact with other students; (5) at no time during the 1996-97 school year was it reported to Thiemann by any parent, teacher, administrative official, governmental official or agency, or any other person that John Doe had himself been abused or was at risk of abusing other students; and (6) Thiemann did not become aware of Hertzel's claims of inappropriate touching until after

the conclusion of the 1996-97 school year, and Prokop did not become aware of these claims until the beginning of the 1997-98 school year. The district court concluded:

> While there are facts by which a reasonable fact-finder could conclude that . . . Hertzel was inappropriately touched on one or more occasions during the 1996-1997 school year, there is no evidence that this alleged touching was a result of negligence on the part of [PSD]. . . .
>
> With respect to the issue of controlling John Doe's behavior, there is no evidence which demonstrates that [PSD] knew that John Doe allegedly touched . . . Hertzel until at best the conclusion of the 1996-1997 school year. The State of Nebraska has adopted the Restatement (Second) of Torts §§ 315 and 319 with respect to when there is a duty to control the conduct of a third party. The undisputed evidence here shows that [PSD] did not have knowledge of the necessity to control John Doe's conduct. Therefore, under the Restatement, [PSD] had no duty to exert such control.

Hertzel timely appeals the district court's order.

ASSIGNMENT OF ERROR

Hertzel asserts that the district court erred in sustaining PSD's motion for summary judgment, because genuine issues of material fact exist as to whether PSD was negligent.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

[3,4] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion. *Id.*

[5,6] Nebraska courts treat claims against school districts for lack of supervision as standard negligence actions. See, *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000); *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998). "For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty." *Brown v. Social Settlement Assn.*, 259 Neb. 390, 393, 610 N.W.2d 9, 11 (2000).

[7,8] The Nebraska Supreme Court has held that a school and its employees owe students some duty of care. See, *Norman v. Ogallala Pub. Sch. Dist., supra*; *Johnson v. School Dist. of Millard, supra*. "The proper standard of care regarding negligent supervision is whether the defendant acted as a reasonably prudent person would in a similar circumstance." *Johnson v. School Dist. of Millard*, 253 Neb. at 638, 573 N.W.2d at 119.

Based upon its review of the depositions and the affidavits, the district court found that neither Thiemann nor Prokop knew of the alleged touching incident occurring in February or March 1997, that neither became aware of the second incident until after the school year was over, and that neither was aware during the 1996-97 school year that John Doe was in counseling. We agree that the record is clear with regard to these findings by the district court.

[9] However, the district court's findings, and thus its ultimate conclusion, completely ignore the school guidance counselor's knowledge acquired in February or March 1997 that a touching incident involving Hertzel had occurred in school. The evidence shows that Joplin made such a report, but there is no evidence that the counselor further investigated the report by Joplin or that the counselor informed Thiemann or Prokop of the incident reported to the counselor. According to Joplin, the counselor told Joplin that it was no big deal and not to make an issue of it. Given that "[t]he proper standard of care regarding negligent supervision is whether the defendant acted as a reasonably prudent person would in a similar circumstance," *Johnson v. School Dist. of Millard*, 253 Neb. at 638, 573 N.W.2d at 119, the counselor's knowledge and her apparent inaction after Joplin's report present a material issue of fact which prevents summary judgment. In short, the factual question is whether the counselor's failure to act was reasonable given the school's duty to supervise its students in order to prevent harm to such students. And, because the counselor is an employee and an agent of PSD, any negligence by the counselor is imputed to PSD. The law imputes to the principal or master responsibility for the negligent acts of his or her agent or servant done in obedience to the express orders or directions of the master, or within the scope of the employee's authority or employment in the master's business, and if those acts cause injury to third persons, the law holds the principal or master liable therefor. *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959); *Van Auker v. Steckley's Hybrid Seed Corn Co.*, 143 Neb. 24, 8 N.W.2d 451 (1943). Thus, if the school guidance counselor was negligent, such negligence would be imputed to PSD. Therefore, PSD failed to make a prima facie case that it is entitled to judgment as a matter of law and summary judgment was improper.

[10] While we have found that summary judgment was improper because of a factual issue regarding whether the counselor's failure to take any action upon Joplin's report was reasonable, PSD also argues that it had no duty under the Restatement (Second) of Torts §§ 315, 319, and 320 (1965). These sections relate to the duty to control a third person to prevent such person from harming another and, in essence, condition liability

upon the actor's knowledge and opportunity to control such third person. However, § 320, for example, speaks in terms of when the actor "knows or should know of the necessity and opportunity for exercising such control." And, § 319 speaks of the duty to exercise reasonable care to prevent harm to another when the actor takes control of the third person and "knows or should know [that the third person is] likely to cause bodily harm to others if not controlled." Thus, while the record shows that PSD, the actor in this case, did not know that John Doe was the child molesting Hertzel until after the second incident was reported to Hertzel's babysitter at the end of the school year, it is the "should know" portion of the two Restatement sections which is crucial. Therefore, remembering the standard of review on a grant of summary judgment, the knowledge the counselor acquired in February or March 1997 can be seen as being such that a reasonable person should have known of the threat that John Doe posed to other children—had she investigated. We do not believe that the Restatement envisions no duty when one fails to acquire the precise knowledge necessary to prevent the harm when the necessary knowledge is available, if one seeks it out. Put another way, "ignorance may be bliss," but ignorance is not always a defense, because as the Restatement makes clear, sometimes one "should know." Whether the counselor and, by imputation, PSD should have known that John Doe had molested Hertzel and thus needed to be controlled to prevent further harm is a factual question for trial.

CONCLUSION

For the reasons stated above, we find that summary judgment was improper because genuine issues of material facts exist. We reverse the district court's award of summary judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

OMAHA COLD STORAGE TERMINALS, INC., A NEBRASKA CORPORATION, APPELLEE, V. JOHN PATTERSON, APPELLANT.

733 N.W.2d 219

Filed May 15, 2007. No. A-05-713.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court.
2. **Jury Trials: Words and Phrases.** The plain meaning of "summarily" does not necessitate, in every context, a finding that no jury is allowed.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded for a new trial.

Thomas F. Hoarty, Jr., of Byam & Hoarty, for appellant.

Alan J. Mackiewicz for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

John Patterson appeals from orders of the district court for Douglas County, Nebraska, denying Patterson's request for a jury trial in this action to determine whether Patterson's employment claim was subject to arbitration, and ruling, on the merits of the action, that the parties had not entered into an agreement containing a provision for arbitration. On appeal, Patterson assigns various errors concerning the court's denial of his request for a jury trial and the court's ruling on the merits of the action. Because we find that Patterson was entitled to a jury trial, we reverse, and remand for a new trial.

II. BACKGROUND

Patterson began employment with Omaha Cold Storage Terminals, Inc. (OCST), in 1984. Patterson resigned from OCST approximately 1 year after starting. Patterson returned to OCST, as president, in 1993. When Patterson returned to OCST in 1993, he was hired pursuant to a written employment contract.

In 1998, Patterson and OCST had discussions concerning Patterson's contract. OCST presented Patterson with a new

contract, which Patterson rejected. Patterson then contacted an attorney to draft a new employment contract. In June, an OCST board meeting was held. OCST informed Patterson that his draft of the new employment contract was not acceptable.

According to Patterson, OCST presented him with another proposed employment contract in July 1998. According to Patterson, he then had his attorney review the OCST proposal and draft another proposed employment contract. On July 13, a meeting was held involving Patterson and OCST board members, at which meeting the proposed employment contracts were discussed. The parties dispute exactly what occurred and whether any of the proposed employment contracts were accepted.

Patterson continued as OCST president and continued to be paid a salary and receive bonuses. In April 2004, OCST terminated Patterson's employment.

On August 12, 2004, Patterson filed a claim with the "United States Arbitration and Mediation Association." Patterson alleged that he and OCST had entered into a written employment contract in July 1998, that he had exercised an option to extend the contract in 2003, and that his employment had been wrongfully terminated by OCST. Patterson attached a copy of the alleged employment contract to his claim, which contract includes a provision requiring arbitration "[i]n the event a dispute shall arise between the parties."

On August 23, 2004, OCST filed a complaint in district court. OCST alleged that there did not exist a valid written agreement to submit claims to arbitration. OCST alleged that Patterson had continued to work for OCST without a written employment contract, as an at-will employee, between 1998 and 2004. On August 31, 2004, OCST filed a motion for a temporary stay of the arbitration proceedings.

On September 1, 2004, Patterson filed an answer and counterclaim. Patterson alleged the existence of a written employment contract and the existence of an arbitration provision.

On September 13, 2004, OCST filed an amended complaint which, for purposes of our discussion, is substantially the same as the original complaint. On October 7, Patterson filed an answer to the amended complaint, in which answer he made substantially the same assertions as in his prior answer.

On October 25 and November 24, 2004, the court entered pretrial orders. The November 24 order indicated trial dates of February 16 and 17, 2005.

On February 2, 2005, Patterson filed a motion requesting a jury trial. On February 14, the district court entered an order overruling Patterson's motion. In overruling the motion, the district court cited the following reasons: because Patterson waited until approximately 2 weeks prior to trial to request a jury; because Patterson's requests for arbitration and a jury trial on the issue of whether there existed an agreement to arbitrate were "inconsistent"; and because the gravamen of the case was whether there existed an agreement to arbitrate pursuant to Neb. Rev. Stat. § 25-2603(b) (Cum. Supp. 2006), which provides that the issue "shall be forthwith and summarily tried," which language the court interpreted to mean "'without a jury.'"

A bench trial was held on February 16 and 17, 2005. On April 14, the district court entered an order on the merits of the case, finding that there was no written employment agreement. This appeal followed.

III. ASSIGNMENTS OF ERROR

Patterson has assigned six errors on appeal concerning the district court's denial of his request for a jury trial and concerning the court's finding that there was no written employment agreement. We find that this appeal is disposed of by consideration of Patterson's three assignments of error concerning the court's denial of his request for a jury trial.

IV. ANALYSIS

One of the issues raised by Patterson in this appeal is his assertion that the district court erred in denying his request for a jury trial. We agree, and we find that each basis for the district court's denial of the request was erroneous.

First, we find that the district court erred in denying Patterson's request for a jury trial on the basis that Patterson waited until "approximately two weeks before the trial" to make his request. The district court cited no authority for this basis, OCST has cited no authority on appeal to support this basis, and we are unaware of any authority that suggests that a party waives his

right to a jury trial by not requesting such more than 2 weeks prior to the scheduled trial date.

Second, we find that the district court erred in denying Patterson's request for a jury trial on the basis that Patterson's request for a jury trial was "inconsistent" with his request to have his underlying wrongful termination claim submitted to arbitration. We see nothing inconsistent about Patterson's position that there was a written agreement containing an arbitration clause which required the wrongful termination claim to be decided by an arbiter on one hand and his request to have a jury determine whether such an agreement existed on the other hand. Patterson's position has consistently been simply that the case should be resolved outside of the court setting, through arbitration; OCST brought the issue of whether there existed an employment agreement into court, but Patterson's position concerning arbitration does not preclude him from requesting a jury trial. The district court has cited no authority in support of its position in this regard, OCST has cited no authority in support of the position, and we are aware of no authority in support of the position.

The third, and crucial, basis for the district court's denial of Patterson's request for a jury trial is premised on the court's interpretation of the language of § 25-2603(b) concerning the issue of whether there exists an agreement to arbitrate. While we disagree with the court's interpretation of the phrase "forthwith and summarily tried," we acknowledge this issue is one of first impression. We do not believe this language mandates that the issue is to be tried without a jury.

[1] The meaning of a statute is a question of law. *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007). When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Id.*

Section 25-2603(b) provides:

> On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party.

> If found for the opposing party, the court shall order the parties to proceed to arbitration.

[2] The issue presented is whether this provision, specifically the phrase "shall be forthwith and summarily tried," should be read to mean that a jury trial is unavailable when the question in dispute is whether the parties entered into a contract containing an arbitration provision. We find that the plain meaning of "summarily" does not necessitate, in every context, a finding that no jury is allowed; that comparable language in the federal Arbitration Act does not have such a meaning; and that the nature of the question in dispute favors the allowance of a jury.

The district court relied heavily on the plain meaning of the term "summarily" in § 25-2603(b), noting, "Black's Law Dictionary . . . defines the word 'summary' as follows: 'Short; concise; immediate; preemptory [sic]; offhand; without a jury; provisional; statutory. The term . . . used in connection with legal proceedings means a short, concise, and immediate proceeding.'" See Black's Law Dictionary 1287 (5th ed. 1979). The district court focused upon the "without a jury" portion of the definition in denying Patterson's request for a jury trial.

Black's Law Dictionary 1476 (8th ed. 2004) defines the term "summary," when used as an adjective, as follows: "1. Short; concise <a summary account of the events on March 6>. 2. Without the usual formalities; esp., without a jury <a summary trial>. 3. Immediate; done without delay <the new weapon was put to summary use by the military>." It further indicates that the term "summarily," an adverb, is synonymous with the term "summary." *Id.* Thus, the plain meaning of "summarily" in the statute includes not only such a meaning as "without a jury," but also such meanings as "short [and] concise" or "immediate [and] without delay." See *id.* There is nothing in the statute to indicate that the plain meaning arrived at by the district court was the most appropriate plain meaning.

The federal Arbitration Act, 9 U.S.C. § 1 et seq. (2000 & Supp. IV 2004), provides in § 4 that if the existence of an agreement to arbitrate is in issue, "the court shall proceed summarily to the trial thereof." See, *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148 (5th Cir. 1992); *Allied-Bruce v. Dobson*, 684 So. 2d 102 (Ala. 1995). Section 4 then

specifically provides that a jury trial may be demanded in such a proceeding. See, *Dillard, supra*; *Allied-Bruce, supra.* Although the federal act includes a subsequent specific grant of the right to request a jury, the federal act uses "summarily" concerning the manner in which the existence of an agreement to arbitrate is to be resolved in an almost identical fashion to the Nebraska statute. If "summarily" in this context means "without a jury," then the federal act would, in essence, paradoxically, provide that the issue is to be resolved without a jury, even though the parties can request a jury.

Similarly, even in Nebraska there is statutory authority for a "summary" proceeding to be held in front of a jury. Neb. Rev. Stat. § 25-1155 (Reissue 1995) provides that "[i]n any civil action, the district court may grant a summary jury trial upon the written motion of all parties or their oral motion in court entered upon the record." In this context, in Nebraska statutes, if "summary" means "without a jury," then § 25-1155 would, paradoxically, provide for a jury trial without a jury.

In both of the above contexts, the alternative plain meaning of "summary" and "summarily" as "short and concise" or "immediate and without delay" would be logical and similar to the meaning the terms have in the other statutory contexts noted. That plain meaning would denote that the court is to proceed quickly and without delay to a short and concise trial on the issue of whether the parties entered an agreement including an arbitration provision. The use of "summary" or "summarily" does not mean that the right to a jury is foreclosed.

Reading § 25-2603(b) to allow for a jury determination would further be consistent with consideration of the matters actually at issue in this case. The questions actually raised by OCST and Patterson surrounding whether there existed an agreement were almost uniformly factual determinations. The questions raised by the parties involved what actually transpired at an OCST board meeting, whether the parties signed a written contract in the presence of each other, and whether the parties reached a meeting of the minds—essentially, whether an employment contract existed. These questions have traditionally been considered factual questions. See, *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001); *Kaiser v. Millard Lumber*, 255

Neb. 943, 587 N.W.2d 875 (1999); *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993). Similarly, actions for declaratory judgment which involve questions of fact entitle the parties to a jury trial. *State Farm Mut. Ins. Cos. v. AMCO Ins. Co.*, 9 Neb. App. 872, 621 N.W.2d 553 (2001). See, also, *Buhrmann v. Buhrmann*, 231 Neb. 831, 438 N.W.2d 481 (1989) (fact questions in declaratory judgment action tried and determined as in other civil cases).

Considering all of the above, we find that "summarily" in § 25-2603(b) does not mean that the issue is to be tried without a jury. Rather, it means that the issue is to be tried without delay, in a short and concise manner. Where the issue is entirely factual, as it is in the present case, there is nothing in the statute to suggest that the parties are not entitled to a jury trial.

V. CONCLUSION

Accordingly, Patterson was entitled to a jury trial on the factual issues concerning whether an employment contract was entered by Patterson and OCST. As such, we reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
LEON SANDERS, JR., APPELLANT.

733 N.W.2d 197

Filed March 27, 2007. Nos. A-05-1415, A-06-523.

This opinion has been ordered permanently published by order of the Court of Appeals dated May 2, 2007.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.

3. **Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
4. ____. The factors to be considered in determining the likelihood of mistaken identification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification.
5. **Trial: Identification Procedures: Evidence.** An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures.
6. **Trial: Identification Procedures.** A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint.
7. **Trial: Identification Procedures: Juries.** Discrepancies and errors in identification where there is an adequate foundation are matters for a jury determination.
8. **Trial: Witnesses.** A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder.
9. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
10. ____: ____: ____. Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant.
11. ____: ____: ____. When determining whether the offenses were properly joined, appellate courts in this state undertake a two-stage analysis. First, the appellate court must determine whether the offenses are properly joinable under Neb. Rev. Stat. § 29-2002(1) (Reissue 1995). If two or more offenses are properly joinable, courts must next determine whether joinder would be prejudicial to the defendant.
12. **Trial: Joinder: Proof.** A defendant opposing joinder of charges has the burden of proving that joinder will be prejudicial to the defendant.
13. **Trial: Joinder: Evidence.** A defendant is not prejudiced by the joinder of charges where the evidence relating to both offenses would be admissible in a trial of either offense separately.
14. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
15. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo.
16. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment,

subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.

17. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
18. **Constitutional Law: Warrantless Searches: Motor Vehicles.** The recognized exceptions to the Fourth Amendment's warrant requirement as applied to automobiles include probable cause, exigent circumstances, consent, search incident to arrest, inventory search, and plain view.
19. **Probable Cause: Words and Phrases.** Probable cause means a fair probability that contraband or evidence of a crime will be found.
20. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. Concerning questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
21. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
22. **Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
23. ____: ____. To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.
24. **Confessions: Evidence.** On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury.
25. **Confessions: Evidence: Proof.** To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight.
26. **Confessions.** Whether a confession, statement, or admission was made knowingly, intelligently, and voluntarily depends on the totality of the circumstances.
27. **Confessions: Appeal and Error.** A preliminary determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
28. **Confessions: Intoxication.** The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant.

29. **Confessions: Mental Competency.** Mental illness, like age, education, and intelligence, is a relevant factor in the totality test. However, no per se rule invalidates the volunteered statement of a mentally ill defendant. Such statements are subject to the general rule that a statement freely and voluntarily given without any compelling influences is admissible.
30. **Criminal Law: Trial: Prosecuting Attorneys: Juries.** It is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his or her personal belief in the guilt of the defendant, unless such belief is given as a deduction from evidence.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Franklin E. Miner for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

Leon Sanders, Jr., was convicted of one count of theft by shoplifting and three counts of burglary. He appeals, alleging that the district court for Lancaster County erred in denying his motions to exclude certain evidence from trial and in granting the State's motion for joinder. Sanders further alleges that he was denied the effective assistance of counsel in pretrial proceedings and at trial. We conclude that Sanders' assignments of error lack merit, and we therefore affirm.

II. BACKGROUND

On February 27, 2005, items were stolen from four Lincoln, Nebraska, businesses. The State charged Sanders with burglary and theft in two separate informations, alleging that he was responsible for the February 27 crimes. We briefly summarize the circumstances surrounding each crime.

In the early morning hours of February 27, 2005, a break-in at the U Stop convenience store at 3747 South 27th Street was reported. The glass in the U Stop's front door was broken out. A surveillance tape recorded an individual breaking the glass out of the front door with a rock and showed him stealing cigarettes from the store. The surveillance video also captured footage of

the suspect's vehicle. The suspect was driving a blue, two-door car with what appeared to be an in-transit sticker on the vehicle's back window. After reviewing the surveillance video, an officer with the Lincoln Police Department (LPD) observed that the fourth taillight left of the right side of the vehicle was missing or burned out and determined that the suspect's vehicle was either a late-1980's Buick Somerset or a 1990 or 1991 Buick Skylark.

Village Market at 3211 South 13th Street and Williams Cleaners at 6891 A Street were also burglarized during the early morning hours of February 27, 2005. Glass in the front doors of both businesses was broken out with a rock. Cartons of cigarettes were taken from the Village Market. Gift certificates and some clothing were taken from Williams Cleaners.

A Hy-Vee grocery store was also a target. An individual entered the Hy-Vee at 6919 O Street at approximately 4 a.m. on February 27, 2005, and stole multiple cartons of cigarettes. A Hy-Vee employee on duty during the incident witnessed the theft. This employee, Marlin Pals, gave a description of the suspect and the suspect's vehicle to the police. In response, the police sent out a broadcast for a male of unknown race, standing between 5 feet 9 inches and 6 feet tall and weighing between 180 and 200 pounds. The broadcast indicated that the suspect was driving a 1990's darker Chevrolet four-door car with "in-transits."

On March 19, 2005, two LPD officers located a vehicle that matched the description of the vehicle from the U Stop burglary. They located this vehicle at an apartment complex on Arapahoe Street. After discussing the vehicle's similarities to the vehicle involved in the U Stop burglary, one officer opened the vehicle's left front door and pressed his foot on the brake pedal while the other officer observed the taillights. The observing officer noticed that one taillight was burned out or missing and that it was in the same position as the missing taillight on the vehicle driven by the suspect in the U Stop burglary.

Other LPD officers charged with investigating these crimes created a photographic lineup of possible suspects. A photograph of Sanders was included in the lineup. An officer showed Pals the lineup on March 22, 2005, and Pals identified Sanders as the party responsible for the theft at Hy-Vee.

On May 9, 2005, the State filed an information in the district court for Lancaster County in case No. CR05-308 charging Sanders with theft by shoplifting in violation of Neb. Rev. Stat. § 28-511.01 (Reissue 1995) for taking possession of goods or merchandise of the Hy-Vee located at 6919 O Street on February 27. On August 3, the State filed an information in the district court for Lancaster County in case No. CR05-584 charging Sanders with three counts of burglary under Neb. Rev. Stat. § 28-507 (Reissue 1995) for breaking and entering the respective premises of Village Market, U Stop, and Williams Cleaners.

On August 11, 2005, the State filed a motion to join the cases for trial. On August 12, Sanders filed a motion to sever the various counts in case No. CR05-584 for separate trials. After a hearing on both motions, the district court concluded that the evidence in both cases would be similar and that, "[i]f believed, it displays a series of events which are all tied together by the testimony of a witness, to whom [Sanders] admitted all four offenses." The court concluded that Sanders would not be prejudiced by having all four counts tried together and therefore consolidated the cases for trial.

Sanders filed several evidentiary motions that are relevant to this appeal. He filed a motion to suppress any evidence of identification of him by Pals, including an in-court identification, which motion the court overruled. The court also determined, after a hearing requested by Sanders, that statements made by Sanders to private citizens were made freely, voluntarily, knowingly, and intelligently and were therefore admissible at trial. Finally, during trial, Sanders orally moved to suppress evidence obtained as a result of the warrantless search of his vehicle on March 19, 2005. The court also overruled this motion.

A jury trial was held from September 14 to 22, 2005. The jury returned a verdict of guilty on all counts. A judgment was subsequently entered, and Sanders was sentenced to 1 to 3 years' imprisonment for theft by shoplifting and 2 to 3 years' imprisonment for each count of burglary.

On November 3, 2005, Sanders filed a notice of appeal in each case. However, because Sanders failed to include the required documents with the notice of appeal in case No. CR05-308, an appeal was not docketed in that case. Sanders, with the assistance

of new counsel, filed a motion for postconviction relief, claiming that he was denied effective assistance of counsel because his trial counsel failed to perfect his appeal and caused him to lose the opportunity for appellate review. On April 19, 2006, after an evidentiary hearing was held, the district court granted Sanders' request for a new direct appeal and Sanders was given 30 days from the date of the order to file a direct appeal. On May 3, Sanders filed a notice of appeal in case No. CR05-308.

The two cases have been consolidated on appeal.

III. ASSIGNMENTS OF ERROR

Sanders alleges, consolidated and restated, that the district court erred in (1) denying his motion to suppress an in-court identification of him by Pals; (2) granting the State's motion for joinder and denying his motion to sever the cases for trial; (3) denying his motion to suppress evidence obtained as the result of a warrantless search of his vehicle; and (4) denying him effective assistance of counsel in pretrial proceedings and at trial, because (a) Sanders' trial counsel ignored the importance of whether Sanders' admissions to private citizens were voluntarily made and then, at trial, failed to object to the use of the admissions and (b) during closing arguments, trial counsel failed to object to statements of the prosecutor's opinion regarding Sanders' guilt.

IV. ANALYSIS

1. Motion to Suppress In-Court Identification

In his first assignment of error, Sanders asserts that the district court erred in denying his motion to suppress Pals' in-court identification. In support of this assignment, Sanders argues that Pals "was unsure of his recollection of individuals he saw the night of the theft at the HyVee grocery [and that] Pals did not identify Sanders as the person taking cigarettes in the store, rather, that Sanders was in the store the night of the theft." Brief for appellant at 16. Specifically, Sanders argues that Pals had a limited view of the theft suspect and that his description of the suspect did not match his description of the second person he saw exiting Hy-Vee. Sanders also points out that Pals expressed uncertainty about the suspect's identity and recanted his initial description of the suspect by writing a letter to the police to

change details about his description. Sanders therefore asserts that under the totality of the circumstances, Pals' identification of Sanders was "unnecessarily suggestive and conducive to irreparably mistaken identification." *Id.*

(a) Scope of Review

[1] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

(b) Application of Law to Facts

[2-4] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *Id.* The factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification. *Id.* See, also, *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

[5,6] An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. *Smith, supra.* A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint. *Id.*

[7,8] Discrepancies and errors in identification where there is an adequate foundation are matters for a jury determination. *State v. Evans*, 187 Neb. 474, 192 N.W.2d 145 (1971). A witness'

credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder. *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

At the hearing on Sanders' motion to suppress evidence of identification, Pals testified that during the early morning hours of February 27, 2005, he was working at the Hy-Vee at 6919 O Street. That particular store is open 24 hours a day. He testified that at approximately 4 a.m., he witnessed an individual removing cigarette cartons from a case that was positioned behind the counter of an express lane and placing the cartons into grocery bags. Pals approached the individual and asked the individual what he was doing. The individual responded that he was going to buy $500 worth of cigarettes. Pals testified that during this encounter, he was unable to see the individual's face because the individual always kept his face turned away from Pals. However, he was able to observe that the individual had no hood on, was a male, was wearing "kind of a light green or greenish type shirt and bluish type pants," and had black hair.

According to Pals, once the individual finished gathering cigarettes, he set the bags full of cigarettes on the floor of the express lane and asked Pals where the grocery carts were located. Pals directed him to the carts. After receiving Pals' directions, the individual walked toward the carts, informing Pals that he was going to do more shopping. He left the cigarettes in the express lane. Pals still did not have a chance to see the individual's face up to that point.

While the individual was out of Pals' sight, Pals attempted to watch the bags of cigarettes gathered by the suspect but also continued working. He shampooed a rug near the front of the store. He testified that no other customers were in the store at this time. He next saw the individual when he "encountered him coming from the back." Pals testified that he saw the individual walking toward him and first noticed him when he was about 10 feet away. Pals stated that at this time, the individual "seemed to have a hood on." Pals continued, "[He] looked like his clothes was [sic] pretty much covered by a coat, full-length black coat. And his hood like covered his face like that so I couldn't get too good a look." Pals subsequently clarified that the hood did not

cover the front of the individual's face, but was around his face. Pals then testified that as the individual approached, he was able to see the individual's face. He said that he got a look at the individual's face for "maybe 10, 20 seconds, I don't know, 30, whatever time it took [him] to walk [out of the store]." Pals testified that when he saw the individual, Pals was paying "[v]ery close [attention]" and the lighting in the store was "good."

After the individual exited the store, Pals noticed that the bags of cigarettes were gone. Pals quickly searched for the cigarettes, then exited the store. He asked the individual who had just exited the store where the cigarettes were. That individual responded that he did not have them. Pals testified that it was very dark out that night, but he also said that there was "a nice big light overhead in the parking lot that was lit." He saw the suspect's face, but "at quite a distance" from across the parking lot. The suspect then drove away.

After the suspect left, Pals contacted the police. When the police arrived, Pals gave a description of the suspect. Pals testified that he described the suspect to the police as being 5 feet 10 inches tall and 180 pounds. He further told the police that the suspect was "maybe in his twenties" in age, but could have been in his thirties. He initially thought that the suspect seemed to be African-American, but noted that "later I thought back and thought that wasn't accurate, so I wrote to the chief [of police] and said [the suspect] was awfully light skinned, so I could not say for sure if he was black." He said he did not remember whether the suspect had facial hair.

Pals testified that on March 22, 2005, a police officer showed him a photographic lineup containing photographs of six individuals. Pals identified Sanders in the lineup and told the police officer that Sanders was the individual whom he saw in Hy-Vee on February 27. Pals said that he had no hesitation when he identified Sanders, and when asked how sure he was that Sanders was the individual he saw in the store on the night in question, he responded, "I think close to 100 percent I think." Pals later testified that the officer who showed him the photographs did not suggest any of the photographs to Pals and did not tell him that one of the individuals in the lineup was responsible for the theft. Pals also identified Sanders at the motion to

suppress hearing. He stated that he was "100 percent" sure that Sanders was the individual he encountered in the store.

Officer Jeremy Wilhelm, an officer with the LPD, testified that on February 27, 2005, at approximately 4 a.m., he was called to the Hy-Vee store at 6919 O Street to investigate a theft. Upon his arrival, he met with Pals, and Pals gave him a description of the suspect. According to Wilhelm, Pals described the suspect as a "lighter skinned black man." He also testified that on March 22, he showed Pals a lineup with six numbered photographs on it. After doing so, he instructed Pals to, among other things, "[c]arefully review all photographs before you make any decisions. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hairstyles, beards, and moustaches may be easily changed."

Wilhelm testified that Pals identified Sanders. Wilhelm denied pointing out any photograph in particular to Pals. Wilhelm testified that he was familiar with Sanders, and Wilhelm identified him at the hearing. When asked to describe Sanders at the time of the hearing, Wilhelm described him as "[l]ight skin, black male, beard, long dark curly hair . . . . 165 to 170 [pounds]."

The district court overruled Sanders' motion to suppress Pals' identification, concluding that "the identification procedure was not 'unnecessarily suggestive and conducive to an irreparably mistaken identification.'" The court noted that although Pals had a short time to observe Sanders' face up close in the store, he had additional time to view Sanders in the well-lit parking lot. The court concluded, "There was sufficient observation of [Sanders] by Pals that the identification should be submitted to the jury for its consideration." At trial, Pals identified Sanders as the individual he saw in the Hy-Vee store on the night of the theft.

The district court's findings of fact were not clearly erroneous. There is nothing in the record indicating that the identification procedure used by Wilhelm was "unnecessarily suggestive" or "conducive to an irreparably mistaken identification." *State v. Smith*, 269 Neb. 773, 784, 696 N.W.2d 871, 882 (2005). Both Pals and Wilhelm testified that Wilhelm in no way suggested a particular photograph to Pals. Our review of the lineup reveals

nothing "unduly suggestive" about the presentation of the photographs in the lineup. See *id.*

For the sake of completeness, we also determine that Pals' in-court identification of Sanders was based on Pals' observations of the suspect on the night of the theft and there is nothing to indicate a substantial likelihood of mistaken identity. Pals testified that he saw the individual's face as he walked past Pals and that Pals was paying very close attention at this time. Approximately 1 month passed between the theft and his initial identification of Sanders.

While Pals admitted that at some point after he first described the suspect to the police, he wrote a letter to the chief of police and told him that the suspect's skin was lighter than Pals initially thought, he explained at trial that he wrote the letter to the chief not because his opinion of what he had seen changed, but because he wanted to "just add . . . more details which [he] thought were more accurate with regard to who the suspect might be." He also stated that the suspect's race was not easy to discern. This testimony is supported by Wilhelm's description of Sanders as an African-American who has light skin. Further, Pals testified that he was very certain that the person he identified in the photograph was the individual whom he saw in the Hy-Vee store on the night in question. Any questions regarding discrepancies in Pals' description were to be resolved by the jury. See *State v. Evans*, 187 Neb. 474, 192 N.W.2d 145 (1971). Further, questions about whether Pals' description indicates that more than one customer was in the store during the theft were factual matters to be resolved by the jury. See *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

(c) Resolution

Because the district court's findings were not clearly erroneous, Sanders' first assignment is without merit.

2. JOINDER

In his second assignment of error, Sanders asserts that the district court erred in granting the State's motion for joinder and denying his motion for severance. He argues that joinder

of the cases prejudiced him during trial. He argues specifically that "when . . . Pals testified [about the theft at Hy-Vee and placed Sanders at the Hy-Vee during the early morning hours of February 27, 2005], his testimony improperly bolstered the State's evidence of the burglaries." Brief for appellant at 21. He further argues that Pals' testimony would not have been admissible in a separate trial for the burglaries and that therefore Sanders was prejudiced when these offenses were joined for trial.

The State points out the many similarities between all of the crimes and argues that Sanders failed to establish that he was prejudiced by the joinder. The State argues that because a private citizen testified that Sanders had confessed to her that he committed all of the crimes at issue, "Pals['] identification of Sanders in no way impermissibly prejudiced Sanders." Brief for appellee at 12.

(a) Scope of Review

[9,10] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

(b) Application of Law to Facts

Pursuant to Neb. Rev. Stat. § 29-2002(2) (Reissue 1995), "The court may order two or more indictments, informations, or complaints . . . to be tried together if the offenses could have been joined in a single indictment, information, or complaint . . . ." Two or more offenses may be joined in the same indictment, information, or complaint if the offenses charged are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." § 29-2002(1). However, "[i]f it appears that a defendant . . . would be prejudiced by a joinder of offenses . . . the court may order an election for separate trials . . . ." § 29-2002(3).

[11-13] When determining whether the offenses were properly joined, appellate courts in this state undertake a two-stage analysis. See *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). First, the appellate court must determine whether the offenses are properly joinable under § 29-2002(1). See *State v. Dandridge*, 1 Neb. App. 786, 511 N.W.2d 527 (1993). In the instant case, all of the charges brought against Sanders are similar in nature. Three of the four charges were for stealing cigarettes. In all but one of the offenses, the perpetrator broke into a business by throwing a rock through a glass door or window. All of the offenses were part of a common scheme or plan. They all occurred during the early morning hours of February 27, 2005. A similar vehicle was identified at more than one of the crime scenes. Further, a private citizen testified that Sanders admitted to her that he committed all of the crimes he was charged with and told her that he committed them all in the early morning hours of February 27. Multiple witnesses would be called to testify at both trials had the cases been tried separately. If two or more offenses are properly joinable, courts must next determine whether joinder would be prejudicial to the defendant. See *id.* A defendant opposing joinder of charges has the burden of proving that joinder will be prejudicial to the defendant. *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999). A defendant is not prejudiced by the joinder of charges where the evidence relating to both offenses would be admissible in a trial of either offense separately. *Freeman, supra.* The evidence will be admitted if it is similar to and reasonably related to the offending conduct and is presented in a manner in which the prejudice does not outweigh its probative value. *Id.*

Pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. Evidence of other crimes may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative

value in determining the accused's guilt of the offense in question. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992). It is within the discretion of the trial court to determine the admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion. *Freeman, supra.*

Sanders was not prejudiced by joinder of the two cases for trial. Sanders argues that he was prejudiced in the burglary case by Pals' identification of Sanders as the individual in the Hy-Vee store the night the crimes were perpetrated. However, we determine that Pals' identification of Sanders would have been admissible at a separate trial on the burglary charges to establish a method of operation, opportunity, and a common plan. Pals' identification of Sanders would be admissible to show that Sanders was potentially involved in a very similar crime that occurred during the same timeframe as the burglaries and would therefore have probative value. See *Timmerman, supra.*

(c) Resolution

Because the trial court did not abuse its discretion by joining the cases for trial and Sanders was not prejudiced by joinder of the cases, this assignment is without merit.

3. Motion to Suppress Evidence Seized From Sanders' Vehicle

Sanders argues that the district court erred in denying his motion to suppress evidence discovered during a warrantless search of his vehicle. Sanders argues that the circumstances surrounding the search do not provide grounds for the application of an exception to the warrant requirement. He argues specifically that the officers lacked probable cause to conduct the search and that the evidence sought during the search was "not readily destroyable, thereby eliminating any reason time to obtain a warrant would impede an investigation." Brief for appellant at 26.

The State responds with two arguments. First, the State argues that Sanders waived the right to object on Fourth Amendment grounds to the admission of evidence obtained during the search. The State argues that because Sanders did not object on Fourth

Amendment grounds to testimony offered at trial that an investigating officer entered Sanders' vehicle and pressed on its brake pedal, the defense waived the right to object to the offer of any evidence discovered during the warrantless search of Sanders' vehicle. Second, the State argues that the officers had probable cause to search Sanders' vehicle.

(a) Scope of Review

[14,15] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Scovill*, 9 Neb. App. 118, 608 N.W.2d 623 (2000). A trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. *Id.*

(b) Application of Law to Facts

On March 19, 2005, Officers Timothy Cronin and Tracy Graham were on duty. Their shift began at 11 p.m. the previous evening and continued until 7 a.m. on the 19th. During their shift, they went to an apartment complex on Arapahoe Street (hereinafter the Arapahoe address) to execute a warrant for Sanders' arrest on charges unrelated to those at issue on this appeal. While at the Arapahoe address, they observed a vehicle that they believed was the vehicle that was being sought in connection with the U Stop burglary (the U Stop vehicle). To determine whether the vehicle was the same, Graham observed the vehicle's taillights while Cronin pressed his foot on the vehicle's brake pedal. Graham observed that one taillight was missing or burned out. It was later discovered that this vehicle belonged to Sanders.

At trial, Cronin testified that he had seen a photograph of the U Stop vehicle before he went on duty on March 18 and was therefore familiar with its characteristics. He testified that the vehicle he observed at the Arapahoe address matched the

description of the U Stop vehicle. He described the vehicle he saw at the Arapahoe address as a "Buick Somerset, or similar, taillights strung from one end to the other." He also testified that he saw in-transit stickers and packs of cigarettes lying inside the vehicle.

The prosecutor then asked Cronin how he was able to determine that the vehicle was missing a taillight, to which he responded, "I pressed the brake pedal and . . . Graham was standing behind me." Counsel for Sanders objected to this testimony on grounds that it was hearsay and violated the confrontation clause. The trial court sustained Sanders' objection and struck this testimony.

After both parties finished questioning Cronin, Sanders' counsel argued that the officers' search of Sanders' vehicle violated the Fourth Amendment and requested the court to suppress evidence discovered during the search. The court therefore interrupted the trial to hold a hearing on this issue.

At the hearing, Cronin's testimony greatly overlapped his trial testimony, although he added a few additional details. He testified that the vehicle at the Arapahoe address had "on the bottom portion of the window . . . markings as if in-transits had been there in recent time." He also noted that the vehicle's driver's-side door was not secured and was open.

At the hearing, Graham testified that she was involved in the investigation of the February 27, 2005, break-in at the U Stop and reviewed the surveillance video from that store on the night of the break-in. She said she watched the surveillance video many times in order to obtain a vehicle description. She testified that she suspected that the vehicle at the Arapahoe address was the same vehicle as the one driven by the suspect who burglarized the U Stop, because it had marks from previous in-transit stickers, the color was similar, the taillights extended across the rear of the vehicle, and it was a Buick Somerset. She testified that Cronin tapped the vehicle's brakes and that when he did this, she observed that one taillight did not light up. The position of the unlit taillight was the same as the position of the unlit taillight on the U Stop vehicle.

After this testimony, the trial court overruled Sanders' motion to suppress. The court reasoned that the officers had probable

cause to search the vehicle to determine if the taillight pattern matched the U Stop vehicle's taillight pattern.

We first conclude that Sanders did not waive his right to object to the admission of evidence discovered during the warrantless search of his vehicle. We recognize that if a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991). Objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent. *Id.*

We do not agree with the State that because Sanders did not object on Fourth Amendment grounds to Cronin's testimony that he entered Sanders' vehicle and pressed his foot on the brake pedal, Sanders waived the right to object to the admission of evidence discovered during the officers' search of Sanders' vehicle. Cronin did not offer testimony regarding any evidence discovered as a result of his entry into Sanders' vehicle and the subsequent search for evidence. Therefore, there was nothing to object to at this point. Sanders orally requested that the court suppress any evidence discovered by the officers during their search of Sanders' vehicle. Sanders then objected to Graham's testimony during trial regarding what she observed after Cronin pressed the vehicle's brake pedal. Sanders had not previously waived his right to object to this testimony.

We now turn to the merits of this assignment. Sanders argues that the warrantless search of his vehicle was not justified and that evidence obtained by the State during the search should have been suppressed. The State counters that Cronin and Graham had probable cause to search the vehicle and that, therefore, evidence gathered during the warrantless search was admissible at trial.

[16-18] The Fourth Amendment to the U.S. Constitution protects people against unreasonable searches and seizures by the government. The Nebraska Constitution has a similar provision. See Neb. Const. art. 1, § 7. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.

State v. Voichahoske, 271 Neb. 64, 709 N.W.2d 659 (2006). In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id.*

> "Less rigorous requirements govern searches of automobiles, not only because of the element of mobility, but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. . . . One has a lesser expectation of privacy in a motor vehicle because its function is for transportation purposes and it seldom serves as one's residence or as the repository of personal effects. . . . As such, the recognized exceptions to the Fourth Amendment's warrant requirement as applied to automobiles include probable cause, exigent circumstances, consent, search incident to arrest, inventory search, and plain view."

State v. Scovill, 9 Neb. App. 118, 125, 608 N.W.2d 623, 630 (2000) (citations omitted), quoting *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

When addressing the automobile exception, the U.S. Supreme Court has held:

> Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. . . . More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. . . . If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.

Pennsylvania v. Labron, 518 U.S. 938, 940, 116 S. Ct. 2485, 135 L. Ed. 2d 1031 (1996) (citations omitted).

Since *Labron*, this state's appellate courts have not directly addressed whether the automobile exception allows police to search an unoccupied vehicle parked in a residential area; however, in several cases, the U.S. Court of Appeals for the Eighth Circuit has concluded that such searches are permissible under

the automobile exception. See, *U.S. v. Fladten*, 230 F.3d 1083 (8th Cir. 2000) (unoccupied vehicle in driveway); *Capraro v. Bunt*, 44 F.3d 690 (8th Cir. 1995) (truck parked in defendant's driveway). In light of these decisions, we conclude that the automobile exception applies in the instant case. Sanders' vehicle was readily mobile. The officers' search was permissible under the Fourth Amendment even though they did not have a search warrant, as long as the officers had probable cause to believe that the search would uncover evidence of a crime.

[19] Probable cause means a fair probability that contraband or evidence of a crime will be found. *Konfrst, supra*. While probable cause escapes precise definition, we determine probable cause by an objective standard of reasonableness: whether the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime will be found. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

The officers had probable cause to enter the vehicle in question to investigate whether all of its taillights were working. Cronin and Graham testified that Sanders' vehicle captured their attention because it looked very similar to the vehicle involved in the burglary at the U Stop. Sanders' vehicle and the U Stop vehicle shared many similar traits. Several very distinctive characteristics linked the two vehicles: (1) They both had taillights extending across the rear of the vehicle, and (2) the U Stop vehicle had an in-transit sticker on its back window and Sanders' vehicle had marks on its windows indicating that in-transit stickers had been recently removed and had in-transit stickers lying inside it. Further, Cronin testified that from looking through the window of Sanders' vehicle, he saw packs of cigarettes. At least one pack he saw was a brand of cigarettes that had been stolen from the U Stop. These facts and circumstances were sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of crime would be found in Sanders' vehicle. See *Voichahoske, supra*.

We also recall that the driver's-side door to Sanders' vehicle was unlocked and was in fact open approximately 1 inch. This fact reinforces our conclusion that the officers did not need a search warrant to enter the vehicle. Sanders' failure to secure

his vehicle further diminished any expectation of privacy he may have had relating to his vehicle. See *U.S. v. Gillis*, 358 F.3d 386 (6th Cir. 2004) (no reasonable expectation of privacy in vehicle that was unlocked and missing several windows).

(c) Resolution

Because the officers had probable cause to believe that evidence of a crime would be found in Sanders' vehicle, this assignment of error is without merit.

4. Ineffective Assistance of Counsel

In his final assignment of error, Sanders argues that because his trial counsel failed to properly address whether incriminating statements made by Sanders to private citizens were voluntary and, during closing arguments, failed to object to the prosecutor's statements of opinion regarding Sanders' guilt, Sanders was denied effective assistance of counsel.

(a) Scope of Review

[20] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. Concerning questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

(b) Application of Law to Facts

[21] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). In this case, the record is sufficient for us to adequately review this assignment.

[22] To state a claim of ineffective assistance of counsel under *Strickland, supra*, and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). These two prongs may be addressed in either order, but if it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. See *id.* For purposes of this appeal, we assume without deciding that Sanders' counsel's performance was deficient and therefore dispose of this assignment by determining whether Sanders was prejudiced by his counsel's performance.

[23] To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

(i) Voluntariness of Sanders' Statements

On September 9, 2005, at a pretrial hearing, Sanders' counsel orally requested a hearing on whether statements made by Sanders to private citizens were voluntary. A hearing was held on the same day. At the hearing, Tammy Alt testified that on June 7, Sanders made comments to her about "places he had robbed" and told her that that he stole cigarettes. She stated that he "appeared to be drunk" and that "it seemed like he was disoriented in some way." Alice Williams testified that Sanders discussed the Hy-Vee theft with her on two separate occasions. According to Alice, Sanders made comments that "they couldn't prove anything because the clerk that identified him identified him as a Hispanic male . . . . And the clerk was . . . old." Brittany Williams testified that Sanders admitted to her during various conversations he committed all of the crimes he was charged with and that he told her details regarding all four crimes, including that he was driving his Buick Somerset when he committed these crimes.

All of the private citizens were asked by the prosecutor whether, at the time Sanders made incriminating statements, the citizens threatened Sanders or made promises in order to get him to make the statements. Each denied making any threats or promises. Brittany and Alice testified that they did not coerce Sanders into making the statements. Brittany testified that Sanders made the statements voluntarily, freely, and intelligently and seemed to know what he was saying. Alice testified that Sanders understood the conversations when he made the statements. She testified that while he was confused and "[i]n and out" during one conversation, he was consistent when he talked about the Hy-Vee theft.

On cross-examination, Sanders' counsel did not ask these witnesses their opinions regarding Sanders' mental state and did not investigate whether Sanders' mental state affected whether these statements were voluntarily given. He failed to do this despite the fact that Alice and Brittany testified that Sanders was in a mental health facility when he made some of the incriminating statements. The court ruled that Sanders voluntarily made all of the statements.

Sanders argues that his trial counsel dodged the purpose of the hearing by failing to question the witnesses on the issue of Sanders' mental health commitment and that his trial counsel failed to object to the use of Sanders' statements at trial. According to Sanders, these mistakes prejudiced his defense. When questioned by the judge, Sanders' counsel stated that it was not the defense's theory that statements made by Sanders while he was in a mental health center were not voluntary.

[24] On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

[25-27] To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. *State v. Melton*,

239 Neb. 790, 478 N.W.2d 341 (1992). Whether a confession, statement, or admission was made knowingly, intelligently, and voluntarily depends on the totality of the circumstances. *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993). A preliminary determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

[28] The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. *Melton, supra.* A defendant must be so intoxicated that he is unable to understand the meaning of his statements. *Id.*

[29] Mental illness, like age, education, and intelligence, is a relevant factor in the totality test. *State v. Dickson*, 223 Neb. 397, 389 N.W.2d 785 (1986). However, no per se rule invalidates the volunteered statement of a mentally ill defendant. *Id.* Such statements are subject to the general rule that a statement freely and voluntarily given without any compelling influences is admissible. *Id.*

In the instant case, even if Sanders' counsel had more aggressively challenged the voluntary nature of Sanders' statements and objected to their admission at trial, there is no reasonable probability that the district court would have determined that these statements were involuntarily made and would have therefore excluded them. See, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999). During the hearing, each witness testified that she did not coerce or threaten Sanders in order to compel him to make incriminating statements, or make any promises in exchange for the statements. The circumstances surrounding the admissions do not indicate that they were anything but voluntarily made. Further, while Alt testified that Sanders appeared drunk and seemed mentally confused when he spoke to her about the burglaries, nothing in the record indicates that Sanders was so intoxicated that he was unable to understand the meaning of his statements, and Alt noted that Sanders was consistent when talking about the Hy-Vee theft. After considering the totality of the circumstances, we conclude that Sanders was not prejudiced by his trial counsel's performance.

(ii) Prosecutor's Statements of Opinion

In the course of the prosecutor's rebuttal during closing arguments, the prosecutor stated, "The burden of proof is on the State. And the State accepts that. And I believe the State has met that in all these charges." The prosecutor also used the phrase "I submit to you" several times during her rebuttal. Sanders argues that his counsel's failure to object to these statements and request a mistrial prejudiced him.

[30] It is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his or her personal belief in the guilt of the defendant, unless such belief is given as a deduction from evidence. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled in part on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). The remarks of a prosecutor in his or her closing argument which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. See *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

In the instant case, we determine that the prosecutor's statements were conclusions that were predicated upon the evidence. While the prosecutor couched her statements in terms of her beliefs, she was merely making deductions from the evidence. We further find that there is no evidence in the record that her statements misled or unduly influenced the jury. There was ample evidence of Sanders' guilt presented during trial, and the trial court instructed the jury that statements made by attorneys were not to be considered as evidence.

(c) Resolution

Because we conclude that Sanders was not prejudiced by any alleged misconduct by his counsel, this assignment is without merit.

V. CONCLUSION

For the foregoing reasons, we conclude that Sanders' assignments of error lack merit, and we therefore affirm.

AFFIRMED.

TINA L. TRUEBLOOD, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARK L. MAXSON, APPELLEE AND CROSS-APPELLANT, V. MARLA J. ROBERTS, APPELLANT AND CROSS-APPELLEE.

732 N.W.2d 368

Filed May 22, 2007. No. A-05-1084.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments.** A judgment's meaning is determined, as a matter of law, by the contents of the judgment in question.
3. **Divorce: Insurance.** The general rule is that divorce does not affect a beneficiary designation in a life insurance policy.
4. **Divorce: Property Settlement Agreements: Intent.** If a dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect.

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

Thomas R. Lamb, of Anderson, Creager & Wittstruck, P.C., for appellant.

Paula J. Metcalf for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

After Mark L. Maxson and Marla J. Roberts divorced, Maxson died, leaving a life insurance policy naming Roberts as beneficiary. The district court for Lancaster County entered summary judgment against Roberts, requiring her to pay the death-benefit proceeds to Maxson's estate. Roberts appeals, and Tina L. Trueblood, the personal representative of Maxson's estate, cross-appeals. We conclude that the settlement agreement and the decree in the divorce do not show an intention to effect a change in Roberts' status as beneficiary. We reverse, and remand for further proceedings.

BACKGROUND

Maxson and Roberts were married on June 25, 1983. On June 26, 1991, Roberts (who at the time shared Maxson's

surname) filed a petition for divorce. The district court for Lancaster County filed its decree of dissolution on July 23, 1992. The decree incorporated the settlement agreement, and such agreement stated that it constituted a "full, final and complete settlement by [Maxson and Roberts] with respect to all property rights, interests and claims between them." Paragraph 4 of the settlement agreement, which we quote in full in the analysis section below, recited the existence of separate life insurance policies owned by Maxson and Roberts and declared that each party would "retain as [his or her] own separate property [his or her] respective life insurance policy described above and any surrender value accrued thereunder."

Maxson died on December 18, 2003, and Trueblood was subsequently appointed personal representative of Maxson's estate. At the time of Maxson's death, his life insurance policy was in effect, and Roberts remained the policy's named beneficiary. On April 12, 2004, Globe Life & Accident Insurance Co. issued a check for the proceeds of Maxson's policy to "Marla J. Maxson" in the amount of $24,763. However, the check was mailed to the attorney for Maxson's estate. The estate's attorney forwarded the check to Roberts, stating that perhaps she would be "back in touch with [Roberts] if it appears that the estate has a claim" on the life insurance policy. On July 7, the estate's attorney mailed Roberts a letter requesting her to return the insurance proceeds to Maxson's estate, based upon the language of the settlement agreement providing that Maxson would retain his life insurance policy.

On December 23, 2004, Trueblood, as personal representative of Maxson's estate, filed a complaint alleging that the dissolution decree and the settlement agreement between Maxson and Roberts terminated Roberts' rights in Maxson's life insurance benefits and asked that the court order Roberts to pay the estate the sum of $24,763, plus prejudgment interest, attorney fees, and costs. Roberts filed an answer to the complaint, admitting that she was Maxson's former spouse. With respect to paragraph 4 of the settlement agreement, Roberts asserted such agreement manifested the intent that Maxson would have ownership of his life insurance policy and that he would "be able to do with said policy of insurance as he pleased from that date forward."

Trueblood filed a motion for summary judgment. At the hearing on that motion, the district court received into evidence Trueblood's affidavit; the motion for summary judgment; the estate's complaint, which contained the decree of dissolution and the settlement agreement; Roberts' answer; and Roberts' affidavit in opposition to the motion for summary judgment.

In its judgment entered on August 18, 2005, the district court found that the estate was entitled to judgment as a matter of law and ordered Roberts to pay the estate the life insurance proceeds that were previously paid to her. The district court denied the estate's request for prejudgment interest, finding that Roberts did not obtain title to the proceeds by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that therefore, there was no constructive trust. Roberts appeals, and Trueblood cross-appeals.

ASSIGNMENTS OF ERROR

Roberts asserts that the district court erred in granting the motion for summary judgment, because several operative facts are still in dispute, and in finding that the settlement agreement effectively disposed of Roberts' beneficiary interest. On cross-appeal, Trueblood asserts that the district court erred in not applying the constructive receipt doctrine in order to award prejudgment interest.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

[2] A judgment's meaning is determined, as a matter of law, by the contents of the judgment in question. *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995).

ANALYSIS

[3,4] Under Nebraska law, the general rule is that divorce does not affect a beneficiary designation in a life insurance policy. *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312,

647 N.W.2d 85 (2002). This rule is based on the notion that the beneficiary's claim to the proceeds evolves from the terms of the policy rather than the status of the marital relationship. *Id.* But a spouse may waive such a beneficiary interest in a divorce decree. See *id.* See, also, *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005). In *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. at 318, 647 N.W.2d at 89, the Nebraska Supreme Court directs us to focus upon

> the language of the dissolution decree and any agreement which sets forth the intentions of the parties concerning property rights. If the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect. We make no distinction among IRA's, life insurance proceeds, or other types of annuities that designate the beneficiary in the event of the death of the payee.

The question before us, then, is whether the divorce documents in the instant case manifest that intent. Because we find significant differences in the divorce documents in the instant case from those in *Pinkard* and *Strong*, we reject the district court's decision finding such intent.

In *Pinkard*, in addition to language stating that the parties agreed to execute documents necessary to carry out the agreement and that upon failure to do so, the decree would operate as a transfer, the agreement stated:

> "In consideration of the above and foregoing property and promises received, each party agrees to accept the benefit of this Property Settlement Agreement *in full and complete satisfaction of all* financial claims, monetary demands, support, alimony, child support or *property rights of any kind, including* all claims that either may have as the widow or widower of the other party or otherwise; and *all claims which he or she had, now has or might hereinafter have against the other in the event of his or her death as an heir at law, surviving spouse or otherwise*; and each party waives any and all claims which he or she may have in any property now owned by the other or which may hereinafter be acquired by the other, except as hereinabove provided."

264 Neb. at 316, 647 N.W.2d at 88 (emphasis supplied). Based on this language, the court concluded as a matter of law that Pinkard had relinquished her expectancy interest as the beneficiary of the annuity.

In *Strong*, while describing Nebraska law as consistent with its application of federal common law, the Nebraska Supreme Court used the standard from *Pinkard* to determine whether a person had waived a beneficiary interest in a benefit plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). Once again, the court found as a matter of law that the dissolution decree language showed a waiver by the former spouse. The court relied upon language from the decree stating:

> "Each of the parties is awarded the ownership of the . . . personal property of every kind and description now in each party's possession, including bank accounts, automobiles, 401K plans, retirement plans, insurance policies, and other intangible property now possessed by each or owned by each in their separate names . . . .
>
> . . . .
>
> . . . *All property and money received and retained by the parties pursuant hereto, except as specifically provided to the contrary, shall be the separate property of the respective parties, free and clear of any right, interest or claim of the other party* and each party shall have the right to deal with and dispose of his or her separate property, both real and personal as fully and effectively as if the parties had never been married . . . ."

Strong v. Omaha Constr. Indus. Pension Plan, 270 Neb. 1, 12-13, 701 N.W.2d 320, 330 (2005) (emphasis omitted) (emphasis supplied).

As the dissenting opinion in *Strong* pointed out,

> whether a waiver has occurred often depends upon hairline distinctions. For example, in the Eighth Circuit, sometimes the failure to specify an exact interest in an employee benefit plan will result in a finding of no waiver. . . . Yet, sometimes broad, sweeping language means that a waiver was intended. . . . A decree that states a spouse is giving up "any interest" in a plan means no waiver was intended;

> but a decree that states giving up "any interest or claim" equates to a waiver. . . . Similarly, reciprocal language—both spouses giving up any interest in the other spouse's benefit plan—is . . . more indicative of an intent to waive than language in which only one spouse gives up an interest in the other spouse's benefit plan.

Id. at 17-18, 701 N.W.2d at 333 (Connolly, J., dissenting). In our opinion, the decision in the case before us turns upon such a distinction.

In the case before us, the dissolution decree adopted Maxson and Roberts' settlement agreement and directed them to perform its provisions. Both the decree and the settlement agreement contained language directing Maxson and Roberts to sign reasonably required documents to accomplish, respectively, the terms of the decree and the intentions of the agreement and stating that in the event of a failure to comply, the instrument would operate as a transfer. In our view, the only other language from these documents significant to our decision is found in paragraph 4 of the settlement agreement, which states:

> 4. INSURANCE. [Roberts] is the owner of a policy of life insurance on her life issued by Globe Life & Accident Insurance Co., policy number . . . . [Maxson] is the owner of a policy of life insurance on his life issued by Globe Life & Accident Insurance Co., policy number . . . . *Each party shall retain as* [*his or her*] *own separate property* [*his or her*] *respective life insurance policy described above and any surrender value accrued thereunder.*

(Emphasis supplied.)

In comparison to the language from the dissolution decrees considered by the court, respectively, in *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), and *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), the language in the decree in the instant case fails to manifest the intent of Maxson and Roberts to relinquish all property rights. First, it provides that each shall "retain" his or her insurance policy as his or her separate property. Such language, where it speaks only of retaining existing separate property, cannot be construed as giving something up. After the dissolution, Maxson retained full ownership of his policy

and the same incidents of ownership that he possessed prior to the divorce—including the right to designate a beneficiary and to change that designation at will. Second, the agreement contains no language evidencing any waiver or relinquishment by Roberts. Instead, Maxson and Roberts reciprocally agreed to maintain existing separate rights to property. That absence of language stands in stark contrast to the respective wording of the agreements and decrees in *Pinkard* and *Strong*.

Trueblood also argues that paragraph 10 of the settlement agreement supports the district court's decision. That paragraph refers to Neb. Rev. Stat. § 30-2316 (Reissue 1989), which in turn expressly applies only to a surviving spouse's right to elective share, the spouse's right to certain statutory allowances, and the spouse's right to other benefits that would pass to the spouse "by intestate succession or by virtue of the provisions of any will executed before the . . . property settlement." *Id.* Clearly, Roberts did not claim the policy proceeds by asserting a right to elective share or a right to statutory allowances. The death benefit of the insurance policy does not pass by intestate succession or by will; rather, the death benefit is based on the contract rights in the policy. By its terms, the language of the settlement agreement based on § 30-2316 does not apply to the property or interests concerned in the instant case. The settlement agreement does not supply the missing manifestation of intent to relinquish all property rights. Ultimately, the settlement agreement lacks any language that Maxson's intent was that Roberts could not receive the death benefit even if she was the named beneficiary of his life insurance policy.

For these reasons, the district court erred in entering summary judgment for the estate, and we reverse, and remand the matter for further proceedings, remembering that Roberts did not file a cross-motion for summary judgment in her favor. Our conclusion, of course, eliminates any need to discuss Trueblood's cross-appeal asserting that the estate should have received an award of prejudgment interest. We reverse, and remand the cause to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

INBODY, Chief Judge, not participating.

SIEVERS, Judge, concurring.

While I concur in the result reached by my colleagues, I take this opportunity to explain that I view the law on the issue presented in this appeal differently than do my colleagues. My point of departure is that my colleagues apparently read the authority so that the inquiry into the parties' intent is limited to the contents of the divorce decree and/or property settlement. I believe that close scrutiny of the leading Nebraska case, *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), and its main underpinning, *Larsen v. Northwestern Nat. Life Ins.*, 463 N.W.2d 777 (Minn. App. 1990), reveals that the inquiry into intent extends beyond the divorce documents and includes facts and events occurring after the divorce. And, in my view, such facts often are far more revealing of the parties' intent than the language of the divorce decree or property settlement agreement.

The majority opinion has already dissected the *Pinkard* decision in some detail, and thus, I focus on *Larsen v. Northwestern Nat. Life Ins., supra*, given our court's use of the Minnesota Court of Appeals decision. The Minnesota court addressed the question of who was the proper recipient of the proceeds of a life insurance policy following the death of the insured. In *Larsen*, the court explained:

> Ordinarily, marriage dissolution does not affect the right of the named beneficiary. When an insured does not change the beneficiary of his or her life insurance policy after a marriage dissolution, the ex-spouse beneficiary is entitled to the proceeds of the policy upon the death of the insured. This rule is based on the notion that the beneficiary's claim to the proceeds evolves from the terms of the policy rather than the status of the marital relationship. . . .
>
> However, under certain circumstances the ex-spouse beneficiary may have surrendered his or her right by a property settlement, which may or may not have been incorporated into the dissolution decree. . . . "Whether a property settlement agreement should be deemed to bar the [ex-spouse beneficiary's right to the insurance proceeds] is a question of the construction of the agreement itself. Where there is no provision that the effecting of the settlement agreement

> should deprive her of her rights as named beneficiary and she in fact remains named as beneficiary, the settlement agreement will not be given broader scope than its express terms specify."

Id. at 779-80 (citations omitted). In finding that the former spouse in *Larsen* was not entitled to the proceeds of the life insurance policy, the Minnesota Court of Appeals said:

> Although neither the stipulation nor the dissolution decree specifically referred to the beneficiary designation of decedent's life insurance policy, we believe the references in the decree and stipulation granting "*all right, title and interest* [in those life insurance policies covering his or her respective life]" contemplated rights beyond the cash surrender value of the policy or the right merely to receive physical delivery of the policy.

Id. at 780 (emphasis in original).

However, the Minnesota court neither acknowledges nor discusses the fact that the most significant right for a policy owner, often more valued than the cash surrender value, is the right to leave the death benefit to a person or entity of the policy owner's choosing. Notably, in *Larsen*, the divorce documents were completely silent on this point. With all due respect to the Minnesota court, I submit that the court simply made the language of the divorce stipulation that each party was awarded "all right, title and interest" in the policy into a beneficial interest waiver. The Minnesota court did this without explaining how an unmentioned waiver was present and without discussing the obvious fact that finding a waiver may well frustrate the owner's true intent with respect to the death benefit, because the court was effectively voiding a contract—of which the policy's named beneficiary is a third-party beneficiary.

With what I perceive as shortcomings of the *Larsen* decision noted, I find great significance in the fact that the *Larsen* court went well outside the language of the divorce documents by reciting facts that clearly justified the fiction that there was a waiver in the divorce documents. The Minnesota court justified the finding of a waiver in the divorce documents by citing from the record several key pieces of evidence as follows: (1) the wife had inquired of her counsel about changing beneficiary

designations, but was told by her counsel to wait until the dissolution was final; (2) the wife was killed in an automobile accident just 50 days after the entry of the final dissolution decree; and (3) there was evidence that the wife's intent was that in the event of her death, she wanted her property to go to her mother. Thus, I suggest that the Minnesota court's finding of a waiver in *Larsen* was really the result of looking beyond the divorce documents in order to ascertain that the wife's true intent was that her former husband not be her beneficiary and that while saying there was a waiver, the court was in reality simply giving effect to the wife's intent as revealed by collateral facts.

This quite naturally takes me to the *Pinkard* court's admonition that "[e]ach case must be evaluated based upon the facts indicating the parties' intent." *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 318, 647 N.W.2d 85, 89 (2002). This statement, by its terms, does not limit the evaluation of intent to that derived solely from the divorce documents. However, I respectfully note that the quoted admonition can be seen as lacking consistency with another statement from the *Pinkard* opinion, as follows:

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

Id. (emphasis supplied).

Therefore, I respectfully suggest that the *Pinkard* opinion leaves open the question of whether the search for intent is limited to the divorce documents or whether the search can properly extend to collateral facts. However, as said, it is significant that the *Larsen* decision, cited by the *Pinkard* court, obviously considered and used the collateral facts to find that the wife's intent was that her former spouse would not be her policy's beneficiary, even though he was still so named at the time of her untimely and unexpected death.

I briefly note the dissent in *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), a decision

discussed by the majority opinion. Justice Connolly's dissent, in which Justice Stephan joined, disagreed with the majority's decision to adopt the waiver rule instead of relying upon the plan-documents rule. Notably, Justice Connolly summarized the myriad of tests that have been developed for determining whether language in a divorce decree was sufficient to act as a waiver and concluded that "the waiver rule has not resulted in the predicted uniformity, but instead has provided an array of muddled and sometimes contradictory precedents." *Id.* at 18, 701 N.W.2d at 333. Justice Connolly further wrote that he joined the opinion in *Pinkard*, which he said "holds that for non-ERISA investments and insurance policies, a beneficiary interest can be waived in a divorce decree," because of "individual fairness." *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. at 18, 701 N.W.2d at 334.

Therefore, I respectfully submit that current Nebraska precedent set forth in *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002), leaves the question open as to where the courts may properly search for the parties' intent—just the divorce documents or also the collateral facts. As a result, while I agree with my colleagues that the divorce documents in the instant case do not manifest either Maxson's intent that Roberts, his former wife, not be his beneficiary (even if she is named in the policy as beneficiary) or Roberts' waiver of her right to receive the policy proceeds if she is named as beneficiary. However, I would go further than my colleagues and look to the collateral facts, which leave no doubt on this record that Maxson intended that Roberts be his beneficiary. By looking to the divorce documents and the collateral facts, I suggest we achieve an approach to these cases that does not resort to legal fictions by crafting waivers which are not stated in the documents and that instead provides more comfort that the result is more likely to be reflective of what the deceased policy owner truly intended. In searching for the policy owners' real intention, which to me is the decisive factor, we should remember how simple it is to write into the settlement agreement or the decree a provision that each former spouse gives up any claim to the death proceeds, regardless of the policy's beneficiary designation.

In the case before us, when the collateral facts in the record are added to the lack of waiver language in the divorce documents, the result is abundantly clear. Remembering the admonition from the majority opinion in *Pinkard* that "[e]ach case must be evaluated based upon the facts indicating the parties' intent," 264 Neb. at 318, 647 N.W.2d at 89, the key collateral fact here is that Maxson did not in the 11 years after the divorce became final change the named beneficiary on his policy—even though, as the policy owner, he had the right to do so—to effect such a change if that was his intent. From the undisputed facts, viewing them in the light most favorable to Roberts—as I must do on review of a grant of summary judgment—the only reasonable inference is that Maxson's intent was that his named beneficiary, Roberts, his former wife, was to receive the life insurance proceeds upon his death. Therefore, I join in the reversal of the grant of summary judgment to the estate.

STATE OF NEBRASKA, APPELLEE, V.
MARVIN WALKER LOVETTE, APPELLANT.

733 N.W.2d 567

Filed February 20, 2007. No. A-06-281.

This opinion has been ordered permanently published by order of the Court of Appeals dated April 6, 2007.

1. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or court rule.
2. **Pretrial Procedure: Appeal and Error.** Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of the trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.

5. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
6. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
7. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
8. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Following a jury trial in the district court for Hall County, Marvin Walker Lovette was convicted of three counts of first degree sexual assault on a child and one count of child abuse. The district court sentenced Lovette to consecutive terms of imprisonment of 15 to 20 years on each of the sexual assault convictions and a term of imprisonment, also consecutive, of 1 to 2 years on the child abuse conviction. Lovette appeals from his convictions and sentences, assigning as error the court's granting of motions for protective orders, the admission of certain testimony at the hearings on the motions for protective orders, and the admission of certain evidence and the exclusion of other evidence at trial. For the reasons that follow, we affirm Lovette's convictions and sentences.

II. BACKGROUND

1. Circumstances of Crimes

Lovette, born July 30, 1946, was 58 years old at the time of or shortly after the charged offenses. The victim, S.S., born November 15, 1990, was 13 years old at the time of the charged offenses. S.S. met Lovette through an Internet "chat room" prior to the summer of 2004. Lovette did not initially provide his real name to S.S., represented his age as being between 19 and 21, and sent S.S. a picture, which S.S. testified appeared to show a person 19 or 20 years old. S.S. initially represented her age to Lovette as 16 or 17. Lovette and S.S. continued "chatting" over the Internet for several months and also spoke directly by telephone. S.S. testified that she and Lovette spoke by telephone nearly every day, sometimes for hours at a time. S.S. provided Lovette her real name and address and sent Lovette photographs of herself at Lovette's request. S.S. eventually told Lovette her real age. Over the telephone, Lovette told S.S. that he was 41 years old but eventually told her his real age. Lovette sent S.S. another photograph of himself, which photograph purportedly showed Lovette at his then-current age.

Lovette and S.S.' telephone conversations included discussions of sex. S.S. testified that Lovette requested her to engage in sexual activities while they talked on the telephone (phone sex). S.S. testified that this included her penetrating her vagina with her own fingers at Lovette's request. Lovette taped the phone sex conversations between himself and S.S., and these audiotapes were played for the jury at trial and admitted into evidence over Lovette's objections.

S.S. testified that Lovette brought up the idea of meeting in person. S.S. testified as to her understanding that upon meeting, "[Lovette] would be giving me things and we'd have sex." The first meeting between Lovette and S.S. occurred late on a weekend night in the summer of 2004. S.S. testified that she met Lovette on a road a distance from her house. Lovette then drove to a field and asked S.S. to perform oral sex on him, and S.S. did so. S.S. testified that this involved placing Lovette's penis in her mouth. Lovette then drove S.S. to a hotel. Lovette and S.S. entered a hotel room where Lovette had sexual intercourse

with S.S. S.S. testified that this involved Lovette's penetrating her vagina with his penis. S.S. then returned home.

Lovette later asked S.S. to send provocative pictures of herself wearing clothing described by Lovette. S.S. had a female friend take photographs of S.S. wearing the clothing as requested by Lovette. Lovette provided S.S. with the camera used to take the photographs. S.S. had the pictures developed and sent to Lovette.

Lovette's next meeting with S.S. occurred 2 to 3 months after the first meeting. S.S. testified that Lovette called her to make plans for the meeting, which plans were to "have sex and to meet in person again and to — he talked about having wedding proposals that he had." S.S. testified that these proposals were "to say to each other to be kind of like partly married." For the second meeting, S.S. again left her house and met Lovette down the road a short way from her house. Lovette again drove S.S. to a hotel where they "had sex again," which S.S. again described as penetration of her vagina by Lovette's penis. S.S. put on a ring that Lovette had given her during their first meeting, and they read "wedding vows" to one another. S.S. testified that these vows were "words. They had—one had his name on it, and one had my name on it, and it had a date and signature line at the bottom." S.S. signed and dated the wedding vow documents given to her by Lovette. Lovette then drove S.S. back home, at which time S.S.' mother caught S.S. trying to sneak back into her house. At the time, S.S. was carrying gifts given to her by Lovette, including a marijuana joint, a 12-pack of beer, cigarettes, a bottle of whiskey, an "Elmo" doll, two sweaters, two bags of candy, and a candle.

After the second meeting, S.S.' mother took away S.S.' telephone and computer, but S.S. used her mother's telephone to continue talking to Lovette. During those conversations, a third meeting was arranged. S.S. testified that Lovette's plan for the third meeting involved S.S.' putting sleep medication in her mother's food. Lovette told S.S. that he would drop off the sleep medication in her driveway. The sleep medication dropped off by Lovette was retrieved by S.S.' mother, and the present proceedings were initiated.

2. Charges Filed

The State filed an information on May 3, 2005, and an amended information on September 26. In the operative information, the State charged Lovette with three counts of first degree sexual assault on a child in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), a Class II felony. The State also charged Lovette with one count of child abuse in violation of Neb. Rev. Stat. § 28-707(1)(d) (Cum. Supp. 2006), a Class IIIA felony. Specifically, the State alleged in counts I and II of the information that on July 24 or 25, 2004, Lovette, being a person of 19 years of age or older, subjected S.S., a person of less than 16 years of age, to sexual penetration. In count III, the State alleged that Lovette again subjected S.S. to sexual penetration on September 5. In count IV of the information, the State alleged that on or between April 1, 2004, and January 31, 2005, Lovette knowingly and intentionally caused or permitted S.S. to be placed in a situation to be sexually exploited by intentionally encouraging S.S. to engage in debauchery.

3. Pretrial Proceedings

On May 26 and November 22, 2005, the State filed motions for protective orders directing Lovette's attorney and employees of the attorney's office to refrain from providing copies or permanent possession of materials, including certain audiotapes, Internet "chat" transcripts, and photographs seized from Lovette's residence, to Lovette or anyone else. The State's motions were both granted by the district court, and we set forth further details concerning the hearings on those motions and the court's rulings in the analysis section below.

4. Trial

A jury trial was held in this case on January 23, 30, and 31 and February 1, 2006. Testimony was presented from witnesses, including S.S., Lovette, and various police officers involved in investigating these crimes. Items admitted into evidence included audiotapes of phone sex conversations between S.S. and Lovette, which audiotapes were played for the jury, photographs of S.S. and typewritten "wedding vows" signed by S.S. recovered from Lovette's home, Lovette's telephone bill showing numerous calls to S.S., various items given by Lovette

to S.S., and receipts for Lovette's stays in hotels in Nebraska on July 24 and 25 and September 5, 2004. Lovette denied having sex with S.S., but he admitted to having computer "chats" and telephone calls with S.S. beginning in approximately March 2004. Lovette testified that he met S.S. in person on only one occasion at a discount store a week before his July birthday. Lovette's explanation for his trips from Colorado to Nebraska was that he was looking for places to live that were cheaper. Lovette's explanation for the phone sex conversations was that he believed at the time that S.S. was "actually 17 turning 18" and that S.S. "likes it when a man talks dirty, nasty, and filthy to her."

5. Verdicts and Sentencing

On February 1, 2006, the jury returned verdicts of guilty on all counts, which verdicts were accepted by the district court. A presentence investigation report was ordered. On March 7, the court sentenced Lovette to terms of imprisonment of 15 to 20 years on each of the sexual assault convictions and a term of imprisonment of 1 to 2 years on the child abuse conviction. All sentences were ordered to be served consecutively. Lovette subsequently perfected his appeal to this court.

III. ASSIGNMENTS OF ERROR

Lovette asserts that the district court erred in (1) allowing certain testimony at the hearings on the State's motions for protective orders, (2) granting both of the State's motions for protective orders, (3) making the following evidentiary rulings at trial: (a) admitting exhibits 80, 81, and 105 (phone sex audiotapes) into evidence and playing exhibits 80 and 105 for the jury, (b) admitting exhibit 89 (telephone bill), (c) admitting exhibit 86 (envelope with notes), and (d) excluding exhibit 106 (juvenile court documents).

IV. STANDARD OF REVIEW

[1,2] Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or court rule. *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992). Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of the trial court,

whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling. *State v. Phelps, supra.*

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Stark, supra.* The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *Id.*

V. ANALYSIS

1. Motions for Protective Orders

Lovette asserts that the district court erred in allowing certain testimony at the hearings on the State's motions for protective orders and in granting both of those motions.

(a) Hearings on Protective Orders

The district court heard the State's motions on June 1 and December 7, 2005. Similar evidence and arguments were presented at both hearings. The State presented evidence that, if called to testify, certain witnesses would testify about photographs of victims or other sensitive information which had been seized by correctional officers from incarcerated individuals represented by the office of Lovette's attorney some time after the trials of those incarcerated individuals and about one case in which the incarcerated individual had been providing sensitive information to other inmates.

(b) District Court's Rulings

The district court entered an order on June 13, 2005, ruling on the State's first motion for protective order. The court stated that the clear and concise purpose of the criminal discovery statutes of Nebraska, particularly Neb. Rev. Stat. § 29-1912 (Reissue 1995), is to provide the defendant, through discovery, with certain materials which may be in the possession of the

government and which may be material to the preparation of the defense. The court stated that the purpose of § 29-1912 was solely for providing materials which the defense deemed necessary to inspect and copy for preparing for hearings and ultimately trial on the pending charges. The court found that the statute specifically excludes a request if the request is for purposes of harassing, coercing, or possibly placing someone in a situation of bodily harm. The court reviewed the evidence showing that discovery materials given to defendants by Lovette's counsel were still in the possession of those defendants following trial and, in light of the items of evidence addressed in the State's motion, determined that there was a reasonable possibility that specific protections provided by § 29-1912 might not be taken into consideration by defense counsel. The court noted that the State was not requesting that the court deny access to the evidence to Lovette's counsel for trial preparation, but was seeking only a protective order, which request the court found not to be unreasonable. The court observed that the items at issue could be produced to Lovette's counsel for trial preparation without providing unfettered access to the evidence or copies thereof to anyone other than Lovette's counsel. The court then ordered:

> [P]ursuant to § 29-1915 at a date, time and place as stipulated by counsel the [State] shall turn over to defense counsel those items of evidence received pursuant to this Motion. If counsel cannot agree upon a date, time and place and then contact the Court and the Court will order specifics. Upon turning over the items aforementioned defense counsel may make such inspection and copies or photographs of the items as may be necessary in preparation of the defense but shall not surrender any of the items or copies thereof to any person or persons without order of this Court. The term surrender refers to any of the items of evidence being left with any person or persons other than [Lovette's counsel's] office employees and attorneys. This Order shall govern [Lovette's counsel], and all attorneys and employees of that office in Hall County, Nebraska.

The court entered a similar order on December 8, 2005, with regard to the items at issue in the State's second motion for protective order.

(c) Terms and Conditions of Court's Order Were Just

Two statutory provisions are relevant to our analysis of Lovette's first two assignments of error: § 29-1912 and Neb. Rev. Stat. § 29-1915 (Reissue 1995). Section 29-1912 provides in relevant part:

> (1) When a defendant is charged with a felony . . . he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:
>
> . . . .
>
> (f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority.
>
> (2) The court may issue such an order pursuant to the provisions of this section. In the exercise of its judicial discretion the court shall consider among other things whether:
>
> (a) The request is material to the preparation of the defense;
>
> (b) The request is not made primarily for the purpose of harassing the prosecution or its witnesses;
>
> (c) The request, if granted, would not unreasonably delay the trial of the offense and an earlier request by the defendant could not have reasonably been made;
>
> (d) There is no substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense; or
>
> (e) The request, if granted, would not result in the possibility of bodily harm to, or coercion of, witnesses.
>
> (3) Whenever the court refuses to grant an order pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based.
>
> (4) Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him

> or her to make such a showing in the form of a written statement to be inspected by the court alone. The statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

Section 29-1915 provides, "An order issued pursuant to the provisions of sections 29-1912 to 29-1921 shall specify the time, place, and manner of making the inspections and of making copies or photographs and may prescribe such terms and conditions as are just."

Lovette argues that it was error for the district court to receive evidence at the hearings on the State's motions about the actions of others besides Lovette, in other words, about other inmates who had possession of discovery materials produced in other cases. The materials in question from the other cases consisted of an alleged sexual assault victim's medical records, vaginal photographs from a sexual assault medical examination, photographs of an assault victim, and documents containing personal information of corrections officers that an inmate had been providing to other inmates. Lovette's counsel made relevancy objections to the offer of this evidence at the hearings on the State's motions for protective orders. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1995).

The discovery materials at issue in the present case contained sexual content involving minors; the items included photographs of S.S. and of other minor females, some in provocative poses, and the audiotapes of Lovette's phone sex conversations with S.S. The evidence that sensitive discovery items in other cases had been provided to inmates by Lovette's counsel or those in his office and were still in the possession of those inmates after their trials were over is relevant to the question of whether such a result is probable in the present case. Lovette's unrestricted access to the items at issue does not seem appropriate, given the nature of the items and the charges against Lovette. The district court noted that § 29-1912 excludes requests if they are for the purpose of harassing, coercing, or

possibly placing someone in a situation of bodily harm and found, based on the evidence before it, a reasonable possibility that the specific protections provided by § 29-1912 might not be taken into consideration by Lovette's counsel. We cannot say that the district court abused its discretion in making this determination or in entering the orders of June 13 and December 8, 2005. Both orders provided Lovette's counsel and his office full access to the discovery materials at issue for purposes of trial preparation. The orders did not prevent Lovette from having access to the discovery materials in his counsel's presence, and there is no allegation that the orders prevented Lovette from preparing his defense. The terms and conditions of the discovery orders entered by the district court were just, given the facts and circumstances of this particular case. Lovette's assignments of error with regard to the protective orders entered and the evidence received at the hearings on the State's motions for protective orders are without merit.

2. Evidentiary Rulings

Lovette asserts that the district court erred in making certain evidentiary rulings at trial.

(a) Playing and Admission of Phone Sex Audiotapes

Lovette asserts that the district court erred in admitting exhibits 80, 81, and 105 into evidence and in playing exhibits 80 and 105 for the jury after their reception into evidence. Exhibits 80 and 81 are the audiotapes of Lovette's phone sex conversations with S.S., and exhibit 105 is a redacted version of exhibit 81. The audiotapes played for the jury were over 2 hours in length. Lovette objected on the basis of evidence rules and foundation, which objections were overruled. See Neb. Rev. Stat. §§ 27-401 through 27-404 (Reissue 1995). The district court found that this evidence went directly to count IV of the information, the child abuse charge. The court found that the audiotapes were "not evidence of other wrongs or acts or crimes to prove the character of the defendant, to show that he acted in conformity therewith. However, it's evidence of the relationship in this series of events charged between the alleged victim and the defendant." The court's instruction to the jury on the material elements of child abuse included instruction that "Lovette

caused or permitted the minor child S.S. to be placed in a situation to be sexually exploited by allowing, encouraging, or forcing such minor child to solicit for or engage in debauchery." Lovette does not assign any error on appeal to the jury instructions that were given.

In his brief on appeal, Lovette argues, based only on § 27-403, that the audiotapes were cumulative evidence and that receiving the audiotapes into evidence and playing them for the jury was unfairly prejudicial in that it unfairly emphasized for the jury the phone sex that occurred. Section 27-403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[6] It is true that S.S. testified that phone sex conversations occurred. Lovette also confirmed the occurrence of these conversations during his own testimony. Lovette, however, attempted to explain the purpose of the conversations by stating that S.S. liked it "when a man talks dirty, nasty, and filthy to her." Upon cross-examination, Lovette admitted that he heard the audiotapes as they were played in court, agreed that they were "[p]retty much" accurate, that the voices on the audiotapes were those of Lovette and S.S., and that on the audiotapes, Lovette encouraged S.S. to masturbate and to use a bottle to masturbate. Lovette attempted to attack S.S.' credibility throughout the trial and, in his own testimony, presented versions of certain events that differed from those presented by S.S. By listening to the audiotapes, the jury could more accurately judge which version of events was most credible. We cannot say that the district court abused its discretion in admitting the audiotapes into evidence or in allowing them to be played for the jury. Even if the admission and playing of the audiotapes was in error, any such error was harmless. Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005). The admission of the audiotapes into evidence was directed toward the charges found in count IV of

the information. The record contains sufficient properly admitted evidence to support the jury's finding of guilt as to count IV even without the admission of the audiotapes into evidence. Lovette's assignment of error is without merit.

(b) Admission of Lovette's Telephone Bill

Lovette asserts that the district court erred in admitting exhibit 89, his telephone bill, into evidence at trial. Exhibit 89 purports to be Lovette's telephone bill for calls made in November and December 2004 and shows numerous long-distance telephone calls to S.S.' residence. Lovette objected to the admission of exhibit 89 on the grounds of foundation and hearsay, which objections were overruled. On appeal, Lovette argues only that the bill is inadmissible hearsay. As with Lovette's previous assignment of error, any possible error in the admission of exhibit 89 was harmless.

[7,8] In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id.*

There was testimony in this case from both Lovette and S.S. about telephone calls between them and the frequency with which those telephone calls occurred. The occurrence of such telephone calls was also confirmed by the audiotapes of the phone sex conversations. Assuming, without deciding, that the admission of the telephone bill into evidence was erroneous, the actual guilty verdicts rendered in the questioned trial were surely unattributable to any such error. Lovette's assignment of error is without merit.

(c) Admission of Envelope With Handwritten Notes

Lovette asserts that the district court erred in admitting at trial exhibit 86, an envelope recovered from Lovette's home

containing various handwritten notes. At trial, Lovette's foundation and relevance objections to the admission of exhibit 86 were overruled. On appeal, Lovette argues that exhibit 86 was not relevant, stating, "What the handwritten note proves (probative value) remains a mystery." Brief for appellant at 16. The notations on exhibit 86 include the telephone number for one of S.S.' friends, which number is identified elsewhere in the record. S.S. testified that Lovette had the number of S.S.' friend and would sometimes call S.S. at her friend's home. We agree that the notations as a whole on exhibit 86 do not have a high degree of relevancy to the issues at trial; however, any error by the district court in admitting exhibit 86, which has some minimal degree of relevancy to the issues at trial, was harmless. See, *State v. Anderson, supra*; *State v. Freeman, supra*. Lovette's assignment of error is without merit.

(d) Exclusion of Juvenile Court Records

Lovette asserts that the district court erred in excluding exhibit 106, S.S.' juvenile court records, from evidence at trial. Exhibit 106 consists of 11 pages. The first page is the county judge's order, entered on September 19, 2005, releasing S.S. from probation after the term of her probation had expired. The second page is the senior probation officer's application for early termination of probation because of S.S.' successful completion of the terms and conditions of her probation. The remainder of the exhibit shows that S.S. was adjudicated in January 2005 as an uncontrolled juvenile after she threatened her mother in a menacing manner, which allegations were admitted by S.S. The exhibit also shows that in February 2005, S.S. was placed under an order of juvenile probation with standard conditions of probation and the additional requirement of family counseling.

When exhibit 106 was offered into evidence by Lovette, the State objected that it was cumulative, lacked foundation, and also objected on the basis of § 27-404. The district court sustained the State's objections. Immediately prior to Lovette's offer of exhibit 106, proceedings were held outside the presence of the jury, during which the district court indicated, "I don't think it adds anything. It's cumulative, lacks foundation,

and it just restates what's in evidence already. I don't see here anything that's contradictory or disputes or is inconsistent with what's been presented to the jury."

We agree with the district court's determination in this regard. During the cross-examination of S.S., Lovette's counsel questioned S.S. about the juvenile charges that were filed against her, the timing of the juvenile petition in relation to the statements S.S. gave police in the present case, and S.S.' being placed on juvenile probation by the county court, all of which S.S. acknowledged occurred. On redirect examination, S.S. explained that the juvenile charges stemmed from a fight with her mother. S.S. explained that although it was not a physical fight, she did tell her mother that "I was going to hit her if she hit me." S.S. explained that her mother then called the police and S.S. was taken to a youth facility, where she spent the night before going to court. S.S. testified further that she admitted the charges, was allowed to go home with her mother, and had lived with her mother since then. S.S. testified that when she was taken to the youth facility, the police made no promises or threats with regard to seeking information about her relationship with Lovette. S.S. testified that she successfully completed her probation and that her probation officer made no threats with regard to S.S.' telling officers about her relationship with Lovette. During his cross-examination of S.S., Lovette had the opportunity to examine S.S. concerning the juvenile court proceedings and whether those proceedings had any effect on her interactions with the officers investigating the present case. S.S. testified that she was involved in juvenile court proceedings, described the incident that led to those proceedings, and stated that she was placed on probation and that she successfully completed that probation. There is nothing contained in exhibit 106 that would add to or explain further the testimony given by S.S. in this regard. The district court did not abuse its discretion in refusing to admit exhibit 106 into evidence. Lovette's assignment of error is without merit.

VI. CONCLUSION

The district court did not err in receiving certain evidence at the hearings on the State's motions for protective orders or in

granting those motions. Likewise, the court did not err in making the evidentiary rulings complained of by Lovette. Accordingly, we affirm Lovette's convictions and sentences.

AFFIRMED.

SPICER RANCH, A NEBRASKA PARTNERSHIP, APPELLANT, V. LARRY SCHILKE, AN INDIVIDUAL DOING BUSINESS AS MID COUNTY FARMS, AN UNINCORPORATED ENTITY, APPELLEE.

734 N.W.2d 314

Filed May 29, 2007. No. A-05-992.

1. **Summary Judgment**. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
4. ____: ____: ____. The purpose of the inquiry as to whether a party is a real party in interest is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.
6. ____: ____. A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion.
7. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

V. Gene Summerlin and Marnie A. Jensen, of Ogborn, Summerlin & Ogborn, P.C., for appellant.

Jeffrey H. Jacobsen and Justin R. Herrmann, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

Spicer Ranch, a partnership, appeals from the decision of the district court for Chase County which granted summary judgment in Spicer Ranch's favor regarding its negligence claim against Larry Schilke, but granted summary judgment in Schilke's favor on the damages issue. While this appeal involves the proper measure of damages for trees which burned as a result of Schilke's admitted negligence, we ultimately decide that summary judgment on the damages issue was improper, because material issues of fact exist which as a matter of law prevent summary judgment as to damages, and that the trial judge committed plain error in deciding the damage issue.

FACTUAL AND PROCEDURAL BACKGROUND

We start by setting out the lay of the land, so to speak. There is a 4,040-acre piece of property in Chase County which is owned by the Spicer Family Children's Trust, started by David Spicer's father. David and his wife own an additional 667 acres of land, which is contiguous to the 4,040 acres. Spicer Ranch is a partnership of which David is the manager and operator. Spicer Ranch leases the 4,040 acres from the Spicer Family Children's Trust.

In 1999, Schilke, doing business as Mid County Farms, cash-rented a cornfield from David that was part of the 4,040 acres described above. The lease included certain real estate and irrigation equipment located in Chase County. On July 5, an aboveground powerline was placed on such leased property to provide electrical power to the irrigation pivot on the leased property. On November 3, while harvesting corn on the leased

property, Schilke's son, as Schilke's agent or employee, cut the powerline with a combine, resulting in a fire on Schilke's leased property which spread to Spicer Ranch's adjacent property. The fire caused damage to the crops, pasture, fences, and windbreak located on the adjacent Spicer Ranch property. The windbreak encompassed approximately 3 acres, and it had been planted by David and watered with an irrigation system.

On November 2, 2000, Spicer Ranch filed a petition alleging that as a result of the facts set forth above, Schilke was negligent and owed damages to Spicer Ranch. Damages were alleged to be as follows: (1) repair of fire damage to the windbreak at a cost of at least $520,000, (2) loss of use of areas damaged by fire, (3) lost profits and increased cattle deaths due to the absence of the windbreak, and (4) reduction in the market value of the adjacent Spicer Ranch property. In Schilke's answer, he denied the negligence claim.

On June 3, 2005, Schilke filed a motion for partial summary judgment on the issue of damages. Schilke alleged that there is no issue of material fact and that under the law of Nebraska, Spicer Ranch's damages are limited to the difference in market value of its property prior to and following the fire.

On June 16, 2005, Spicer Ranch sought leave to file an amended petition, making the same allegations as in the original petition, but alleging repair of fire damage to the windbreak at a cost of at least $270,098, rather than $520,000 as stated in the original petition. Also on June 16, Spicer Ranch filed its motion for summary judgment alleging that there is no issue of material fact regarding Schilke's negligence. Spicer Ranch further alleged that there is no issue of material fact regarding damages and that under Nebraska law, Spicer Ranch is entitled to receive the replacement cost of the windbreak damaged by Schilke's negligent actions.

In Schilke's answer to the amended petition, he alleged that Spicer Ranch was not the real party in interest in that it was not the owner of the real estate involved in the action. Schilke denied the negligence claim. Schilke further alleged that any damage would be limited to the difference in market value of the adjacent Spicer Ranch property immediately prior to and immediately following the fire.

A hearing on the motions for summary judgment was held on July 12, 2005. At that hearing, Schilke offered into evidence his deposition; the depositions of David, Schilke's son, Thomas Luhrs, and John Widdoss; the report by Luhrs; the reports by Widdoss dated February 17 and November 17, 2004; and the affidavit of Luhrs. Spicer Ranch offered into evidence the deposition of Thomas Wiens, the report by Wiens, and the affidavit of David. The court received all exhibits.

The district court filed a journal entry on August 5, 2005, which granted Spicer Ranch's motion for summary judgment as to Schilke's liability, finding that there were no issues of material fact with regard to the negligence issue—a finding not challenged on appeal. The district court found, however, that Schilke was entitled to summary judgment regarding the measure of damages, finding the proper measure of damages to be the comparison of the "before and after" values of the property. Rather than attempting to summarize the trial judge's reasoning, we set forth the district court's ruling in some detail.

> The Court's ruling is based upon the following facts which are not disputed and which are material:
>
> 1. [Schilke's] negligence caused a fire in an irrigated cornfield, which the defendant [Schilke] cash rented from the plaintiff [Spicer Ranch]. Before the fire was out, it burned a windbreak owned by the plaintiff consisting of red cedar and juniper trees, about five hundred yards from the plaintiff's house up a small hill. The evidence shows that the plaintiff utilized the windbreak in the normal fashion of slowing the wind, providing shelter for cattle, for calving, for horses and for general farm use.
>
> 2. The windbreak was on a tract of farm ground consisting of approximately 110 acres of corn and pastureland.
>
> 3. The plaintiff, the defendants [sic] and defendant's son in depositions all testified about the windbreak and its uses for cattle and horses and the plaintiff, the defendant, and the defendant's son all specifically called the trees a windbreak.
>
> 4. The plaintiff's expert valued the windbreak at replacement costs, determining replacement costs and a loss to the plaintiff of [$]270,098.00 for replacement of the trees.

> 5. The plaintiff[,] in [David's affidavit], discussed the recreational uses for the windbreak and his intentions to use the windbreak for recreational purposes, such as hunting and enjoyment of nature. The windbreak also was intended to be used by the plaintiff's children for school projects such as FFA projects involving the growth of trees in the Chase [C]ounty area. The Court notes parenthetically, that the youngest child of the plaintiff is 25 years old, and the plaintiff is in the farming and ranching business.
>
> 6. The Court further finds and orders that to value the trees on this 110 acre tract at $270,098.00 far exceeds the value of the real estate involved. The irrigated corn ground and pasture were not permanently damaged but there was some loss for the plaintiff for the remainder of that pasture season. The trees included only made up a small percentage of that 110 acre tract and that small percentage of land over a period of years likewise would not be permanently damaged because of the loss of the trees.
>
> 7. The plaintiff argues that the $270,098.00 does not exceed the value of all the real estate owned by the plaintiff. That fact is true and is not disputed, the plaintiff owns some 4,400 acres with a total value of $1,450,000.00, approximately. However, this analysis, using the entire 4,400 acres to show that the $270,098.00 would not exceed the value of the real estate would tend to considerably overvalue the damages suffered by the plaintiff. If the Court just considers the 110[-acre] tract that was damaged by the fire, this would amount to some $2,000.00 per acre for irrigated corn ground that was not permanently damaged, for pastureland that was not permanently damaged and for a very small acreage of trees that were permanently damaged but that can be replanted. The value of the $2,000.00 per acre for the 110 acres of ground is not reasonable and is not an accurate measure of damages.

The court awarded Spicer Ranch $30,000, "which is the highest amount of damages suffered by [Spicer Ranch] according to the before and after damage appraisal."

Spicer Ranch timely appeals the district court's order.

ASSIGNMENTS OF ERROR

Spicer Ranch asserts that the district court erred in (1) concluding that the proper measurement of damages is the "'before and after'" measurement of damages and (2) determining that the replacement cost of the trees exceeded the market value of the property prior to Schilke's negligence.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Real Party in Interest.

[3,4] Schilke argues that Spicer Ranch is not the real party in interest because the land in question is owned by the Spicer Family Children's Trust. Thus, Schilke argues that the district court lacked subject matter jurisdiction to grant summary judgment in favor of Spicer Ranch and to award it money damages. To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995). The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.*

The Spicer Family Children's Trust owned the 4,040 acres of land on which the fire damage occurred. Spicer Ranch leased all 4,040 acres from the Spicer Family Children's Trust—although the lease is not in our record, David's testimony about such is

undisputed. Spicer Ranch in turn leased a portion of the 4,040 acres to Schilke—again the lease is not in our record, so this fact is not controverted. Thus, the undisputed evidence shows that Spicer Ranch was the lessee of all of the land, a small portion of which was then subleased to Schilke. Therefore, Spicer Ranch is liable to the Spicer Family Children's Trust for the damages from the fire. See Neb. Rev. Stat. § 76-1421 (Reissue 2003) (upon termination of tenancy, tenant shall place dwelling unit in as clean condition, excepting ordinary wear and tear, as when tenancy commenced). See, also, *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989). As a result, Spicer Ranch has "a legally protectable interest or right in the controversy that would benefit by the relief to be granted," because it is liable, as a lessee, to the Spicer Family Children's Trust for any damages caused by the fire, and it has a "real interest" in collecting such damages from Schilke. See *Misle v. Misle, supra*. Therefore, Spicer Ranch is a real party in interest and has standing to sue Schilke for damages.

Measure of Damages.

[5,6] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence, showing the existence of a material issue of fact that prevents judgment as a matter of law, shifts to the party opposing the motion. *Id.*

Spicer Ranch asserts that the district court erred in concluding that the proper measurement of damages for the tree windbreak is the "before and after" measurement of damages. In support of that assertion, Spicer Ranch cites to the following proposition in *Keitges v. VanDermeulen*, 240 Neb. 580, 589-90, 483 N.W.2d 137, 143 (1992):

> [I]n an action for compensatory damages for cutting, destroying, and damaging trees and other growth, and for related damage to the land, when the owner of land intends to use the property for residential or recreational purposes according to his personal tastes and wishes, the owner is not limited to the difference in value of the property before and after the damage or to the stumpage or other commercial value of the timber. Instead, he may recover as damages the cost of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible. However, the award for such damage may not exceed the market value of the property immediately preceding the damage.

The district court's implicit rationale for its calculation of damages is that the land was used for the farming business, not for any recreational purposes—apparently because David's youngest child was then 25 years old. The court concluded that the replacement value of the trees exceeded the value of the land, apparently limiting its consideration of the land's value to just the 110 acres involved in the fire rather than the whole 4,000-plus-acre ranch. These findings are found in paragraph 7 of the district court's order quoted above. A close reading of such paragraph shows that it is filled with the trial judge's factual findings and conclusions. However, there is a material issue of fact as to whether the windbreak was used for residential and recreational purposes, as stated in David's affidavit, or whether the windbreak was simply a "normal and average farm windbreak," as could be implied from David's deposition testimony and as stated in the affidavit of Luhrs, a real estate appraiser. The measure of the plaintiff's damages depends upon the evidence presented at trial and might require alternative instructions depending upon the jury's determination of contested factual issues. See *Keitges, supra*. See, also, *Hart v. Chicago & Northwestern R. Co.*, 83 Neb. 652, 120 N.W. 176 (1909) (in suit to recover damages for timber injured by fire, court may decline to instruct jury that measure of damages is difference in value of plaintiff's land before and after fire, where trees have value separate from land). But clearly, the trial judge decided

these issues on a motion for summary judgment, when the real issue on such a motion is whether there is a genuine issue of material fact. See *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000).

[7,8] However, neither party addresses the heart of the problem which we face—that there clearly are issues of fact with respect to how the damaged trees were used, which ultimately affects how damages are calculated. Because a material issue of fact exists, summary judgment with respect to damages was improper. We find that the district court's award of summary judgment with respect to damages was plain error. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Id.*

Even under the "before and after" theory of damages used by the district court, the evidence revealed a range of damages—not just a fixed, undisputed figure of $30,000. Nonetheless, the trial judge made a factual finding when he awarded Spicer Ranch $30,000, "which is the highest amount of damages suffered by [Spicer Ranch] according to the before and after damage appraisal." The trial judge made a factual finding rather than determining whether a material issue of fact existed with respect to damages, which prevents summary judgment on the damage issue. Therefore, we reverse the order awarding $30,000 in damages.

CONCLUSION

We affirm the district court's order with respect to liability, a finding which was not assigned as error on appeal. However, we find that material issues of fact exist which prevent summary judgment with respect to damages. Therefore, we reverse the order awarding $30,000 in damages and remand the cause for further proceedings to determine the amount of damages

suffered by Spicer Ranch as a result of Schilke's undisputed negligence.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HANNON, Judge, Retired, concurring.

I agree with the majority's opinion, except I believe a part of the rule quoted from *Keitges v. VanDermeulen*, 240 Neb. 580, 483 N.W.2d 137 (1992), is not applicable to the case at hand and is misleading when applied to this case. I refer to that part which states, "when the owner of land intends to use the property for residential or recreational purposes." *Id.* at 589, 483 N.W.2d at 143. Insofar as I can learn, this particular part of the rule first appeared in the *Keitges* case. In *Keitges*, the geographic location of the property, the location of the trees on the property, and their origin were such that the trees could have value only if they had value for recreational and residential purposes. The evidence in that case showed there was an indigenous growth of trees and shrubs on the edge of a 10-acre parcel of real estate located in extreme eastern Nebraska. That situation is in no way comparable to a deliberately planted and watered grove of trees near a farmstead on a 4,000-acre ranch in southwestern Nebraska.

The *Keitges* court noted, "One person's unsightly jungle may be another person's enchanted forest." *Id.* The facts in *Keitges* bore out that observation. The defendant, who owned a similarly sized adjacent piece of property, apparently thought nothing of taking a bulldozer and chain saw to the trees. The defendant's evidence was to the effect that the value of the plaintiff's property was not decreased by his destructive action. In *Keitges*, the undisputed evidence was to the effect that the plaintiff intended to build a residence on the property in the future and to enjoy the property as a family retreat for "'nature hikes'" and "'nature study'" in the meantime. 240 Neb. at 590, 483 N.W.2d at 143. The evidence does not indicate that he had any other purposes for the trees. To my mind, on the point I raise, I think the case stands for the proposition that one's lawful use of his or her property is entitled protection from a negligent neighbor even if the neighbor, or even the neighborhood, does not think much of the landowner's use.

The evidence in the case at hand is that Spicer Ranch's trees were planted in the early 1980's and subsequently watered and that they not only sheltered the home but also gave shelter and protection for calving and horse operations. I think anyone familiar with the history of tree claims during pioneer days or the shelterbelts starting in the 1930's knows that trees in outstate Nebraska can be considered either priceless or a detriment, or something in between, depending upon the values and economic interests of the owner.

Since in the past trees could not be readily moved and irrigated, the older cases involving trees did not consider the possibility of replacing damaged and destroyed trees in rural areas. However, those cases did recognize the value of the use the landowner made of the trees and the value the owner placed on them. The landowner's recovery was not limited to the decrease in the value of the real estate. The old cases held that where the trees had no value separate from the land, testimony on the value of the trees with reference to the real estate was admissible. See, *Alberts v. Husenetter*, 77 Neb. 699, 110 N.W. 657 (1906); *Union P. R. Co. v. Murphy*, 76 Neb. 545, 107 N.W. 757 (1906); *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, 84 N.W. 416 (1900). The evidence in these cases was invariably the value the owner and his neighbors placed on the trees as they set on the land.

The old cases involving trees are not helpful on replacement damages, but they do throw some light on what causes trees to have a value separate from the real estate. In *Alberts, supra*, a Brown County case, the court recognized the shortage of natural timber in western Nebraska as well as the value of the landowner's cottonwood and mulberry trees as ornaments and as furnishing shade in the summer and shelter in the winter. Insofar as I can tell, none of these cases attached any significance to recreation or residency as opposed to just farm use. In my opinion, it is common in western Nebraska for shelterbelts to protect farmsteads from the wind, to provide shade, and to add beauty, but shelterbelts located a distance from the farmers' and ranchers' homes are used to shelter animals, both domestic and wild. Some shelterbelts are even used by nonfarm businesses. Such owners are also entitled to protection from tort-feasors.

In my opinion, depending upon the evidence, the rule is that if an owner is using land according to his or her personal tastes and wishes for any lawful purpose, the owner is entitled to recover the reasonable replacement cost and improvement to the extent of the value of the real estate upon which the owner has seen fit to maintain the trees.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT D. MCCULLOCH, APPELLANT.

733 N.W.2d 586

Filed May 29, 2007. No. A-06-275.

1. **Sexual Assault: Juries: Evidence.** In statutory sexual assault cases, a jury may consider the physical appearance of the defendant to determine whether he is of a sufficient age to satisfy the statutory element, if there is other circumstantial evidence presented to support an inference that the defendant is of a sufficient age.
2. **Trial: Juries: Evidence.** It is uniformly the rule that a defendant's physical appearance may be considered by the jury in determining his or her age. However, the jury may not fix the age of the defendant by merely observing him or her during the trial; there must be some other evidence in conjunction with the appearance of the defendant.
3. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
4. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
5. **Double Jeopardy: Convictions: Proof: Appeal and Error.** When a conviction is overturned due to a failure of proof at trial, the prosecution has been given one fair opportunity to offer whatever proof it could assemble.
6. **Convictions: Proof: Appeal and Error.** An appellate reversal of a conviction, when due to a failure of proof at trial, means that the government's case was so lacking that it should not have even been submitted to the jury.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Motion for rehearing sustained. See 15 Neb. App. 381, 727 N.W.2d 717 (2007), for original opinion. Original opinion withdrawn. Reversed and remanded with directions to dismiss.

Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

This matter is before the court on rehearing. We granted the motion for rehearing of the appellant, Robert D. McCulloch, regarding our opinion reported at *State v. McCulloch*, 15 Neb. App. 381, 727 N.W.2d 717 (2007). We withdraw the previous opinion and issue this opinion in its stead.

McCulloch appeals from the decision of the district court for Burt County which, after a jury trial, convicted him of one count of first degree sexual assault. McCulloch's primary claim is that his trial counsel was ineffective by introducing evidence of McCulloch's age when the State's evidence had failed to establish that he was 19 years of age or older, an essential element of the charge against McCulloch. The record shows that the State did not introduce direct evidence of McCulloch's age, and the only sufficient evidence of age was elicited by McCulloch's counsel, both during cross-examination of the State's witnesses and during the defense's case. We find that defense counsel was ineffective and that such ineffectiveness prejudiced McCulloch. Because we find that the State failed to adduce sufficient evidence to support a conviction, we reverse, and remand with directions to dismiss.

II. BACKGROUND

The State alleged that McCulloch had sexually assaulted his niece, P.M., who was born on March 10, 1990. Following a jury trial, the jury found McCulloch guilty of one count of first degree sexual assault:

> McCulloch on or between November 14, 2003 and February 1, 2004 in the county of Burt . . . then and there being did subject P.M. to sexual penetration when [McCulloch was] nineteen years of age or older and [P.M. was] less than sixteen years of age.

The district court sentenced McCulloch to 8 to 15 years' imprisonment with 423 days' credit for time served. No direct appeal was filed.

McCulloch filed a verified motion for postconviction relief alleging that his trial counsel had provided ineffective assistance of counsel by failing to file a direct appeal on McCulloch's behalf. The district court granted McCulloch postconviction relief by way of granting McCulloch the right to file this appeal from his conviction and sentence.

Because the nature of McCulloch's assignments of error requires a discussion of the specific testimony adduced at trial, we will set forth details of that testimony below.

III. ASSIGNMENTS OF ERROR

McCulloch assigns two errors. Because it is dispositive, we will discuss only McCulloch's assignment that he received ineffective assistance of counsel at trial when his counsel elicited testimony tending to prove he was "'nineteen years of age or older'" at the time of the offense.

IV. ANALYSIS

1. Ineffective Assistance of Trial Counsel

McCulloch argues that his trial counsel provided ineffective assistance because counsel "elicited witness testimony tending to prove McCulloch was 'nineteen years of age or older' at the time of the offense." Upon our review of the record, we find that the State failed to produce direct evidence of McCulloch's age and that the only sufficient evidence of age was elicited by defense counsel. We find that this performance was deficient and that such deficient performance prejudiced McCulloch.

The Nebraska Supreme Court has adopted the two-part test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved in part on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). To establish that he or she was denied effective assistance of counsel, a defendant first must show that counsel was deficient, meaning that counsel did not perform at

least as well as a criminal lawyer with ordinary training and skill in the area. See *Strickland v. Washington, supra.* Second, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel by demonstrating with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *id.*

The primary issue to be resolved in this appeal is whether the State adduced sufficient evidence, apart from the testimony elicited by McCulloch's counsel, to prove that McCulloch was at least 19 years of age at the time of the offense. Inasmuch as the State did not adduce any direct evidence of McCulloch's age, that issue requires us to examine the status of Nebraska law concerning the requisite level of circumstantial evidence to prove a defendant's age in statutory sexual assault cases.

[1] Our research indicates only two prior appellate decisions in this jurisdiction directly addressing the issue of what circumstantial evidence of a defendant's age is sufficient to support a conviction for statutory sexual assault. See, *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985) (although direct evidence was also presented); *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978). In both cases, the Nebraska Supreme Court recognized that a jury may consider the physical appearance of the defendant to determine whether he is of a sufficient age to satisfy the statutory element, if there is other circumstantial evidence presented to support an inference that the defendant is of a sufficient age. See *id.*

[2] It is uniformly the rule that a defendant's physical appearance may be considered by the jury in determining his or her age. *State v. Lauritsen, supra.* It has been held, however, that the jury may not fix the age of the defendant by merely observing him or her during the trial; there must be some other evidence in conjunction with the appearance of the defendant. See *id.*

In this case, McCulloch was present in court and was identified by witnesses at trial. For example, P.M. specifically identified McCulloch by "point[ing] him out" to the jury. Therefore, McCulloch's physical appearance was open to view by the jurors, whose attention was unquestionably drawn to him when he was identified during the course of the trial.

Aside from McCulloch's physical appearance, however, the State adduced insufficient additional evidence from which the jury could infer McCulloch's being at least 19 years of age. The State adduced no direct evidence of McCulloch's age. The only circumstantial evidence adduced by the State was evidence that McCulloch was P.M.'s uncle, which evidence is insufficient to allow the jury to infer McCulloch's age.

In *State v. Lauritsen, supra*, the State presented evidence that the defendant had been seen purchasing and drinking beer in a tavern on the day of the alleged crime and that he had purchased alcohol on another occasion. The defendant testified that he had frequented the tavern for 3 or 4 weeks prior to the day of the alleged crime and often went there after work with a fellow employee. The Nebraska Supreme Court noted that at the time, the law required a person to be at least 19 years of age to purchase alcohol. Although the defendant's purchase of alcohol, in and of itself, would not have been sufficient to prove that the defendant was of a particular age, it was relevant to the issue, when combined with the defendant's physical appearance. Other relevant circumstantial evidence on the issue of the defendant's age was that witnesses referred to the defendant as a "'man'" when they identified him and testimony relating to the defendant's membership in the Ku Klux Klan along with evidence that a requirement of membership in the Ku Klux Klan was that a person had to be at least 18 years of age. *Id.* at 820, 261 N.W.2d at 757. The court found that all of this circumstantial evidence, when combined in the jury's consideration with the defendant's physical appearance, was sufficient to support the jury's conclusion that the defendant was at least 18 years of age.

In the present case, the State argues that additional circumstantial evidence was presented which, when combined in the jury's consideration with McCulloch's physical appearance, would support the jury's conclusion that McCulloch was over the age of 19 at the time of the offense. The State argues that P.M. described McCulloch as her "uncle." Brief for appellee at 8. When asked if McCulloch was "one of [her] dad's brothers," P.M. answered in the affirmative, and she answered additional questions about her "uncle" (McCulloch).

In contrast to the evidence presented in *State v. Lauritsen*, 199 Neb. 816, 261 N.W.2d 755 (1978), testimony showing that P.M. identified McCulloch as her uncle is not circumstantial evidence from which the jury could draw logical inferences about McCulloch's age. See *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998) (circumstantial evidence is evidence which, without going directly to prove existence of fact, gives rise to logical inference that such fact exists). The evidence in *State v. Lauritsen, supra*, was circumstantial evidence of the defendant's age because the jury could logically infer from the defendant's having purchased alcohol, which the law required a person to be at least 19 years of age to do, and the defendant's having been in the Ku Klux Klan, which required a person to be at least 18 years of age to join, that the defendant was, in fact, at least 18 years of age. Testimony that McCulloch is P.M.'s uncle does not allow the jury to infer that McCulloch is of any age, because McCulloch could have been of any age and still been "one of [her] dad's brothers." Being P.M.'s uncle does not give rise to a logical inference that McCulloch was at least 19 years of age.

The State adduced no other evidence, direct or circumstantial, to establish McCulloch's age. The only other evidence from which the jury might have made any inference about McCulloch's age was testimony elicited by McCulloch's counsel: evidence that McCulloch had a sexual relationship with P.M.'s mother sometime after 2000, at such a time as P.M.'s mother was old enough to have a 10-year-old daughter; circumstantial evidence that P.M.'s mother was more than 19 years of age at the time of the offense; and direct testimony that McCulloch is 6 years older than his sister, P.M.'s aunt, who was old enough to have children who were 12 and 13 years old at the time of trial.

Our review of the record shows that the State proved with direct evidence McCulloch's having sexually penetrated P.M. and P.M.'s having been less than 16 years of age at the time of the incident, but the State did not adduce sufficient evidence of McCulloch's age to prove that McCulloch was 19 years of age or older at the time of the incident. Because the only evidence sufficient to prove the necessary element of statutory sexual

assault that McCulloch was 19 years of age or older at the time of the incident was elicited by McCulloch's counsel, it was only because of McCulloch's counsel that sufficient evidence was presented to support a conviction. As such, we conclude that McCulloch's counsel performed in a deficient manner and that such deficient performance prejudiced McCulloch.

2. Resolution

Having concluded that there was prejudicial trial error, we must determine whether the Double Jeopardy Clause forbids a retrial of McCulloch. Because we have concluded that the evidence presented by the State was insufficient to support a conviction, we conclude that the Double Jeopardy Clause forbids a retrial.

[3,4] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). In *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered *by the State* and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. See, also, *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

[5,6] When a conviction is overturned due to a failure of proof at trial, the prosecution has been given one fair opportunity to offer whatever proof it could assemble. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Palmer, supra*. Such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. *Burks v. United States, supra*; *State v. Palmer, supra*. Because appellate courts necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. See, *Burks v. United States, supra*; *State v. Palmer, supra*.

Pursuant to *Lockhart v. Nelson, supra*, when considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. *State v. Anderson, supra*. As discussed above, when considering all the evidence presented by the State, we conclude that the State failed to adduce sufficient evidence to support a conviction. Even though evidence elicited by McCulloch's counsel, when considered along with the State's evidence, would have been sufficient to support a conviction, we conclude that the State was given one fair opportunity to prove its case and failed to do so. Because the State failed to produce sufficient evidence to convict McCulloch, the Double Jeopardy Clause prohibits the State from retrying him. See *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995), *overruled on other grounds, State v. Anderson, supra*.

V. CONCLUSION

We conclude that McCulloch's counsel performed in a deficient manner when he elicited the only evidence adduced at trial which would support a jury's determination that McCulloch was 19 years of age or older at the time of the offense, a necessary element of the offense of statutory sexual assault. We find that the State failed to produce sufficient evidence to convict McCulloch at trial and that the Double Jeopardy Clause prohibits the State from retrying him. We therefore reverse, and remand to the district court with directions to dismiss this action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE CHARLES C. WELLS REVOCABLE TRUST. LEE W. WELLS, APPELLEE, V. LARRY D. WELLS, APPELLANT.

734 N.W.2d 323

Filed June 5, 2007. No. A-05-849.

1. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
2. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
6. **Limitations of Actions: Appeal and Error.** The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
7. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the County Court for Buffalo County: GERALD R. JORGENSEN, Judge. Affirmed.

Daniel L. Aschwege and Marsha E. Fangmeyer, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

This is an appeal from an order of the county court for Buffalo County removing Larry D. Wells as cotrustee for the Charles C. Wells Revocable Trust and requiring Larry to account to the trust for his actions while holding the position of

cotrustee. On appeal, Larry asserts that the county court erred in removing Larry as cotrustee and in failing to hold that the action for accounting by the other cotrustee, Lee W. Wells, was barred in part by estoppel, laches, and the statute of limitations. Because we find no error in the county court's decision, we affirm the removal of Larry as cotrustee and the order requiring Larry to provide an accounting.

BACKGROUND

The trust was executed by Charles C. Wells, the father of Larry and Lee, in February 1992. Charles was the sole trustee and income beneficiary of the trust until his death in March 1993. Upon Charles' death, Lee, Larry, and their mother, Irene Wells, became the trust's income beneficiaries and Larry and Lee became cotrustees. Irene passed away in January 2003, leaving Larry and Lee as cotrustees and income beneficiaries. Prior to Charles' death, Larry was a tenant of most of the trust's real property. The trust provides for its termination 15 years after Charles' death or Irene's death, whichever is later, or upon Larry's retirement from active farming after the latter of their deaths. Upon the trust's termination, the real property of the trust is to be divided between Larry and Lee under the terms of the trust agreement. At the time of the trial in this case, Larry was still engaged in active farming of and resided on the trust property.

Lee filed a petition in the county court on July 27, 2004, claiming that Larry had been in possession of residential real property belonging to the trust and had failed to pay rent to the trust or its cotrustees for the use of the property. Lee also alleged that Larry had failed to properly account to Lee for his acts and doings as a cotrustee and a tenant of the farmland and residential property of the trust. Lee alleged that it was impossible for him and Larry to adequately function as cotrustees of the trust. Lee alleged that a conflict of interest arose by virtue of Larry's serving as cotrustee at the same time as he served as a tenant of the property owned by the trust. Lee sought an order from the court removing Larry as cotrustee of the trust and requiring Larry to account for his acts and doings in connection with the affairs and administration of the trust. Lee also sought an order

requiring Larry, as a tenant, to negotiate with the trustees the terms and conditions of the rental agreement or agreements (1) for the year 2004, relating to farmland owned by the trust and farmed by Larry, and (2) relating to residential property owned by the trust and possessed by Larry.

Larry answered, alleging among other things that he and Lee could act as cotrustees and that if anything, Lee should be removed as cotrustee for neglecting the business of the trust. Larry also affirmatively alleged that Lee's action for an accounting was barred by the doctrines of estoppel and laches and the statute of limitations for such actions.

Trial in this case was held on December 17, 2004, and January 25, 2005. We note at the outset that the issue of a rental agreement for the trust farmland for the year 2004 had been resolved prior to trial.

Larry testified about the terms of the trust agreement. When the trust was created in 1992, Charles conveyed certain real and personal property to the trust. The real property originally conveyed to the trust remained in the trust at the time of the December 2004 hearing, but the trust retained none of the originally-conveyed personal property. Upon Charles' death, Larry purchased the trust's personal property, which included machinery, equipment, and livestock, as provided for in the trust. The real estate owned by the trust includes farmland, pasture, a house with a detached garage, certain outbuildings and grain bins, and some Platte River accretion land. Among other things, the trust agreement provided that no part of the trust's property shall be liable for the debts or obligations of any beneficiary, that the trustees may lease the property of the trust to others, and that the trustees may borrow money for any purpose connected with the protection, preservation, or improvement of the trust estate whenever advisable in the trustees' judgment.

Larry testified it was his understanding that he and Lee must act jointly as cotrustees and that neither he nor Lee had the power to do anything separately in connection with the administration of the trust. Larry testified that when Charles died, Larry "treated the trust as [Larry] always treated the trust, as a family unit to be improved and maintained for the benefit of the beneficiaries."

Prior to the creation of the trust, Larry and Charles were partners with respect to both crops and livestock. The partnership utilized the farmland and pasture now owned by the trust. Prior to and after the creation of the trust, Larry and Charles had a crop-share arrangement for the farmland and an equal-division arrangement for the livestock.

In 2003, the farming arrangement shifted to a cash rent lease for both the farmland and the pasture owned by the trust. Larry signed the lease agreements both in his capacity as tenant and in his capacity as cotrustee. Lee also signed as cotrustee. Larry thought that the legal descriptions of real property set forth in the 2003 leases included the land upon which the house, grain bins, outbuildings, and cattle pens are located. Further evidence, particularly a cash rental analysis, indicates that the house, grain bins, outbuildings, and cattle pens were not included in determining the rental value of real property set forth in the 2003 leases. The 2003 leases did not require any additional payments for the use of the house, grain bins, outbuildings, and cattle pens.

Larry has lived in the house on the trust property since 1979. When Larry moved into the house, it was owned by Charles and Irene, and it is now owned by the trust. Larry never paid any rent for the house to Charles or Irene and has never paid any rent to the trust, either while Charles was trustee or since Charles' death. There has never been a lease agreement in place for the house. According to Larry, Charles consented to Larry's residing in the house and having use of the detached garage without payment of rent. Larry has made improvements to the house. Larry testified that his parents were aware of the money and labor Larry and his wife put into remodeling the house. Larry has not provided to Lee any of the underlying bills or contracts relating to the various improvements, but Larry has told Lee about some of those improvements.

When Larry farmed in partnership with Charles, he did not pay Charles any rent for use of the grain bins, cattle pens, or outbuildings on the property. Nor has Larry paid rent to the trust for use of these items. Larry testified that he has placed additional outbuildings and cattle pens and made additions to the grain bins on the property at his own expense. Larry testified

that the house, grain bins, cattle pens, and outbuildings are included in the real property that will be transferred to him upon termination of the trust. Larry testified that he did not feel he should have to pay rent for the house, grain bins, outbuildings, or cattle pens until "such time as [he has] used up the amount of monies that [he] had — and labor that [he] had put into the buildings of [his] own money."

The trust has a single bank account located at the State Bank of Riverdale. Since Charles' death, Larry has received all of the bank statements, canceled checks, and deposit slips in connection with the account. Until March 2003, Larry had possession of the trust's checkbook and wrote almost all of the trust's checks. In March 2003, the signature card at the bank was changed to require the signature of both cotrustees on trust checks. Since that time, all checks drawn on the trust's checking account have been signed by both Larry and Lee. Prior to the change, Larry wrote some checks on the trust account for personal expenses, including a haircut and a personal credit card bill of over $4,000. Those personal expenses were paid by Larry without Lee's knowledge and consent. Larry either reimbursed the trust bank account for those personal expenses or, in one instance, paid for a trust expense with a personal check. Larry testified that he paid for the haircut from the trust account because he simply happened to be carrying the trust checkbook on that particular day. Larry was paid a farm management fee of $5,000 in 1994 and 1995 and of $4,500 in 1996 out of the trust's money without Lee's knowledge or consent.

In April 2004, Larry presented Lee with two checks to sign in connection with the trust for real estate taxes. Larry asked Lee to send the checks to the respective county treasurers for payment of the real estate taxes. Larry became aware that there were insufficient funds in the trust's checking account to cover the two checks, but he did not inform Lee. After the bank called Larry, he deposited personal funds into the trust's checking account to cover the checks. Larry considered the deposit to be part of his rent for 2004. Larry testified that these actions were taken without the knowledge or consent of Lee. Larry agreed that since Charles' death, he had essentially been operating the trust as the

only trustee. Larry did not begin to share copies of tax returns for the trust with Lee until 1996 or 1997. Larry has provided Lee with bank records for the trust's account only "within the last couple of years [before the hearing,] after the lawyers got involved."

Larry testified that since 1993, he has asked Lee on occasion, in his capacity as cotrustee, to join with Larry in borrowing money. Lee has declined to do so on each occasion, telling Larry that he did not believe that it was permitted by the trust agreement. Larry sought legal advice to attempt to persuade Lee that borrowing money on the trust's behalf was appropriate. Larry proceeded to borrow money for the trust on various occasions without Lee's knowledge or consent. A bank employee testified that Lee was asked to sign documents as cotrustee on some of the trust's borrowings, but stated that he "guess[ed]" Lee "just didn't feel like he wanted to sign them." In connection with these prior loans, Larry signed several security agreements in favor of the bank, purporting to act on behalf of the trust and doing so without Lee's knowledge or consent. Larry paid interest to the bank out of the trust's checking account for the loans which he obtained purporting to act on behalf of the trust.

In 2000, Larry sought to have Lee join in the purchase of some cattle by the trust. Lee declined to join in any cattle operation by the trust. Larry proceeded with the purchase and borrowed $26,766.92 on March 8 from the State Bank of Riverdale, purporting to act on behalf of the trust, and wrote a trust check to acquire an interest in the cattle. The purchase was made without the knowledge or consent of Lee.

In August 2003, Larry signed a deed of trust at the request of the State Bank of Riverdale covering real estate owned by the trust, purporting to act on behalf of the trust. Larry did so without Lee's knowledge and consent, and Lee had declined to sign an earlier version of the deed of trust. The deed of trust secured eight promissory notes, all of which were Larry's personal debt, up to a limit of $500,000. Seven promissory notes were still in existence at the time of the December 2004 hearing. At the time the deed of trust was signed, the trust owed no money to the bank. All of the prior loans taken out by Larry purporting to act on behalf of the trust had already been paid.

A bank employee testified that the reason why the bank asked Larry for the deed of trust to the trust property was because the bank was in a "we[a]k collateral position" for Larry's personal obligation with "a loan that [wa]s classified by the regulators." The employee stated that the bank was "trying to get [the loan] off of the classified list and trying to sharpen the bank's collateral" and that "that is the reason for the trust deed." The employee testified that livestock, crops, and equipment were available as collateral for Larry's obligations to the bank, but that neither the bank nor the regulators felt that these were sufficient collateral. The bank filed the trust deed on Larry's "share" of the trust's real property. The bank employee did not have any conversations with Lee about the deed of trust prior to the filing of the deed. Eventually, the employee explained to Lee that the bank was only interested in trust assets that would be Larry's at some point in time. The bank employee testified that he felt Lee was satisfied with this explanation.

Larry provided Lee with very little from an accounting perspective at the beginning of the trust because Larry "was not happy with the type of bookkeeping system" in use. Since about 1996 or 1997, Larry has provided a yearly registry of trust checks along with the income tax documentation of the trust for Lee's review. Larry testified that about a year prior to the hearings in this case, his accountant put together "a complete accounting of the trust at [Lee's] request." A copy of the accounting documentation prepared by Larry's accountant was admitted into evidence as a 70-plus-page document containing an itemization of deposits and checks for the trust account for each year from 1993 through 2003 and reporting beginning balances and ending balances for each year. Larry testified that in terms of the crop-share arrangement with the trust, he had copies of most of the scale tickets or other evidence of crops harvested from the trust's farm ground, together with records showing receipts from the sale of crops, records of various expenses, and canceled personal checks showing reimbursements to the trust account. Larry testified that he understood the trust agreement to require a yearly accounting.

Larry testified that Lee played a very limited role in the operation of the trust as cotrustee, although Lee did sign documents

requiring two signatures. Larry tried to discuss with Lee "important improvements that . . . need[ed] to be done to trust property" but "[n]ever got many answers at all other than it is probably too expensive." Larry testified that he and Lee have shared in the management of the trust's accretion ground. Larry has helped control noxious weeds on that property, while Lee runs a gravel pit operation and has contact with hunters who wish to use the accretion property. Larry testified that Lee has provided him with "[b]its and pieces" by way of an accounting of his acts with regard to the gravel operation. Larry agreed, however, that every gravel royalty check was deposited in the trust's bank account and that he was the sole recipient of statements for the account. Larry testified that after 1999, when he knew Lee disagreed with the trust's borrowing money, he asked the farm finance manager at the bank to bring Lee in to help prepare farm financial statements and balance statements, but that Lee would not attend any of the meetings.

Lee testified that it was not possible for him and Larry to continue to serve as cotrustees of the trust because of "the admitted conflict of interest with [Larry] in the property." Larry did not share Lee's opinion about their being unable to continue to work and serve together as cotrustees. Larry expressed his position that he and Lee could effectively act as cotrustees in managing the trust.

The county court entered an order in this case on June 9, 2005. After setting forth the factual background of the case, the court stated:

> It is axiomatic and pointed out by the parties that this Court, where possible, shall give full deference to the intention of the grantor, Charles . . . , in forming the trust. It is clear to the Court that the overriding intention of Charles . . . was that his two sons, Lee and Larry . . . , should administer the trust jointly for the benefit, first of their mother [Irene] and lastly for themselves. However, it is equally clear to the Court that Larry . . . has, for the most part, acted alone in conducting the business of the trust and has acted, if not improperly, certainly in a manner that appears inappropriate.

> First of all, the trust clearly provides that Larry . . . is to pay a reasonable rental for the use of all of the premises, both the pasture ground and the residence. There is no dispute that Larry . . . has never paid any amounts for the use of the residence. It may be, as he alleges, that improvements to the residence have offset some of those amounts but those improvements have been made for his personal benefit and they have not been accounted for. Additionally, the evidence shows that Larry . . . paid himself a farm management fee for several years, the authority for which, is no where [sic] to be found in the four corners of the trust. The evidence reflects that he has paid some personal debts out of trust funds (albeit alleging that he has repaid them) and has also pledged trust real estate to secure personal loans from the State Bank of Riverdale. Interest on some of these loans has been paid out of trust funds, cattle ha[ve] been purchased out of trust funds, and most if not all of the above-noted transactions have been done without the knowledge or consent of his brother and co-trustee Lee . . . .
>
> The explanation for these unilateral actions seems to be an allegation that Lee . . . didn't care or was not interested in the conduct of the businesses of the trust but it is clear from the evidence that no real effort was made to include him in those dealings.
>
> From the evidence presented, therefore, the Court finds [Lee's] position is correct and that Larry . . . should be and is hereby removed as a co-trustee of the Charles C[.] Wells [R]evocable [T]rust and further that he should make a full accounting to Lee . . . of his actions while holding the position of co-trustee. The Court finds that 90 days from the date of this judgment is an appropriate amount of time for said accounting to be provided to Lee . . . .

The county court stated that in accordance with the relevant provision in the trust for naming a successor trustee, Larry and Lee were given a period of 30 days from the date of the court's order to name a successor trustee to the interest of Larry. The court set a hearing date to determine the successor trustee in

the event that the parties could not agree on a successor. Larry subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Larry asserts that the county court erred in (1) removing Larry as cotrustee of the trust and (2) failing to hold that Lee's action for an accounting was barred, in part, by estoppel, laches, and the statute of limitations.

STANDARD OF REVIEW

[1] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[2-5] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust of Rosenberg, supra*; *In re Trust Created by Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *In re Trust of Rosenberg, supra.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[6] The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

ANALYSIS

Applicable Law.

The Nebraska Uniform Trust Code (NUTC) was enacted in 2003 and became operative on January 1, 2005, between the two evidentiary hearings held in this proceeding. See Neb. Rev. Stat.

§§ 30-3801 to 30-38,110 (Cum. Supp. 2004). This operative date has significance in this case because the NUTC applies to certain preexisting trust relationships. § 30-38,110. See, generally, John M. Gradwohl and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312 (2003). Specifically, § 30-38,110(a) provides:

> Except as otherwise provided in the [NUTC], on January 1, 2005:
>
> (1) the [NUTC] applies to all trusts created before, on, or after January 1, 2005;
>
> (2) the [NUTC] applies to all judicial proceedings concerning trusts commenced on or after January 1, 2005;
>
> (3) the [NUTC] applies to judicial proceedings concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the [NUTC] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the [NUTC] does not apply and the superseded law applies; and
>
> (4) an act done before January 1, 2005, is not affected by the [NUTC].

Under § 30-38,110(a)(1), the NUTC is generally applicable to all trusts in existence on January 1, 2005, subject to certain statutory and perhaps constitutional exceptions. See Gradwohl & Lyons, *supra*. Because this judicial proceeding was commenced prior to the operative date of the NUTC, § 30-38,110(3) requires us to apply the NUTC except in those instances where we determine that such application would "substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties," in which case we must apply prior law which has been superseded by the NUTC. See *In re Trust of Rosenberg, supra*. We find no prejudice to the parties in applying the NUTC in this case.

Removal of Larry as Cotrustee.

Larry asserts that the county court erred in removing Larry as cotrustee of the trust. Section 30-3862 provides:

> (a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (b) The court may remove a trustee if:
>
> (1) the trustee has committed a serious breach of trust;
>
> (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
>
> (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
>
> (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.
>
> (c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under subsection (b) of section 30-3890 as may be necessary to protect the trust property or the interests of the beneficiaries.

The language of § 30-3862 is identical to that of Unif. Trust Code § 706, 7C U.L.A. 575 (2006). The Uniform Trust Code was promulgated in 2000. Given its recent adoption, there is not a great deal of case law discussing the application of § 706; nor is there any Nebraska case law, to date, discussing the merits of a trial court's decision to remove a trustee under § 30-3862. However, the comments to § 706 provide some relevant information for our consideration of the trial court's decision in the present case. With regard to removal of a trustee for a "serious breach of trust," the comment to § 706 provides:

> The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.

7C U.L.A. at 576. With regard to removal for "lack of cooperation among cotrustees," the comment to § 706 provides:

> The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 704 appointment of a successor trustee is not required.
>
> Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable.

7C U.L.A. at 576.

Although the county court did not refer to the language of § 30-3862 in making its decision that Larry should be removed as cotrustee, the county court made several factual findings which would support removal under that statute. The county court found that Larry has, for the most part, acted alone and in a seemingly inappropriate manner in conducting the business of the trust; has failed to pay rent for the use of the house; has paid personal debts out of the trust; has pledged trust real estate to secure personal loans; and has made these transactions without the knowledge or consent of Lee, his brother and cotrustee. We note that the county court did make a couple of erroneous factual findings—that the trust agreement did not provide for the payment of a management fee and that Larry paid interest on his personal loans from the trust bank account.

Larry and Lee are in the unique position of being both cotrustees and cobeneficiaries. In addition to the findings of the county court stated above which are supported by the record, it also appears that there has been very little cooperation or

communication between the cotrustees with regard to the trust business. Larry's and Lee's lack of cooperation and communication with one another has clearly impaired the administration of the trust and has led to the present court action. We conclude that these actions (or inactions), by Larry, when considered together, justify the removal of Larry under § 30-3862(b)(1), (2), and (3). The decision of the county is supported by competent evidence. See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007) (in absence of equity question, appellate court, reviewing probate matters, examines for error appearing on record made in county court). Larry's assignment of error is without merit.

Action for Accounting.

In the petition, Lee sought an order requiring Larry "to account for his acts and doings in connection with the affairs and administration of the Trust, including, without limitation, as a tenant of trust property and as a co-trustee of the Trust." The county court ordered Larry to "make a full accounting to Lee . . . of his actions while holding the position of co-trustee." Larry asserts that the county court erred in failing to hold that Lee's action for an accounting was barred, in part, by estoppel, laches, and the statute of limitations.

Although Larry does not assign error to the order to provide an accounting in general, we do note that Larry has provided Lee with various accounting information over the years. Since 1996 or 1997, Larry has provided a yearly registry of trust checks along with the income tax documentation of the trust for Lee's review. Larry's accountant compiled and provided to Lee an accounting of the trust receipts and expenses from 1993 through 2003. In addition, Larry has provided Lee with copies of various expense documentation over the years.

Larry argues that a 4-year period of limitations should be applied in order to bar any request for an accounting 4 years prior to the institution of Lee's lawsuit. Larry urges the application of either Neb. Rev. Stat. § 25-207 (Reissue 1995) (§ 25-207(3) applies to action for injury to rights of plaintiff, not arising on contract and not thereinafter enumerated) or Neb. Rev. Stat. § 25-212 (Reissue 1995) (actions not specified).

Lee argues that the applicable statute of limitations is the special statute of limitations found in Neb. Rev. Stat. § 30-2818(2) (Reissue 1995). Section 30-2818 was repealed effective January 1, 2005, but it was in effect at the time this case was commenced on July 27, 2004. Section 30-2818(2) provided:

> Unless previously barred by adjudication, consent, or limitation, or subsection (1) of this section, or unless otherwise provided by the instrument creating the trust, any claim against a trustee by a beneficiary for breach of trust or breach of any fiduciary duty arising out of the trust is barred as to any beneficiary who has received an annual or a periodic account or statement fully disclosing the matter subject to the claim *which contains the statement "Claims against the trustee for breach of trust or breach of any fiduciary duty arising out of the trust shall not be made after the expiration of four years from the date the beneficiary receives the annual or periodic account or statement fully disclosing the matter subject to such claim."*, unless a proceeding to assert the claim is commenced within four years after receipt of such account or statement.

(Emphasis supplied.)

The record shows that Lee received certain accounting information from Larry over the years, but there is nothing in the record to show whether the statement necessary to the application of § 30-2818(2) was included in any of the accounting information. Lee argues that § 30-2818(2) does not begin to run until accounting information with the required statement has been provided to the beneficiary. We cannot agree with Lee's assertion. The introductory language of § 30-2818(2) contemplates that by the time a trustee provides an accounting with the requisite statement, the claim might have already been barred by "adjudication, consent, or limitation." In other words, another statute of limitations might be applicable, and if so, any cause of action that was previously barred would remain barred. Thus, we must determine whether another statute of limitations operates to bar any portion of Lee's claim for an accounting.

While we have previously held that an equity action for an accounting is subject to a 4-year statute of limitations, see *American Driver Serv. v. Truck Ins. Exch.*, 10 Neb. App. 318,

631 N.W.2d 140 (2001) (applying § 25-207), we have found no case in Nebraska where a 4-year statute of limitations has been applied to an accounting action in connection with a trust, under either § 25-207 or § 25-212. Prior cases from the Nebraska Supreme Court have recognized the general rule that the statute of limitations is tolled while a trust continues. See, *Dewey v. Dewey*, 163 Neb. 296, 79 N.W.2d 578 (1956) (laches and statute of limitations will generally begin to run between trustee and beneficiary of express or voluntary trust when trust terminates by its own limitations or trustee repudiates trust by assertion of adverse claim to or ownership of trust property); *In re Estate of Statz*, 144 Neb. 154, 12 N.W.2d 829 (1944) (trust of executor or administrator is continuing trust, and he cannot set up statute of limitations as against rights of next of kin or persons entitled to distribution of assets of estate unless they repudiate trust or set up claims in their own rights, or until trust is terminated). See, also, 54 C.J.S. *Limitations of Actions* §§ 21 and 184 (1987) (as general rule, statute of limitations is tolled while trust exists); George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 964 (rev. 2d ed. 1983) (unless there is statute expressly governing matter of time within which suit for accounting can be brought, rules with regard to statute of limitations and enforceability of trusts in general apply, and time period will not run against right to account until repudiation and actual or constructive notice thereof).

Although the NUTC was adopted after the institution of this suit, we find certain of its provisions instructive. Section 30-3890(b) provides that a court may order a trustee, among other things, to account or to remedy a breach of trust that has occurred or may occur. Section 30-3894 sets forth a limitation of action against a trustee as follows:

> (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) of this section does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within four years after the first to occur of:

(1) the removal, resignation, or death of the trustee;

(2) the termination of the beneficiary's interest in the trust; or

(3) the termination of the trust.

The above statute replaces Neb. Rev. Stat. § 30-2812(2) (Reissue 1995), argued by Lee. We view § 30-3894 as a recognition of the general rule recited above that a cause of action for breach of trust, including a request for an accounting, does not accrue until the termination of the trust, with an exception if a potential claim for breach of trust is disclosed to the beneficiary.

[7] Based upon the foregoing, we decline to apply laches or a period of limitations to bar Lee's action for an accounting. We need not address Larry's assertions with respect to estoppel, as he did not present any arguments relating to estoppel in his brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006). Larry's assertion that the accounting should be barred, in part, by a period of limitations or the doctrine of laches or estoppel is without merit.

CONCLUSION

We affirm the decision of the county court removing Larry as cotrustee of the trust and the order requiring Larry to provide an accounting.

AFFIRMED.

IN RE INTEREST OF KEVIN K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KEVIN K. AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

735 N.W.2d 812

Filed June 5, 2007. No. A-06-447.

1. **Juvenile Courts: Final Orders: Appeal and Error.** An order terminating the jurisdiction of the juvenile court is a final, appealable order.
2. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Juvenile Courts: Jurisdiction.** A juvenile court may continue to exercise jurisdiction over a minor child even after the basis for acquiring jurisdiction no longer exists.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Reversed and remanded for further proceedings.

Kara E. Mickle and Alicia B. Henderson, Deputy Lancaster County Attorneys, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth Elliott for appellee Kevin K.

Jon Bruning, Attorney General, and B. Gail Steen, Special Assistant Attorney General, for appellee Nebraska Department of Health and Human Services.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

The State of Nebraska has appealed the decision of the Lancaster County Separate Juvenile Court terminating jurisdiction over Kevin K. The issue presented is whether a juvenile court which has assumed jurisdiction over a minor child for truancy issues may continue jurisdiction over that child when the basis for acquiring jurisdiction no longer exists.

STATEMENT OF FACTS

On April 25, 2005, the juvenile court adjudicated Kevin pursuant to Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2004), finding that he had been habitually truant from school. Disposition in this matter was entered on July 14. Temporary legal custody of Kevin was placed in the Nebraska Department of Health and Human Services (DHHS), and physical custody of Kevin remained with his mother. The dispositional order provided that Kevin was to "attend all scheduled classes without any truancies or tardies" and that "[a]ny illnesses shall be verified through a medical provider, school nurse or health paraprofessional." The order also provided that Kevin's mother "shall not excuse Kevin . . . from school without prior approval from [DHHS]."

On November 21, 2005, Kevin filed a motion to terminate jurisdiction based upon the fact that Kevin was 16 years old, and on November 3, Kevin's mother executed a notarized release on a form provided by the school, discontinuing Kevin's enrollment. The hearing on the motion to terminate was held on December 13. The DHHS case manager assigned to Kevin's case testified that it was DHHS' recommendation that the case be closed because it was a truancy case, Kevin was 16 years old, Kevin's mother disenrolled him from school on November 3, and truancy no longer applied. The case manager further testified that he believed it was in Kevin's best interests to close the case and that since Kevin was no longer enrolled in school, there were no further services that DHHS could provide to Kevin.

On March 14, 2006, the juvenile court sustained Kevin's motion to terminate jurisdiction, reasoning that even when a child is under the jurisdiction of the juvenile court, a parent retains the right to disenroll his or her child from school pursuant to Neb. Rev. Stat. § 79-201 (Cum. Supp. 2006), and that when a parent exercises that right, the child is no longer legally required to be enrolled in school and the juvenile court's jurisdiction should terminate where the court's jurisdiction was based solely upon the child's truancy. The court further noted:

> [I]t is clear that Kevin's best interests are not served by terminating the court's jurisdiction and dismissing the Petition. Kevin has no daily program, is not enrolled in

> a GED program, is not employed and indeed has no significant work history whatsoever. Clearly such a situation does not bode well for his "development of his capacity for a healthy personality, physical well-being, and useful citizenship and to protect the public interest." Neb. Rev. Stat. §43-246 (Reissue 2004).

The State has timely appealed to this court.

ASSIGNMENT OF ERROR

The State contends that the juvenile court erred in terminating the court's jurisdiction over Kevin for truancy issues based upon his mother's execution of a parental release to discontinue his enrollment in school pursuant to § 79-201.

STANDARD OF REVIEW

[1] An order terminating the jurisdiction of the juvenile court is a final, appealable order. *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992); *In re Interest of Lisa V.*, 3 Neb. App. 559, 529 N.W.2d 805 (1995).

[2] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

ANALYSIS

The State contends that the juvenile court erred in terminating the court's jurisdiction over Kevin for truancy issues based upon his mother's execution of a parental release to discontinue Kevin's enrollment in school pursuant to § 79-201. The State contends that the juvenile court should have continued to exercise its jurisdiction pursuant to § 43-247.

Section 43-247 provides, in part:

> Notwithstanding any disposition entered by the juvenile court under the Nebraska Juvenile Code, the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until

> the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.

The juvenile court took jurisdiction of Kevin pursuant to § 43-247(3)(b). The statute provides, in pertinent part: "The juvenile court in each county as herein provided shall have jurisdiction of . . . [a]ny juvenile . . . who is habitually truant from home or school." Once Kevin reached the age of 16, and despite the dispositional order providing that Kevin's mother shall not excuse him from school without prior approval from DHHS, Kevin's mother executed a notarized release discontinuing his enrollment in school pursuant to § 79-201(3)(d). This section provides an exception to the compulsory education requirement where the child "[h]as reached the age of sixteen years and such child's parent or guardian has signed a notarized release discontinuing the enrollment of the child on a form provided by the school." Based upon Kevin's mother's execution of this release, the juvenile court terminated its jurisdiction over Kevin. The issue raised by this appeal is: May a juvenile court maintain jurisdiction over a minor child when the basis for acquiring jurisdiction no longer exists?

This court considered this issue in the context of a juvenile's marriage in the case *In re Interest of Steven K.*, 11 Neb. App. 828, 661 N.W.2d 320 (2003), *affirmed in part and in part dismissed* 267 Neb. 55, 671 N.W.2d 777. In *In re Interest of Steven K.*, this court held that a minor's marriage terminated the jurisdiction of the juvenile court. Our determination was based upon the language of Neb. Rev. Stat. § 43-2101 (Reissue 2004), which provides that the minority of a person under the age of 19 ends when he or she marries, and the language of § 43-247, which specifically provides that a juvenile court's jurisdiction terminates upon an individual's reaching the age of majority. Thus, the language contained in Nebraska statutes dictated both results in *In re Interest of Steven K.*: the end of a child's minority status due to marriage and the termination of the juvenile court's jurisdiction upon a child's reaching the age of majority.

A case in which a factual situation nearly identical to that of the instant case was addressed is *In Interest of C.W.*, 292 Ill. App. 3d 201, 684 N.E.2d 1076, 226 Ill. Dec. 80 (1997). In that

case, the minor child was adjudicated on the sole basis that he was a truant minor in need of supervision. Following his 16th birthday, the minor child filed a petition seeking a discharge from supervision, alleging that Illinois law no longer required him to attend school and accordingly that the trial court no longer had jurisdiction over him. The trial court denied the petition and retained jurisdiction, and the minor child appealed. The appellate court held that a minor child who is adjudicated a truant minor in need of supervision is not entitled to discharge from supervision merely by virtue of his reaching the age of 16.

[3] In the instant case, Kevin's minority status has not ended as a result of his mother's discontinuing his enrollment from school. He remains a minor. Pursuant to § 43-247, "the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until . . . the court . . . discharges the individual from its jurisdiction." Further, in order for a juvenile court to assume jurisdiction over a child, the State must prove a factual basis that the child falls within the asserted subsection or subsections of § 43-247. This statute does not set forth that the factual basis justifying the juvenile court's acquisition of jurisdiction must continue to exist throughout the duration of the juvenile court's exercise of that jurisdiction. Thus, a juvenile court may continue to exercise jurisdiction over a minor child even after the basis for acquiring jurisdiction no longer exists.

We note that this reading of the statute comports with the stated purposes of the Nebraska Juvenile Code, which include "[t]o assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest." Neb. Rev. Stat. § 43-246(1) (Reissue 2004).

The final question is whether it is in Kevin's best interests that the juvenile court retain jurisdiction over him. We have reviewed this case de novo, and we are in complete agreement with the juvenile court's findings:

> [I]t is clear that Kevin's best interests are not served by terminating the court's jurisdiction and dismissing the Petition. Kevin has no daily program, is not enrolled in

> a GED program, is not employed and indeed has no significant work history whatsoever. Clearly such a situation does not bode well for his "development of his capacity for a healthy personality, physical well-being, and useful citizenship and to protect the public interest." Neb. Rev. Stat. §43-246 (Reissue 2004).

Since termination of the juvenile court's jurisdiction is not in Kevin's best interests, we find that the court erred in terminating its jurisdiction over Kevin.

CONCLUSION

Having determined that a juvenile court is not required to terminate its jurisdiction over a minor child even when the sole basis for the court's acquiring jurisdiction over the child no longer exists and that it is not in Kevin's best interests that the juvenile court's jurisdiction be terminated, we reverse the order of the juvenile court terminating its jurisdiction over Kevin and remand this cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MOORE, Judge, dissenting.

I must respectfully dissent from the majority opinion. While I do not disagree with the finding of either the juvenile court or the majority opinion that the best interests of Kevin are not served by terminating jurisdiction, I believe that the plain language of the compulsory education statutes, together with the jurisdictional principles noted in *In re Interest of Steven K.*, 11 Neb. App. 828, 661 N.W.2d 320 (2003), *affirmed in part and in part dismissed* 267 Neb. 55, 671 N.W.2d 777, requires an affirmance of the trial court's dismissal of the juvenile petition in this case.

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002); *In re Interest of Steven K., supra.* In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and

popular sense. *In re Interest of Valentin V.*, 12 Neb. App. 390, 674 N.W.2d 793 (2004).

Neb. Rev. Stat. § 79-201(3)(d) (Cum. Supp. 2004) provides an exception to the compulsory education requirement where the child "[h]as reached the age of sixteen years and such child's parent or guardian has signed a notarized release discontinuing the enrollment of the child on a form provided by the school." In the instant case, Kevin's mother signed a notarized release on a form provided by the school, discontinuing Kevin's enrollment in compliance with the statute.

The State, having a high responsibility for the education of its citizens, has the power to impose reasonable regulations for the control and duration of basic education. *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). The Legislature, in the context of the law requiring children to regularly attend school, which the Legislature implicitly determined was in the best interests of children, carved out an exception, recognizing the right of a parent or guardian to disenroll a child who has reached the age of 16. The Legislature put no limitation on this right, and according to the statute's plain language, all that must occur is that the child reach age 16 and that the parent sign the required form. The effect of the majority opinion is to place a limitation on § 79-201(3)(d) by excluding children who are under the jurisdiction of the juvenile court. While this may certainly be an appropriate limitation on this section, it is for the Legislature, and not the courts, to make this decision.

Further, Kevin was adjudicated solely under Neb. Rev. Stat. § 43-247(3)(b) (Cum. Supp. 2004), whereby the court found that he had been habitually truant from school. By virtue of the execution of the release by Kevin's mother, Kevin can no longer be considered truant under the compulsory education laws. Under this circumstance, and where there is no other basis for the juvenile court's jurisdiction, the juvenile court can no longer retain jurisdiction. See *In re Interest of Steven K., supra.*

Finally, it is noteworthy that the case manager assigned to Kevin's case recommended that the case be dismissed because truancy no longer applied. The case manager further opined that it was in Kevin's best interests that the case be closed, as there

were no further services available in connection with the basis for Kevin's adjudication.

For the foregoing reasons, I would affirm the decision of the juvenile court terminating its jurisdiction in this case.

TIERONE BANK, APPELLEE, V. CUP-O-COA, INC., ET AL., APPELLANTS, AND KEARNEY STATE BANK AND TRUST COMPANY, INTERVENOR-APPELLEE.

734 N.W.2d 763

Filed June 12, 2007. No. A-07-006.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Jurisdiction: Final Orders: Motions for New Trial: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.
3. **Motions for New Trial: Judgments: Notice: Appeal and Error.** The right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment.
4. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
5. **Jurisdiction: Appeal and Error.** An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.
6. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
7. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
8. **Actions: Parties: Judgments: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.
9. **Final Orders: Appeal and Error.** If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in

trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Appeal dismissed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellants.

Betty L. Egan and Michael F. Kivett, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

Thomas W. Tye II, of Tye & Rademacher, P.C., L.L.O., for intervenor-appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

We consider the motion of TierOne Bank (TierOne) for summary dismissal. We lack jurisdiction over this appeal, not because, as TierOne contends, the appellants filed their notice of appeal out of time, but, rather, because the pendency of a complaint in intervention by Kearney State Bank and Trust Company (Kearney) and the absence of the language required by Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006) means that the order sought to be appealed was interlocutory.

BACKGROUND

The transcript does not contain the initial complaint. Thus, we infer from other documents before us that TierOne commenced an action against Cup-O-Coa, Inc.; Barista's and Friends, Inc.; Barista Company; W.E., L.L.C.; Cathy S. Mettenbrink; and Steven D. Sickler (collectively the appellants) seeking a monetary judgment and delivery of specified tangible personal property consisting essentially of refrigeration equipment and machinery. TierOne filed a motion for default judgment against the appellants. Although the motion bears a file-stamp date of August 22, 2006, the bill of exceptions and the court's order recite a hearing date of August 21 and suggest that the motion came into the hands of the court, or at least the district

court judge, on August 21. On August 22, the district court entered a document styled as a judgment in favor of TierOne for $196,074.21 plus interest and costs and for delivery of the personal property. The order did not include the "express determination" or "express direction for the entry of judgment" authorized by § 25-1315(1).

On August 18, 2006—3 days prior to the hearing held on TierOne's motion for default judgment—Kearney filed a complaint in intervention. Kearney's complaint asserted a first lien on the assets of certain of the appellants and sought a determination that its interest was superior to that of TierOne. The bill of exceptions from the August 21 hearing on TierOne's motion shows the appearance of counsel for Kearney, recognition of Kearney's intervention, and statements of counsel recognizing that Kearney's claim to a superior interest in some of the items sought by TierOne had not yet been resolved. Nothing in the transcript or bill of exceptions shows that Kearney's complaint in intervention was later resolved.

On August 31, 2006, the appellants filed a motion for new trial, alleging that one of the appellants "arrived at the courthouse in time for the hearing and checked in properly with the Clerk of the Court. Nevertheless, [that individual] was not informed when the hearing began, meaning that he was not given the chance to appear in his own defense." The motion requested the district court to vacate the order filed August 22 and to grant a new trial.

On October 5, 2006, the district court held a hearing on the appellants' motion for new trial. At the conclusion of the hearing, the district court announced its decision overruling the motion. However, no written order was filed until November 14, when the court entered an order overruling the motion. The order contains a notation that copies were sent to counsel for the appellants and to counsel for TierOne. A second order overruling the motion for new trial was filed on December 5. The appellants' notice of appeal was filed on December 28.

MOTION FOR SUMMARY DISMISSAL

TierOne moves for summary dismissal of the appeal under Neb. Ct. R. of Prac. 7B(1) (rev. 2001). TierOne asserts that the

appellants' notice of appeal was filed more than 30 days after the entry of the November 14, 2006, order and that under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2006), this court lacks jurisdiction over the appeal.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is a matter of law. *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

ANALYSIS

[2] TierOne's motion raises a jurisdictional issue stemming from the existence of two orders, each purporting to overrule the appellants' motion for new trial. The Nebraska Supreme Court has often held that in order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. See, e.g., *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). The appellants' notice of appeal filed on December 28, 2006, is untimely as to the first order, filed on November 14, but would be timely as to the second order, filed on December 5.

In the appellants' response to the motion for summary dismissal, they state:

> [T]he [a]ppellant[s'] attorney had not been made aware of the November 14 Journal Entry as of early December. Appellant[s'] attorney therefore drafted a Journal Entry which dismissed the [appellants'] Motion for a New Trial and submitted it to the court. Said Journal Entry was signed by the trial judge and filed on December 5, 2006. . . . It is from the December 5 Journal Entry that the [a]ppellant[s] timely [appeal].

[3] But for the complaint in intervention, which we discuss below, the notice of appeal would be untimely. In *Simmons v. Lincoln*, 176 Neb. 71, 125 N.W.2d 63 (1963), the Nebraska Supreme Court stated that if the trial court overruled the motion for new trial without attempting to notify the plaintiff or her counsel of the ruling and if the plaintiff or her counsel did not learn of the ruling until after the time to file a notice

of intention to appeal had passed, the order overruling the motion for new trial should be vacated. The Supreme Court also stated that the statute requiring the mailing of a notice of rendition of judgment after a case has been taken under submission by a court includes a ruling on a motion for new trial, as well as any other order finally disposing of an action. *Id.* The Supreme Court later summarized the law, stating that the right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment. *Nye v. Fire Group Partnership*, 263 Neb. 735, 642 N.W.2d 149 (2002). See, *Tietsort v. Ranne*, 200 Neb. 651, 264 N.W.2d 860 (1978); *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976).

[4,5] However, the proper method of addressing the situation would have been by a motion to vacate the November 14, 2006, order. See *id.* When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. *Id.* Because the district court was not requested to vacate—nor did it vacate on its own motion—the November 14 order, that order remained effective, and the time for appeal would have expired prior to the date of filing of the notice of appeal.

[6,7] This reasoning, upon which TierOne relies, assumes that the August 22, 2006, "judgment" was, in fact, a judgment within the meaning of § 25-1315. See, also, Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2006) ("judgment is the final determination of the rights of the parties in an action"). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pfeil v. State*, 273 Neb. 12, 727 N.W.2d 214 (2007).

After we initially considered TierOne's motion, we issued an order allowing the parties to address the significance of the pendency of Kearney's complaint in intervention. Only TierOne

responded, restating its reliance upon the reasoning underlying its motion for summary dismissal.

[8] The August 22, 2006, order granting a monetary judgment against the appellants and directing issuance of an order for delivery of specified property is silent as to Kearney's complaint in intervention. Further, as noted above, the August 22 order does not invoke § 25-1315(1), which states:

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

The question before us is whether, because of the unresolved complaint in intervention, § 25-1315(1) classifies the August 22 order, although styled as a judgment, as an interlocutory order subject to revision until final adjudication of the complaint in intervention.

In *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005), James Malolepszy and his wife, Lynn Malolepszy, sued the State of Nebraska for damages relating to James' injuries in a motor vehicle accident which occurred in a highway construction zone. The State filed a third-party complaint against Chas. Vrana & Son Construction Co. (Vrana), the company contracted by the State to carry out the highway construction, and the driver of the other vehicle involved in the accident, who was subsequently dismissed as a party. The State filed a motion for summary judgment. On May 13, 2004, the district

court granted the State's motion for summary judgment and dismissed the Malolepszys' petition against the State. The third-party action filed by the State against Vrana was not resolved in the May 13 order, and the district court did not direct the entry of a final judgment under § 25-1315(1) as between the Malolepszys and the State. The Nebraska Supreme Court dismissed the Malolepszys' appeal for lack of jurisdiction, reasoning that there was no express adjudication of the State's third-party action against Vrana and that the district court did not make an express determination and express direction to enter judgment on the Malolepszys' claim against the State as required by § 25-1315(1).

In our opinion, the reasoning of *Malolepszy* applies to a complaint in intervention. Section 25-1315(1) refers to "more than one claim for relief," but also adds "whether as a claim, counterclaim, cross-claim, or third-party claim." While this language does not specifically mention a claim in intervention, neither does it limit the term to a plaintiff's "claim." Neb. Rev. Stat. § 25-329 (Cum Supp. 2006) refers to the "*claim* of the intervenor." (Emphasis supplied.) See, also, Neb. Rev. Stat. § 25-328 (Cum. Supp. 2006). Moreover, § 25-1315 applies when more than one claim for relief is presented or when multiple parties are involved. Section 25-328 allows the intervenor to "become a party" to the action. See *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001). Clearly, there are multiple parties in the instant case.

The principle underlying § 25-1315 would apply equally to a claim in intervention. The Nebraska Supreme Court explained in *Malolepszy v. State*, 270 Neb. at 107-08, 699 N.W.2d at 392, as follows:

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

> in cases with multiple claims or parties, an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties.

[9] Generally, appeals may be taken only from final judgments. If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). Section 25-1315 recognizes that in some circumstances, an appeal should be allowed where a claim has not been resolved, but it requires the trial judge to make an express determination and an express order to that effect. In the case before us, the district court made no such determination or order.

CONCLUSION

Because of the apparent pendency of Kearney's complaint in intervention and the absence of any express determination and express direction under § 25-1315(1), the August 22, 2006, order was not a final judgment. Neither that order nor the subsequent order overruling the appellants' motion for new trial was final and appealable. Although we reach the conclusion for a different reason than the one advanced by TierOne, we agree that we lack jurisdiction and must dismiss the instant appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. DONALD NEWMAN AND MARIETTA NEWMAN, APPELLANTS, V. COLUMBUS TOWNSHIP BOARD, A BODY POLITIC, ET AL., APPELLEES.

735 N.W.2d 399

Filed June 26, 2007. No. A-06-575.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
3. **Legislature: Public Policy.** The Legislature has declared the policy of this state to be that the formation of public policy is public business and may not be conducted in secret.
4. **Public Meetings: Statutes.** The Nebraska public meetings laws are a statutory commitment to openness in government.
5. ____: ____. The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public.
6. **Political Subdivisions: Counties.** A township is a subdivision of the state and is organized as a unit of county government under authority of the state legislature.
7. **Political Subdivisions.** The distinguishing feature of township organization lies in the application of the principle of local self-government.
8. ____. A township is a political subdivision.
9. **Political Subdivisions: Public Meetings.** The electors of a township at their annual meeting are a public body under the Open Meetings Act.
10. **Public Meetings: Notice.** The purpose of the agenda requirement of the Open Meetings Act is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration.
11. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
12. **Mandamus.** Mandamus is appropriate when (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
13. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act.

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

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellants.

Clark J. Grant, of Grant & Grant, for appellees.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Donald Newman and Marietta Newman sued the Columbus Township Board and Columbus Township Board members Steve Blaser, David Scharff, and Rick Braun (collectively Appellees), seeking a writ of mandamus to require Appellees to put into effect the motions passed by the electors of the township at their 2005 annual meeting. We conclude that the electors of the township at the annual meeting constituted a public body subject to Nebraska's Open Meetings Act (the Act); that the actions voted upon during the annual meeting were not adequately identified on the agenda, in violation of the Act; and that the Newmans failed to demonstrate a clear right to mandamus relief. We therefore affirm the decision of the district court dismissing the suit.

BACKGROUND

We recognize that Neb. Rev. Stat. § 23-219 (Reissue 1997) specifies that "[t]he corporate name of each town shall be the town of (name of town)." However, the provisions in chapter 23, article 2, of the Nebraska Revised Statutes concerning "Counties Under Township Organization" use "town" and "township" seemingly interchangeably. As the parties use the term "Columbus Township" to refer to the particular political subdivision at issue, and in order to avoid confusion with the city of Columbus, Nebraska, we will refer to the subdivision in the same manner.

The Newmans are electors of the Columbus township in Platte County, Nebraska. Blaser, Scharff, and Braun were at all relevant times elected, appointed, qualified, and acting members of the Columbus Township Board. On September 15, 2005, the Columbus township held its annual meeting. The notice of the time and place of the meeting was published on September 8 in the Columbus Telegram newspaper, and the notice stated that the meeting agenda was available for public inspection at the "Cornhusker Public Power office" during normal business hours.

The agenda for the annual meeting stated that there was no old business to be discussed. The agenda listed the following items as new business: rates for custom work, insurance policies, an equipment update, equipment storage, and meeting notices.

The Newmans attended the September 15, 2005, meeting, as did Scharff, Blaser, and nine electors of the township. During the annual meeting, the electors and the two board members in attendance voted to (1) permanently terminate the services of an employee, (2) reduce the per diem paid to Columbus Township Board members per meeting from $250 to $150, (3) change the meeting place of the Columbus Township Board from "Cornhusker Public Power offices" to a more central location in the city of Columbus, and (4) sell the "old maintainer." No emergency was declared with regard to the motions underlying those votes, and no effort was made to modify the agenda to include those items.

On September 22, 2005, the Columbus Township Board next met for a regular monthly meeting, and it declared void all motions passed at the September 15 annual meeting.

On December 1, 2005, the Newmans filed a petition seeking an alternative and peremptory writ of mandamus compelling the performance of the actions taken at the September 15 annual meeting. The petition alleged that the annual meeting was in accordance with Neb. Rev. Stat. §§ 23-224, 23-227, and 23-228 (Reissue 1997). The Newmans alleged that they had no plain and adequate remedy in the ordinary course of law or equity.

On December 23, 2005, Appellees filed an answer and counterclaim. The counterclaim sought an order declaring void the above-mentioned motions made at the September 15 annual meeting. Appellees alleged that because the agenda did not contain any items concerning the termination of an individual's employment, a reduction in the per diem paid to the Columbus Township Board members, a change of meeting place, or the sale of the "old maintainer," the motions made and passed at the annual meeting violated Neb. Rev. Stat. § 84-1411 (Cum. Supp. 2004).

On April 24, 2006, the district court entered its order finding that the Newmans were not entitled to relief and dismissing the complaint. The court determined that the electors of the

township were a governing body and that the electors present at the annual town meeting thus constituted a "'public body'" subject to the Act. The district court denied Appellees' counterclaim, concluding that no township official had the capacity to maintain an action to declare official township conduct void for noncompliance with the Act.

The Newmans timely appeal.

ASSIGNMENTS OF ERROR

The Newmans allege that the district court erred in (1) determining that electors present at the annual town meeting were a "'public body'" subject to the Act, (2) determining that the electors were subject to the agenda requirement of the Act and that they could not avoid the inadequacy of an agenda even though they did not make it, (3) determining that actions taken by the electors at the annual town meeting were in violation of the agenda requirement of the Act, (4) failing to determine that Appellees had a duty to perform the acts voted upon and passed at the annual meeting, and (5) holding that the Newmans failed to clearly and conclusively show that they were entitled to mandamus relief and dismissing their petition.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). When reviewing questions of law, we resolve the questions of law independently of the trial court's conclusions. *Id.*

ANALYSIS

PURPOSE OF ACT

[3-5] The Legislature has declared the policy of this state to be that "the formation of public policy is public business and may not be conducted in secret" and that with a few exceptions, "[e]very meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies." Neb. Rev. Stat. § 84-1408 (Cum. Supp. 2006). The Nebraska public meetings laws are a statutory commitment to openness in government. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb.

403, 648 N.W.2d 756 (2002). As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy, and in this manner, government may be accountable to the governed. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. See *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

Township Organization

[6] A township is a subdivision of the state and is organized as a unit of county government under authority of the state legislature. 87 C.J.S. *Towns* § 4 (2000). Such townships, also called towns, constituted the original units of local government in New England, forming the constituent elements of the colonies and states. *Id.* "In their essential nature they have remained unchanged, having undergone only such modifications as have been rendered necessary by time and adaptation to changed conditions." *Id.* at 18.

[7] Township organization is one of the rare examples in Nebraska of direct democracy. The distinguishing feature of township organization lies in the application of the principle of local self-government. *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895). The powers of a township are usually exercised by vote of a town meeting or of the town council. 87 C.J.S. *Towns* § 58 (2000). The essential characteristic of the township meeting form of government is that all the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities in the exercise of their corporate powers, each qualified inhabitant of the town having an indisputable right to vote on every question presented, as well as to discuss it. *Id.* It exercises both legislative and executive functions. *Id.*

Whether Electors of Township Are "Public Body"

The question we must answer is whether the electors of a township at their annual meeting are a public body under the Act. The district court answered that question in the affirmative, determining that the electors were a governing body.

[8] The Act provides that public bodies mean, among other things, "governing bodies of all political subdivisions of the State of Nebraska." Neb. Rev. Stat. § 84-1409(1)(a)(i) (Cum. Supp. 2006). A township is a political subdivision. *Steenblock v. Elkhorn Township Bd.*, 245 Neb. 722, 515 N.W.2d 128 (1994). The town board is subject to the Act. See *id.* However, the court in *Steenblock, supra*, did not consider whether the electors, when gathered for the township's annual meeting, constituted a "governing body."

Because the Act does not define "governing bodies," we look to other Nebraska statutes which purport to define the phrase. In some instances, other statutes would appear to designate only the town board as the "governing body." Neb. Rev. Stat. § 13-2202(2) (Cum. Supp. 2006) states that for purposes of the Local Government Miscellaneous Expenditure Act, the "[g]overning body" of a township is the town board. The Political Subdivisions Tort Claims Act contains the following definition:

> Governing body shall mean the village board of a village, the city council of a city, the board of commissioners or board of supervisors of a county, the board of directors of a public power district . . . and any duly elected or appointed body holding the power and authority to determine the appropriations and expenditures of any other unit of local government.

Neb. Rev. Stat. § 13-903(2) (Cum. Supp. 2006). This definition would certainly include the township board; but, because the electors of a town are neither "elected" nor "appointed," it may not include them. Because in both instances, the definitions are expressly made "[f]or purposes of" the particular act, neither definition is controlling in the case before us. See §§ 13-903 and 13-2202.

Other statutes explicitly equate electors of a township with a "city council" or "mayor and council," a "village board" or "board of trustees," and a "county board" or "board of supervisors or commissioners" when discussing powers given to such equivalent bodies. See, Neb. Rev. Stat. §§ 51-201 and 51-501(1) (Reissue 2004) (library and museum, respectively); Neb. Rev. Stat. § 71-1637(1) (Reissue 2003) (home health nurse

or agency); Neb. Rev. Stat. § 80-202 (Reissue 2003) (erection of statue, monument, or memorial). Where § 71-1637(2) states that "[t]he governing body of any city, village, county, or township may contract with [health care providers], subject to the supervision of the governing body," it clearly refers to the electors discussed in § 71-1637(1).

The electors of a township at their annual meeting have a broad range of control over functions of the township. They can sell the township's corporate property, provide for instituting a lawsuit on the township's behalf, construct public wells, direct the raising of money by taxation for certain purposes, and make bylaws, rules, and regulations needed to effectuate the powers granted by statute and to impose fines and penalties under certain circumstances. § 23-224. Section 23-228 additionally empowers the electors to elect township officers as may be needed to direct the institution and defense of lawsuits; direct money to be raised for the support and maintenance of roads and bridges or for any other purpose provided by law as they deem necessary; take measures and give directions for the exercise of their corporate powers; impose penalties upon persons offending against any such regulations; and make rules, regulations, and bylaws necessary to carry into effect the powers granted by § 23-228.

[9] We conclude that the electors of a township, when assembled at the annual meeting, constitute a governing body of the township. At other times, the individual electors do not constitute members of a governing body. In the hours and days before the annual meeting and the hours and days after that meeting, the electors are not a governing body. But when the electors come together at the annual meeting to exercise the powers granted to them by statute, they become a governing body of a political subdivision and are thus a public body subject to the requirements of the Act.

Agenda Requirement of Act

[10] In the instant case, because the electors at the annual town meeting constituted a public body under the Act, they were bound by the Act's notice requirements, which notice must include an agenda. The purpose of the agenda requirement is to

give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. See *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). An agenda is important because the electors of the township may not be the only "persons who are interested" in the actions to be considered during the annual meeting. The Act clearly contemplates that "citizens," as well as members of the general public and reporters or other representatives of news media, are intended as beneficiaries of the openness sought by the Act. See §§ 84-1408 and 84-1411.

[11] Under § 84-1411(1), each public body must give reasonable advance publicized notice of the time and place of each meeting, and the notice must contain an agenda "of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection." That statute also grants the public body the right to modify the agenda to include items of an emergency nature. The statutes relating to townships and annual or special meetings also contain notice requirements. Section 23-227 requires publication of notice of the time and place of the annual meeting but does not require an agenda. But Neb. Rev. Stat. § 23-230 (Reissue 1997) states that notice of a special town meeting "shall set forth the objects of the meeting as contained in the statement," and Neb. Rev. Stat. § 23-231 (Reissue 1997) provides that "special town meetings shall have no power to act upon any subject not embraced in the statement of the notice calling the same." The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006). Reading these statutes together, we find no conflict between the notice contemplated in § 23-227 and the notice requirements of § 84-1411. The latter statute imposes an additional requirement concerning agenda items consistent with the general notice of meeting required by § 23-227.

In *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 895, 578 N.W.2d 476, 481 (1998), this court held that

an agenda item which simply stated "'Work Order Reports'" was insufficient to give adequate public notice of a decision to approve a work order which involved an expenditure of over $47 million for the construction of a 96-mile transmission line across privately held property to connect two power substations. We stated that the agenda "did not give the public meaningful notice so as to enable the public to observe and participate in the decisionmaking process." *Id.* Effective July 14, 2006, the Legislature amended § 84-1411(1) to add that agenda items shall be "sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting." 2006 Neb. Laws, L.B. 898.

The Newmans argue that the agenda advertising the meeting as the annual meeting "puts all on notice that those powers conferred upon electors as per state statute could be exercised." Brief for appellants at 12. As discussed above, the electors at the annual meeting have a wide range of powers under §§ 23-224 and 23-228. Declaring only that a meeting is the annual meeting does not provide the meaningful notice of the subject matter of the meeting. The agenda in the case at hand listed the following items to be considered during the meeting: rates for custom work, insurance policies, an equipment update, equipment storage, and meeting notices. During the meeting, however, the electors voted to terminate an individual's employment, reduce the Columbus Township Board members' compensation, change the meeting place of the Columbus Township Board, and sell the "old maintainer." No emergency was declared, and the electors made no effort to modify the agenda to include the items upon which they voted. We conclude that the agenda in the instant case failed to advise the general public of the matters at issue.

We recognize that the agenda requirement of § 84-1411 imposes some minimal obligation upon an elector desiring to raise a matter at the annual meeting. In the "old days," an elector could simply appear at the annual meeting and bring up any subject falling within the broad powers of the electors. Under the Act, generally, in advance of the meeting, the elector must request an addition to an agenda. The Act places great value on the openness and knowledge fostered by such requirements.

Whether the benefit gained by the public from such openness and knowledge outweighs the detriment to the individual elector represents a policy judgment properly belonging to the Legislature.

The Newmans contend that the "public body" is responsible for preparing the agenda and that the electors would not have the ability to control the agenda. Brief for appellants at 12 (emphasis omitted). We disagree. Section 23-230 provides a manner for the electors to call for a special town meeting and to get a matter included in the notice for the meeting. The electors could take similar action for the annual town meeting, notifying the town clerk in writing of matters to be placed on the agenda.

MANDAMUS IS NOT APPROPRIATE

[12,13] The Newmans brought suit seeking a writ of mandamus requiring the Columbus Township Board to put into full force and effect those actions voted upon and passed at the annual meeting. Mandamus is appropriate when (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 729 N.W.2d 311 (2007). In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act. *Id.*

Because the actions taken by the electors at the annual meeting violated the agenda requirement of the Act, the Newmans failed to clearly and conclusively show that they had a clear legal right to a writ of mandamus compelling the performance of the actions taken at the annual meeting. The district court properly denied the Newmans' complaint.

CONCLUSION

Because the electors of a township at the annual meeting are a governing body of a political subdivision, they are a public body subject to the requirements of the Act. The Newmans failed

to show a clear right to the relief sought, i.e., to have effect given to the actions voted upon and passed during the annual meeting, because the subjects of those matters were not identified on the agenda as required by the Act. We affirm the decision of the district court dismissing the Newmans' complaint.

AFFIRMED.

ADT SECURITY SERVICES, INC., APPELLEE AND CROSS-APPELLANT, v. A/C SECURITY SYSTEMS, INC., AND TROY D. BAUMERT, APPELLANTS AND CROSS-APPELLEES, AND DAVID W. BAUMERT, APPELLEE.

736 N.W.2d 737

Filed July 3, 2007. No. A-05-379.

1. **Actions: Pleadings: Equity.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
2. **Equity: Appeal and Error.** Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.
3. ____: ____. An appellate court reviews a claim or counterclaim that sounds in equity de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Judgments: Appeal and Error.** On review of a claim or counterclaim, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
5. ____: ____. In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in a 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.
6. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
7. **Injunction: Damages: Appeal and Error.** In actions seeking both injunctive relief and damages, the standard of review applicable in reviewing questions of fact is de novo; however, when questions of fact involve the assessment of monetary damages, an appellate court will not set aside such judgment if it is within the range of the evidence and is not arbitrary.

8. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
9. **Names: Words and Phrases.** Under Neb. Rev. Stat. § 87-128(8) (Cum. Supp. 2006), service mark means any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown.
10. **Names.** Under Neb. Rev. Stat. § 87-128(9) (Cum. Supp. 2006), trade name means any name used by a person to identify a business or vocation of such person.
11. **Contracts: Sales: Goodwill: Presumptions: Intent.** Even where a contract for the sale and transfer of a business omits to mention the goodwill, the presumption is that it was the intention of the parties that the goodwill should pass with other assets.
12. **Names: Words and Phrases.** A designation is used as a trade name when the designation is displayed or otherwise made known to prospective purchasers in the ordinary course of business in a manner that associates the designation with the goods, services, or business of the user.
13. **Names.** At common law, the use of a trade name may be established by its appearance on signs, documents employed in conducting business, mail solicitations, or advertising.
14. **Corporations: Merger: Abatement, Survival, and Revival.** When two or more corporations effect a merger or consolidation, the surviving corporation possesses all the rights, privileges, immunities, and franchises, as well as all the property—real, personal, and mixed, including the debts—of each of the merging corporations, and any interest vested in any of such corporations shall not revert or be in any way impaired by reason of such merger.
15. **Names: Abandonment.** For purposes of the Trademark Registration Act, a mark is considered abandoned either (1) when its use has been discontinued with intent not to resume such use, which intent may be inferred from the circumstances—nonuse for 2 consecutive years constituting prima facie evidence of abandonment—or (2) when any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.
16. ____: ____. In an action for infringement of a trademark, trade name, collective mark, or certification mark, it is a defense that the designation was abandoned by the party asserting rights in the designation prior to the commencement of use by the actor. A trademark, trade name, collective mark, or certification mark is abandoned if (1) the party asserting rights in the designation has ceased to use the designation with an intent not to resume use or (2) the designation has lost its significance as a trademark, trade name, collective mark, or certification mark as a result of a cessation of use or other acts or omissions by the party asserting rights in the designation.
17. **Names: Sales.** The maximum reach of a successor in interest's position in owning a trade name/service mark can be no better than that of its predecessors in interest.

18. **Names.** In a trade name infringement case, the subsequent registration of the trade name with the Secretary of State upon the application of another does not adversely affect the trade name owner's rights acquired in good faith at common law.
19. **Names: Proof.** The evil sought to be eliminated by trade name protection is confusion. The burden is upon the plaintiff to show whether the likelihood of such confusion exists.
20. ____: ____. The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party.
21. **Names.** No precise rules can be laid down to determine whether trade name confusion exists or is likely to arise. Among the considerations are (1) degree of similarity in the products offered for sale, (2) geographic separation of the two enterprises and the extent to which their trade areas overlap, (3) extent to which the stores are in actual competition, (4) duration of use without actual confusion, and (5) actual similarity, visually and phonetically, between the two trade names.
22. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
23. **Moot Question: Appeal and Error.** It is not within the province of an appellate court to determine moot questions.
24. **Injunction: Judgments.** Where there is a final judgment against the party enjoined, the temporary injunction merges into the final decree and any questions concerning the propriety of the issuance of the temporary injunction become moot.
25. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question in which the issues presented are no longer alive.
26. **Moot Question: Appeal and Error.** The public interest exception to the mootness doctrine provides that moot issues may be addressed by an appellate court when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.
27. ____: ____. In determining whether the public interest exception to the mootness doctrine should be invoked, an appellate court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
28. **Bonds: Liability: Judgments.** There can be no liability on the bond when a full trial on the merits results in a final judgment against the party enjoined.
29. **Damages: Judgments: Appeal and Error.** With respect to damages, appellate courts review the trial court's factual findings under a clearly erroneous standard of review.
30. **Damages: Appeal and Error.** Appellate courts will affirm the trial court's damage award unless it is arbitrary and outside the range of the evidence.
31. **Actions.** The remedy available in an action is a question of law, not fact.
32. **Names: Federal Acts: Legislature: Intent.** It is the intent of the Legislature that the Trademark Registration Act provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the federal Trademark Act of 1946, as amended by the Lanham Trade-Mark Act.

33. ____: ____: ____: ____. Pursuant to Neb. Rev. Stat. § 87-127 (Cum. Supp. 2006), the construction given the federal Trademark Act of 1946, as amended by the Lanham Trade-Mark Act, should be examined as persuasive authority for interpreting and construing Nebraska's Trademark Registration Act.
34. **Names: Federal Acts: Damages: Costs.** The Lanham Trade-Mark Act provides that a party can recover the infringer's profits, any damages sustained, and the costs of the action.
35. ____: ____: ____: ____. The Lanham Trade-Mark Act provides for an award of damages under a "profits" theory, which is also referred to as the "accounting" theory, or a "damages" theory, which is also referred to as the "pecuniary loss" theory.
36. **Names: Damages.** The trial court has wide discretion in assessing the damages in a trademark infringement case although such damages may not be susceptible of precise calculation.
37. **Names: Federal Acts: Damages.** An award of the infringer's profits is viewed under the common law as well as under the Lanham Trade-Mark Act as a way of compensating the plaintiff for sales lost to the infringer.
38. **Names: Damages.** In a trademark infringement case, the infringer's profits are a rough measure of the plaintiff's damages, and they are probably the best possible measure of damages available.
39. ____: ____. In a trademark infringement case, an award of the infringer's profits serves to deprive the infringer of any unjust enrichment and provides a deterrent against similar activity in the future.
40. ____: ____. Absent an award of monetary damages in a trademark infringement case, it is apparent that an infringer can violate the law of unfair competition and trade name/service mark protection with relative impunity.
41. ____: ____. Monetary awards for trade name infringement are intended to make it financially futile for a competitor to benefit from another's business identity and to neutralize any financial gain the infringer may realize.
42. **Names: Damages: Proof.** Whether a monetary award is appropriate in cases of trade name infringement at common law depends upon the particular facts of the case, but even when the infringer acted in good faith, monetary awards may still be recoverable if the trade name owner proves pecuniary harm.
43. **Names: Damages.** Monetary remedies in cases of trade name infringement are subject to equitable principles, and the court should consider the particular facts of the case when deciding whether actual damages or accounting of profits is appropriate.
44. **Names: Damages: Proof.** In a trademark infringement case, an award based on the trade name owner's pecuniary loss places the burden of proving actual business damages and the amount of such damages or loss on the trade name owner.
45. **Names: Damages: Intent.** In a trademark infringement case, an award based on the infringer's profits, also referred to as an "accounting," should be reserved for cases in which the infringer engaged in the conduct with the intention of causing confusion or deception.
46. **Names: Damages.** An award of monetary damages is an appropriate remedy, in addition to injunctive relief, for infringement of a common-law trade name/service mark.

47. **Claims: Words and Phrases.** A colorable claim is a claim that is advanced in good faith on some plausible legal theory.
48. **Names: Damages: Proof.** Under the infringer's profits method of determining an award in cases of trade name infringement, the trade name owner must prove gross sales or revenue and then the burden shifts to the infringer to prove the proportion of sales or revenue not attributable to the infringement and the costs properly deductible from the gross revenue in calculating the net profit.
49. **Names: Damages.** A monetary award based on the infringer's profits can be awarded to prevent unjust enrichment and to deter future infringement of a trade name.
50. **Trial: Names: Damages.** The trial court has broad discretion in determining the proper monetary award for infringement of a trade name.
51. **Deceptive Trade Practices: Costs.** The Uniform Deceptive Trade Practices Act directs allowance of costs to the prevailing party unless the court otherwise directs.
52. **Deceptive Trade Practices: Attorney Fees.** The Uniform Deceptive Trade Practices Act authorizes the court, in its discretion, to award attorney fees to the prevailing party if the party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive.
53. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
54. **Deceptive Trade Practices: Attorney Fees.** Under the Uniform Deceptive Trade Practices Act, it is in the discretion of the trial court to award attorney fees to the prevailing party.
55. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
56. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
57. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
58. ____: ____. A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court.
59. **Restrictive Covenants: Employer and Employee: Goodwill.** When a noncompetition provision is contained in an employment agreement made ancillary to the sale of a business, courts are generally more willing to uphold promises to refrain from competition made in connection with sales of goodwill than those made in connection with contracts of employment.
60. **Restrictive Covenants: Employer and Employee.** The rationale behind the differential treatment of a noncompetition provision contained in an employment agreement is that in a sale of a business, it is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete

for a reasonable period within a restricted area and then use the funds thus obtained to do the very thing the contract prohibits.

61. **Vendor and Vendee: Goodwill: Restrictive Covenants.** The restraint of trade that is permissible in connection with the sale of goodwill as a business asset is no greater than is necessary to attain the desired purpose—the purpose of making goodwill a transferable asset. It is lawful for the seller to restrict his own freedom of trade only so far as is necessary to protect the buyer in the enjoyment of the goodwill for which he pays. The restraint on the seller's own freedom must be reasonable in character and in extent of space and time.
62. **Vendor and Vendee: Restrictive Covenants.** A noncompetition provision contained in an employment agreement made ancillary to the sale of a business is binding unless it contravenes the public interest.
63. ____: ____. The elimination of one competitor from a restricted area for a limited time in the business field does not constitute such a restraint of trade or tendency toward monopoly incompatible with the public interest as to warrant one of the parties to avoid his solemn agreement to a noncompetition provision ancillary to the sale of a business.
64. **Restrictive Covenants.** A covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case.
65. ____. In a case dealing with a noncompetition provision ancillary to the sale of a business, the "customer specific" rule is not applicable.
66. ____. In the case of a noncompetition provision ancillary to the sale of a business, a restraint is enforceable if it is reasonable in both time and scope.
67. **Restrictive Covenants: Employer and Employee: Words and Phrases.** Nebraska jurisprudence reflects a consistent refusal to strike or alter the language of an integrated covenant not to compete in order to make it enforceable.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Larry E. Welch, Sr., and Larry E. Welch, Jr., of Welch Law Firm, P.C., for appellants.

Duane C. Dougherty for appellee ADT Security Services, Inc.

IRWIN and SIEVERS, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

This is a deceptive trade practice and trade name infringement case. A/C Security Systems, Inc. (Old A/C Security), was sold in 1997, and one of the stockholders, Troy D. Baumert (Troy), received his payment in 1997. In 2001, Troy started

a new corporation using the same name; such company, for clarity, will be henceforth referenced as "New A/C Security." ADT Security Services, Inc. (ADT), effectively acquired Old A/C Security through a series of transactions, and in November 2001, ADT brought this action for injunctive relief and damages against New A/C Security, Troy, and David W. Baumert (David). The district court for Douglas County granted ADT a temporary injunction in April 2002. After a bench trial, the district court found that ADT had not abandoned the disputed trade name, ordered that the causes of action against David be dismissed with prejudice, and found that New A/C Security and Troy (hereinafter collectively Defendants) had violated ADT's common-law right to a trade name/service mark and violated the Uniform Deceptive Trade Practices Act (UDTPA), Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 1999 & Cum. Supp. 2006). The district court enjoined Defendants from using the name "A/C Security" until November 28, 2005, and ordered them to pay $88,972.27 in damages, but the court denied ADT's request for attorney fees. Defendants appeal, and ADT cross-appeals. We affirm.

I. FACTUAL BACKGROUND

Old A/C Security was initially incorporated with the Secretary of State of Nebraska on November 1, 1982. It was a closely held corporation with most of its stock owned and held by David and his family, including his son, Troy. Old A/C Security sold and installed security alarm systems for homes and businesses, monitored the alarm systems, installed communication and home entertainment systems, and sold and installed lightning protection systems. Old A/C Security entered into alarm monitoring agreements with an indeterminate term, but after being sold in 1997, Old A/C Security entered into alarm monitoring agreements typically with 3-year or 5-year terms, depending upon the agreement. Such agreements would automatically renew for another year if neither party discontinued the agreement. Under the alarm monitoring agreements, the customers paid a monthly fee, referenced in the industry as monthly recurring revenue (MRR). MRR is the industry's "bread and butter."

With this background in place, we trace the transactions involving Old A/C Security. MidAmerican Capital Company (MCC), a wholly owned subsidiary of MidAmerican Energy Holdings Company, became the parent company of Old A/C Security through a stock purchase agreement dated December 18, 1997. The day prior to the execution of the stock purchase agreement, Troy and David each entered into an employment agreement with Old A/C Security which contained noncompetition provisions stating in part:

> **Non-Competition.** The Employee agrees that at all times during the term of his employment hereunder and for a period of three (3) years after the termination of this Agreement, he will not (1) directly or indirectly induce any customers of the Company to patronize any competing business; (2) canvass, solicit or accept any security and/or lock services related business relationship from any customers of the Company; or (3) directly or indirectly request or advise any customers of the Company to withdraw, curtail or cancel such business with the Company.

Under the stock purchase agreement, MCC paid a total of $3 million, of which Troy received $17,500 for his shares of stock. Troy and David continued to work for Old A/C Security, which was held by MidAmerican Security Company (MSC), a subsidiary of MCC, and which was operating under the name "A/C Security Systems."

On March 6, 2000, MCC sold all of its interest in the stock of MSC and its subsidiary Old A/C Security to Signature Security Systems, Inc. (SSS). In April 2000, MSC changed its name to Cambridge Security Systems, Inc. (Cambridge). David retired in the summer of 2000, but Troy continued to work for Cambridge. Cambridge honored the Old A/C Security contracts with customers, including the alarm monitoring agreements. In June 2000, a Domestic Corporation Occupation Tax Report was filed with the Nebraska Secretary of State on behalf of Old A/C Security for the calendar year commencing January 1, 2000.

In July 2000, Bob McBroom began working for Cambridge as the director of business development. In August 2000, Robert Gaucher began working for Cambridge as the vice president of operations. Both McBroom and Gaucher knew and worked with

Troy, who was then the Omaha general manager for Cambridge. According to Gaucher and McBroom, Cambridge had acquired other companies in the "burglar alarm business" in addition to Old A/C Security. According to Gaucher, who was responsible for the day-to-day operations of Cambridge, Cambridge sent a letter to the Old A/C Security customers informing them that their accounts had been bought by Cambridge.

Gaucher explained that Cambridge had a "roll-up business plan" under which after acquiring companies in the burglar alarm business, it would begin "'rebranding'" those businesses as "Cambridge" following a 6- to 12-month transition period. The rebranding process consisted of having companies acquired by Cambridge operate under the standard rules and procedures as well as under the Cambridge name and brand, which required changing the names on the trucks, uniforms, stationery, and advertising material. According to Gaucher, Cambridge began rebranding Old A/C Security as Cambridge in early 2001.

On October 15, 2000, Cambridge, the parent company of Old A/C Security, adopted the articles of a merger with Old A/C Security. The "Agreement of Merger," which was filed with the Nebraska Secretary of State, provided that on December 14, 2000, Old A/C Security's separate existence would cease and Cambridge, the parent company of Old A/C Security, would continue as the surviving corporation. Part of the "Agreement of Merger" provided that Cambridge owned all the stock of Old A/C Security on the effective date of the merger, December 14, 2000; that Old A/C Security's shares would not be converted, but would be extinguished; and that Cambridge's shares would remain as outstanding shares of the surviving corporation. The "Agreement of Merger" stated in part:

> Upon the merger becoming effective, all the property, rights, privileges, franchises, patents, trademarks, licenses, registrations, and other assets of every kind and description of . . . A/C shall be transferred to, vested in and devolve upon Cambridge, without further act or deed and all property, rights, and every other interest of Cambridge shall effectively be the property of Cambridge.

In January 2001, Cambridge in turn merged with its parent company, "Cambridge Protection Industries, Inc." As part of the

merger, the parent company changed its name to "Cambridge Security Systems, Inc.," which we will continue to reference as "Cambridge." Cambridge operated its Omaha office out of the leased premises formerly occupied by MCC and Old A/C Security. The building has a large sign on its front which reads "A/C Security Systems, Inc." The record reflects that as of 2000, Cambridge entered into 3- and 5-year contracts using Old A/C Security alarm monitoring agreements, and that as of May 25, 2001, Cambridge entered into an alarm monitoring agreement for a 5-year term using an Old A/C Security contract.

ADT, a Delaware corporation licensed to transact business in Nebraska and engaged in the business of selling and monitoring residential and commercial alarm systems throughout the United States, including east central Nebraska, entered the picture in May 2001. On May 16, ADT entered into an agreement to purchase the stock of Cambridge, and that purchase closed effective July 3. The purchase agreement between ADT and Cambridge gave ADT the right to use all "trademarks (whether registered or unregistered), service marks, trade names, services names, brand names, logos, and copyrights" of Cambridge. The purchase agreement included a schedule entitled "Cambridge Trading Name Listing" with Cambridge's owned intellectual property as of May 9. Part of Cambridge's owned intellectual property included the trade name "A/C Security," and the schedule provided that "A/C Security" was "[r]ebranded as Cambridge Security Systems." In the same attachment, there were notes indicating that some names of the owned intellectual property were "not in use," but "A/C Security" was not designated as such.

ADT took over Old A/C Security customer files, which consisted of approximately 4,700 customers, and honored all of the Old A/C Security customer contracts, which included multiyear monitoring agreements. ADT leased the Omaha location formerly occupied by Cambridge, MCC, and Old A/C Security, but operated its security business from a different location in Omaha. ADT retained Old A/C Security's telephone number.

On August 9, 2001, Troy was not selected to be the ADT general manager in Omaha and Troy's employment ended with ADT. Troy was offered an agreement with a general release

and a noncompetition provision in exchange for approximately $60,000, but Troy declined ADT's offer.

Upon inquiry, the Nebraska Secretary of State informed Troy that there was no record of the trade name "A/C Security Systems, Inc." Thus, on August 13, 2001, Troy filed articles of incorporation for "A/C Security Systems, Inc." Thereafter, he conducted business using that name for his new company which we earlier said we would reference as "New A/C Security." Troy hired Old A/C Security employees. David, the initial owner of Old A/C Security and Troy's father, cosigned a line of credit for New A/C Security, solicited Old A/C Security customers, and was on the board of directors of New A/C Security at the outset. Troy placed advertisements in the telephone books for New A/C Security and operated the business from a location in Omaha. On at least one occasion, Troy used Old A/C Security stationery and an envelope with the Old A/C Security address on it that identify the building which at the time was leased by ADT. Some customers and vendors of New A/C Security sent their checks and invoices to ADT's address. New A/C Security utilized the same shape, color, and design of Old A/C Security's decals and yard signs.

In July 2001, ADT sent a letter informing customers that ADT had acquired Cambridge's customers and that beginning September 19, ADT would start servicing their accounts. In December 2001, Cambridge merged into ADT and, as a result, Cambridge ceased to exist as a separate corporation. In a 2003-2004 telephone directory for the area of Omaha, ADT had listed after its name the telephone number of Old A/C Security, which had merged into Cambridge.

From the time that Troy opened New A/C Security in August 2001 until the spring of 2002, approximately 320 Old A/C Security customers canceled their monitoring agreements with ADT and transferred their accounts to New A/C Security. This fact is not disputed by Defendants.

We summarize the foregoing narrative of the significant transactions by the following timeline:

December 1997: Old A/C Security sold its stock to MCC. MCC's subsidiary MSC was the parent company of Old A/C Security.

March 2000: MCC sold its MSC and Old A/C Security stock to SSS.

April 2000: MSC changed its name to Cambridge.

December 2000: Old A/C Security merged with Cambridge, and Old A/C Security ceased to exist as a separate corporation.

July 2001: Cambridge sold its stock to ADT.

August 2001: Troy's employment with ADT ended, and Troy incorporated New A/C Security (roughly 4 years after Troy was paid by MCC for his shares in Old A/C Security).

December 2001: ADT merged with Cambridge, and Cambridge ceased to exist as a separate corporation.

II. PROCEDURAL BACKGROUND

On November 28, 2001, ADT filed a petition against Defendants, and on February 28, 2002, a second amended petition was filed seeking injunctive relief and damages for infringement of a trade name and deceptive trade practices, among other claims. In Defendants' answer, they alleged that Cambridge had abandoned the name "A/C Security Systems, Inc." before the sale of its business and assets to ADT and Defendants admitted that they had contacted ADT customers. Defendants cross-petitioned, requesting the court to determine that ADT had no legal claim or right to the name "A/C Security Systems, Inc."

On April 1 through 3, 2002, the district court held a hearing on the motion for a temporary injunction. The district court granted the temporary injunction on April 16 by enjoining Defendants "from using the trade name 'A/C Security' in any manner to solicit or operate its business." In the district court's written findings, the court found that Cambridge did not consider the trade name "A/C Security" abandoned when it sold its assets to ADT; that the "length of time in which Cambridge stopped using the A/C name [was] not . . . substantial enough to indicate intent not to resume use"; that the name "A/C Security" which ADT purchased and the name "A/C Security Systems, Inc.," under which Troy incorporated his new business were substantially similar names; and that the name "A/C Security" had not lost its significance as a trade name. ADT was ordered to provide security in the amount of $50,000, which ADT did on April 24, 2002. Defendants then changed the name of New

A/C Security to "Advanced Security Systems" and continued the business as such during the course of this litigation. Defendants were found in contempt of the temporary injunction in August 2002 and October 2003—which we discuss in more detail later.

After the issuance of the temporary injunction, ADT added David as a defendant and amended its petition to allege that Troy and David breached their employment agreements, which had been executed in December 1997. In November 2002, ADT filed a motion for partial summary judgment, and in January 2003, Defendants and David filed a motion for summary judgment. After hearings on December 19, 2002, and February 13, 2003, the district court filed its order on March 14 sustaining summary judgment in favor of Defendants and David with respect to the noncompetition provision, stating that such provision was contrary to public policy and void. The court also entered judgment for Defendants and David on ADT's misappropriation of trade secrets claim. The district court overruled the remaining aspects of the motions for summary judgment.

The trial was held on December 9 through 12, 2003, and January 7, 2004. ADT asserted three causes of action against Defendants and David at trial: (1) violation of the common-law right to trade name and/or service mark, (2) violation of the UDTPA, and (3) civil conspiracy. Defendants and David asserted in their cross-petition and raised as a defense that they had a superior right to the name "A/C Security."

Gaucher testified that by July 2001, when ADT acquired Cambridge, the rebranding process of Old A/C Security by Cambridge was "60 percent" complete, such that the vehicles had been repainted and rebranded and the new uniforms, stationery, printed matter, and decals had been delivered. However, he testified that the advertising, marketing material, additional telephone directory advertisements, and changing of the sign on the Cambridge-leased building in Omaha was not yet completed. Gaucher explained that Cambridge left the Old A/C Security name and telephone number in the telephone book the first year after Cambridge acquired Old A/C Security. With respect to the vehicles, Troy testified that not all of them had been repainted or rebranded.

McBroom also testified that Cambridge still had the Old A/C Security sign on the front of its Omaha building in July 2001 and that because Cambridge was a new company, it took time to create and disseminate signs, stickers, and uniforms as well as to write new contracts bearing the Cambridge name. The record reveals that as late as May 2001, 5-year contracts bearing the name "A/C Security" were still being executed. The record further reveals that the Omaha telephone books for 2000-2001 and 2001-2002 contained listings using the name "A/C Security" with Cambridge's address and telephone number in them. While Gaucher and McBroom stated that it was Cambridge's intent to not use the name "A/C Security" and to rebrand everything using the name "Cambridge," the record reveals that Cambridge honored and did not rewrite preexisting Old A/C Security customer contracts, including multiyear monitoring agreements which generated MRR for Cambridge.

Mary Rice, ADT's administrative manager in Omaha, also testified. According to Rice, ADT honors approximately 4,700 Old A/C Security alarm monitoring agreements, which generate a total of over $80,000 in MRR for ADT.

On January 22, 2004, ADT filed an application to show cause why Defendants and David should not be held in contempt. After a hearing on February 6, the district court found Defendants in contempt of court for the third time. On February 19, Defendants and David filed an appeal of the contempt order to this court. On November 29, the parties filed a stipulation for dismissal of the appeal in case No. A-04-258, and we dismissed the appeal on December 3.

On January 18, 2005, the district court filed its 30-page "Memorandum Opinion and Judgment" (opinion), and the court's comprehensive and detailed work is noteworthy. As the district court clearly set forth, this case is primarily a deceptive trade practice and trade name infringement case. We note that at the close of evidence, ADT made a motion to conform the pleadings to the evidence and add the claim that the name "A/C Security" was also a service mark, which motion the district court granted. For purposes of this appeal, we will treat the alleged trade name and service mark as one and the same in our analysis by referring to them as "trade name/service mark" or

some other similar derivative when applicable. In summary, the district court found that (1) ADT met its burden of proving both a violation of its common-law trade name/service mark rights to the name "A/C Security" and violations of the UDTPA, (2) Defendants were jointly liable to ADT for monetary damages, (3) ADT was entitled to an injunction prohibiting Defendants from using the name "A/C Security" until November 28, 2005, (4) ADT did not prove a civil conspiracy, (5) David was not individually liable, (6) Defendants' counterclaim was dismissed, and (7) attorney fees for ADT were not appropriate. Also as part of the January 18 opinion, the district court incorporated its March 14, 2003, order finding that Defendants were entitled to summary judgment on ADT's claims of misappropriation of trade secrets and breach of employment agreements. The district court also ordered that the bond posted by ADT would be exonerated and released.

On January 24, 2005, ADT filed a motion for new trial and further review regarding damages, attorney fees, the length of the injunction, the finding that David was not personally liable, and the grant of the summary judgment with respect to the noncompete agreements. A hearing was held on February 14, 2005, and on February 24, the district court overruled the motion for new trial.

Defendants filed a timely appeal, and ADT cross-appealed. Additional facts, particularly concerning damages, will be set forth as needed in our analysis.

III. ASSIGNMENTS OF ERROR

Defendants allege, restated and reordered, that the district court erred in (1) finding that ADT owned and was entitled to trade name protection of the name "A/C Security Systems"; (2) finding that ADT was entitled to a temporary and permanent injunction; (3) exonerating ADT's undertaking entered to effectuate the temporary order before a final, unappealable order in its favor was entered; and (4) "awarding damages of $88,9[72].27."

In ADT's cross-appeal, it alleges, restated, that the district court (1) erred by awarding an inadequate amount of damages, (2) abused its discretion when it failed to award attorney fees to

ADT, and (3) erred in refusing to enforce the noncompete agreements against Troy and David.

IV. STANDARD OF REVIEW

[1,2] To determine the appropriate standard of review for this appeal, it is necessary to determine whether a claim or a counterclaim is an action at law or an action sounding in equity. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

[3-5] An appellate court reviews a claim or counterclaim that sounds in equity de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). On review of a claim or counterclaim, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. See *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). The appellate court does not reweigh the evidence but considers the judgment in a 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. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[6] ADT sought an injunction and damages for Defendants' violation of the UDTPA and violation of the common-law right to the trade name "A/C Security." Defendants cross-claimed and asked the district court to enjoin ADT from claiming or using the name "A/C Security." Both sides sought equitable relief, and the pleadings and the nature of the case suggest that the

"main objective" of the case was equitable relief with respect to the use of the name "A/C Security." The fact that ADT sought damages does not change the essential character of the action. ADT and Defendants both assert in their briefs that this action was equitable in nature and that the scope of review is de novo on the record. We agree and apply a de novo standard of review to the substantive assignments of error regarding the common-law trade name infringement cause of action. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Channer v. Cumming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

[7] We take note of *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994), a case in which landowners brought a nuisance action seeking both injunctive relief and monetary damages against a nearby hog-raising facility. The district court in *Goeke, supra*, granted injunctive relief with respect to the offensive odors produced by the facility, as well as monetary damages. The Supreme Court upheld the trial court's decision, stating the following:

> We are mindful that the standard of review applicable in reviewing questions of fact is de novo. However, when questions of fact involve the assessment of money damages, an appellate court will not set aside such judgment if it is within the range of the evidence and is not arbitrary.

Id. at 267, 512 N.W.2d at 630, citing *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980).

Because this action seeks injunctive relief and damages, we apply the same standard of review as set forth in *Goeke, supra.*

V. ANALYSIS

1. Defendants' Appeal

(a) Protection of Trade Name "A/C Security"

[8] In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception

or confusion by ordinary persons dealing with ordinary caution. *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

(i) Was "A/C Security" Valid Trade Name Entitled to Protection?

[9-11] Under Neb. Rev. Stat. § 87-128 (Cum. Supp. 2006), a service mark and trade name are defined as follows:

> (8) Service mark means any word, name, symbol, or device or any combination thereof used by a person, to identify and distinguish the services of one person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor;
>
> (9) Trade name means any name used by a person to identify a business or vocation of such person.

The record reflects that Old A/C Security was initially incorporated in 1982. After 15 years of operating under the name "A/C Security Systems, Inc.," and establishing substantial goodwill in Nebraska in the security business, Old A/C Security was purchased by MCC for $3 million. In March 2000, SSS, which later became Cambridge, purchased MCC. The purchase agreement between MCC and Old A/C Security included provisions addressing trade names; the purchase agreement between MCC and Cambridge included a list of the owned subsidiaries, which list contained the name "A/C Security Systems, Inc."; and the purchase agreement between ADT and Cambridge included a list of intellectual property, which list contained the name "A/C Security." However, the aforementioned purchase agreements do not refer specifically to the goodwill of the trade name "A/C Security." Nevertheless, the presumption is that it was the intention of the parties that the goodwill should pass with the other assets. See, e.g., *Gable v. Carpenter*, 136 Neb. 669, 287 N.W. 70 (1939) (noting generally accepted principle that even where contract for sale and transfer of business omits to mention goodwill, presumption is that it was intention of parties that goodwill should pass with other assets).

After our review of the record, the evidence presented established that the phrase "A/C Security" is both a trade name and a service mark under Nebraska law—a point which Defendants do not contest. Even though ADT purchased the trade name "A/C Security" in the "Agreement of the Purchase and Sale of Stock" between Cambridge and ADT, it is also apparent that ADT also acquired the trade name "A/C Security Systems," and the trade names "A/C Security" and "A/C Security Systems" will hereinafter be used interchangeably.

Defendants allege in their assignments of error that the district court erred in finding that ADT owned and was entitled to trade name protection of the name "A/C Security Systems." Defendants argue that ADT did not establish an intent to use such trade name in the marketplace to distinguish its business from others in the same market and that such trade name was abandoned by Cambridge. The issue of whether ADT intended to use such trade name and whether that trade name was abandoned by Cambridge relates to the first component of a trade name infringement prima facie case—whether a trade name is entitled to protection.

[12,13] The Nebraska Supreme Court in *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000), discussed how to establish a legally protectable common-law interest in a trade name and adopted the common-law definition for "use" of a trade name as set forth in Restatement (Third) of Unfair Competition § 18 at 184 (1995), which provides: "A designation is 'used' as a . . . trade name . . . when the designation is displayed or otherwise made known to prospective purchasers in the ordinary course of business in a manner that associates the designation with the goods, services, or business of the user . . . ." The Supreme Court in *White* said, "At common law, the use of a trade name may be established by its appearance on signs, documents employed in conducting business, mail solicitations, or advertising." 260 Neb. at 37, 614 N.W.2d at 338.

[14] We recall at the outset that the record establishes that Cambridge merged with Old A/C Security in December 2000, whereby Old A/C Security ceased to exist as a separate corporation. However, merely because a corporation merges into

another corporation does not lead to the conclusion that the surviving corporation does not have the right to use the trade name of the now nonexistent corporation. To the contrary, when two or more corporations effect a merger or consolidation, the surviving corporation possesses "'all the rights, privileges, immunities, and franchises,'" as well as all the property—real, personal, and mixed, including the debts—of each of the merging corporations, and "any interest . . . vested in any of such corporations shall not revert or be in any way impaired by reason of such merger." *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 296, 440 N.W.2d 456, 461 (1989). Cambridge, as the surviving corporation in the merger, would have clearly acquired the trade name "A/C Security" and the right to use it. It is obvious from the record and neither party disputes that in the spring of 2001, Cambridge used the trade name "A/C Security" by displaying it—for example, on signs and documents.

Nonetheless, Defendants argue that after Cambridge acquired Old A/C Security, Cambridge immediately began a process of rebranding the trade name "A/C Security." Defendants allege that such rebranding led to Cambridge's abandonment of the trade name "A/C Security" and that such abandonment was complete at the time ADT acquired Cambridge.

[15,16] For purposes of the Trademark Registration Act, Neb. Rev. Stat. §§ 87-126 to 87-144 (Cum. Supp. 2006), in order for a mark to be considered "abandoned," either of the following has occurred:

> (a) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for two consecutive years shall constitute prima facie evidence of abandonment; or
>
> (b) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.

§ 87-128(1). These statutory hallmarks of an "abandoned mark" are consistent with the Restatement (Third) of Unfair Competition § 30 at 308 (1995), which provides:

> (1) In an action for infringement of a trademark, trade name, collective mark, or certification mark, it is a defense

> that the designation was abandoned by the party asserting rights in the designation prior to the commencement of use by the actor.
>
> (2) A trademark, trade name, collective mark, or certification mark is abandoned if:
>
> (a) the party asserting rights in the designation has ceased to use the designation with an intent not to resume use; or
>
> (b) the designation has lost its significance as a trademark, trade name, collective mark, or certification mark as a result of a cessation of use or other acts or omissions by the party asserting rights in the designation.

As said earlier, the merger of Old A/C Security into Cambridge did not, standing alone, result in Cambridge's abandoning the trade name "A/C Security." As a result, the next question is whether Cambridge's process of rebranding or changing of the trade name "A/C Security" to reflect Cambridge resulted in an abandonment of the trade name by Cambridge.

Defendants did not identify an exact date when Cambridge allegedly abandoned the trade name "A/C Security," but in Defendants' reply brief, they alleged that the sale of Cambridge to ADT "expressed the completed abandonment" of the trade name. Reply brief for appellants at 5. To constitute abandonment under the above authority, either Cambridge had to cease using the trade name with the intent not to resume use or the trade name had to have lost its significance as a result of a cessation of use, irrespective of intent.

In this particular case, the record reflects that Cambridge intended to use one name, "Cambridge," when soliciting new customers and entering into new contracts with customers and not the name "A/C Security." However, the record also contains evidence that the process of rebranding the trade name "A/C Security" was only 60 percent complete in July 2001. At that time, Cambridge still had the Old A/C Security sign on the building Cambridge was using and had telephone book listings under the name "A/C Security." Cambridge was also using the Old A/C Security telephone number and vehicles with the name "A/C Security" on them. Plus, Cambridge had thousands of contracts in effect under the name "A/C Security," which

contracts were producing very substantial MRR for Cambridge. In the record, there is evidence that Cambridge executed an Old A/C Security contract on May 25, 2001, with a term of 5 years, which date was a little over a month before ADT purchased Cambridge. Thus, the record shows that before ADT acquired Cambridge, Cambridge did not cease using the trade name "A/C Security" nor did such trade name lose its significance as a result of a cessation of use.

Therefore, because Cambridge had not abandoned the trade name "A/C Security" through its rebranding process, which was clearly incomplete, and because Cambridge was actively using such trade name while conducting its business, ADT acquired the trade name "A/C Security" in July 2001 as provided for in the purchase agreement, which specifically provided for the transfer to ADT of intellectual property, including the name "A/C Security." We find that the defense of abandonment fails.

Defendants' remaining argument or defense can be summarized as follows: Because ADT did not do business using the name "A/C Security" after ADT acquired Cambridge and never intended to do business as such, ADT does not have a legally protectable common-law interest in the trade name "A/C Security."

[17] ADT owned the trade name/service mark "A/C Security" as the ultimate successor in interest from the original sale of Old A/C Security in 1997, and the "maximum reach" of ADT's position in this respect "could be no better than that of its predecessors in interest." See *Ransdell v. Sixth Street Food Store*, 174 Neb. 875, 884, 120 N.W.2d 290, 295 (1963). Similarly to Cambridge, ADT honored the Old A/C Security contracts, which included approximately 4,700 monitoring agreements that generated over $80,000 of MRR; assumed Cambridge's lease of the Old A/C Security building in Omaha; maintained the Old A/C Security sign on the building; and retained the Old A/C Security telephone number. ADT acknowledges that it did not advertise or market to the general public by using the trade name "A/C Security" and does not intend to do so. Nonetheless, despite its future intentions, the fact is that under Nebraska's definition of "use" of a trade name, ADT did use the trade name "A/C Security" in its business after it acquired Cambridge.

[18] Therefore, to summarize, the evidence shows that Cambridge did not abandon the trade name "A/C Security," that Cambridge sold it to ADT, and that ADT made use of such trade name in its ordinary course of business. ADT received considerable goodwill from the acquisition of Cambridge, which in reality flowed in part from the trade name "A/C Security," and ADT maintained the association with the name "A/C Security" by continuing to honor all Old A/C Security contracts and by receiving MRR of approximately $80,000 from such contracts. The fact that Defendants had subsequently registered the trade name "A/C Security" with Nebraska's Secretary of State after Cambridge was acquired by ADT does not adversely affect ADT's rights acquired in good faith at common law. See Neb. Rev. Stat. § 87-218 (Reissue 1999). See, also, *Ransdell, supra.* Thus, we conclude that ADT had a legally protectable common-law interest in the trade name "A/C Security," and Defendants' arguments to the contrary are without merit.

(ii) Was There Actual or Probable Deception or Confusion Between Names?

[19,20] Because ADT had a legally protectable common-law interest in the trade name "A/C Security," the next analytical step is to determine whether Defendants infringed upon ADT's trade name "A/C Security." The key concept is that "the evil sought to be eliminated by trade name protection is confusion." *Dahms v. Jacobs*, 201 Neb. 745, 746, 272 N.W.2d 43, 44 (1978). The burden is upon the plaintiff to show whether the likelihood of such confusion exists. See *id.* "The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party." *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 861, 523 N.W.2d 676, 680 (1994). However, the potential for confusion in the present case does not rest on similarity of names, as in *Nebraska Irrigation, Inc., supra*, where the "dueling" trade names were "Nebraska Irrigation" and "Nebraska Irrigation Sales & Equipment." Rather, the confusion in the present case arises from two business entities using the same name when one of them, ADT, has a protectable interest in the trade name at issue, "A/C Security."

[21] No precise rules can be laid down to determine whether trade name confusion exists or is likely to arise. Among the considerations are

> (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) actual similarity, visually and phonetically, between the two trade names.

Equitable Bldg. & Loan v. Equitable Mortgage, 11 Neb. App. 850, 861, 662 N.W.2d 205, 214 (2003).

First, the degree of similarity in the product and service offered for sale by both ADT and New A/C Security is obviously substantial. The record establishes that ADT—which owns the Old A/C Security contracts, agreements, and warranties—and New A/C Security both sell, install, and monitor residential and commercial security systems.

Second, the two enterprises are not geographically separate. The record established that ADT leases the building in Omaha formerly occupied by Cambridge, MCC, and Old A/C Security; that such building has a large sign bearing the name "A/C Security" on the outside; and that the building with the sign is within 15 blocks of New A/C Security's building, which also had the name "A/C Security" on the outside. Both ADT and New A/C Security operate in Omaha and in east central Nebraska. Thus, while ADT is a nationwide enterprise and New A/C Security operates largely in Omaha, for purposes of this case, their trade areas overlap.

Third, as might be expected as a consequence of the overlap of ADT's and New A/C Security's trade areas and the fact that the companies are in the same business, the record establishes that ADT and New A/C Security are in direct competition with each other. ADT's district general manager testified that ADT and New A/C Security were in direct competition. Troy also admitted at the temporary injunction hearing that New A/C Security competed directly with ADT. The evidence establishes that ADT and New A/C Security compete for the same customers, as clearly shown by the undisputed fact that approximately 320 customers have abandoned their Old A/C

Security contracts, thereby leaving ADT to do business with New A/C Security.

The fourth factor is the duration of use without actual confusion. Prior to the entry of the temporary injunction, the record demonstrates that from August 2001, when Troy incorporated New A/C Security, until April 2002, when the district court granted the temporary injunction enjoining Defendants from using the trade name "A/C Security," vendors and customers sent invoices and checks that were intended for New A/C Security to ADT. The administrative manager for ADT in Omaha testified that the Internal Revenue Service sent ADT materials intended for New A/C Security and that customers telephoned ADT complaining of being double-billed by ADT and New A/C Security. Clearly, ADT established that actual confusion existed.

Fifth, confusion can necessarily be inferred from the fact that Troy incorporated and operated New A/C Security using the same name as Old A/C Security and that the name is clearly substantially similar to the trade name "A/C Security" which ADT owned, was using, and for which it was entitled to legal protection.

After consideration of these five factors, the record shows that ADT met its burden of proof, by a preponderance of the evidence, that either actual or probable confusion in the use of the trade names existed.

In summary, in this case of trade name infringement, ADT met its burden of proving both that the name "A/C Security" is a valid trade name entitled to protection and that a substantial similarity existed between the trade name and Troy's new corporation, so that there was either actual or probable deception or confusion by ordinary persons dealing with ordinary caution. Defendants' first assignment of error is without merit.

(b) Uniform Deceptive Trade Practices Act and Injunctions

[22] Defendants failed to separately assign as error the district court's finding that Defendants violated the UDTPA, specifically § 87-302. Nonetheless, Defendants argue:

> The Court concludes that [Defendants] were guilty of deceptive trade practices in that ". . . they solicited many

> of their customers by creating the impression that it was the old A/C, that it was back in business, and that it had acquired the name/service mark and goodwill of the old A/C company." [Defendants] respectfully suggest that the record does not support such a broad, general conclusion and the evidence does not reach the level of deceptive trade practice.

Reply brief for appellants at 7. Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). To the extent that Defendants seek to introduce a new assignment of error in their reply brief, such attempt fails, and we do not address the above-quoted claim.

[23-25] Defendants did assign as error the claim that the district court wrongfully entered the temporary injunction of April 2002 as well as the final injunction entered in January 2005. However, it is not within the province of this court to determine moot questions. *State ex rel. Douglas v. Ledwith*, 204 Neb. 6, 281 N.W.2d 729 (1979). Where there is a final judgment against the party enjoined, the temporary injunction merges into the final decree and any questions concerning the propriety of the issuance of the temporary injunction become moot. *Id.* A moot case is one which seeks to determine a question in which the issues presented are no longer alive. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000). The April 2002 temporary injunction order merged into the January 2005 final judgment, which included a finding that Defendants should be enjoined from using the name "A/C Security" in any manner until November 28, 2005. The parties filed their briefs prior to November 28, but neither party discussed mootness. Nonetheless, the final injunction has now expired by the passage of time, and it is no longer effective or "alive." Thus, the matter of the entry of the injunctions is moot.

[26,27] However, the public interest exception to the mootness doctrine is well established. See *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000) (moot issues may be addressed by appellate court when claims presented involve matter of great public interest or when other rights or liabilities may be affected by case's determination). In determining whether the

public interest exception should be invoked, we consider the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Id.* The injunctions here were narrow and merely enjoined Defendants from using a specific trade name. Defendants were not enjoined from competing in the security business under a different name, which Defendants did immediately after the issuance of the temporary injunction in April 2002. Defendants' appeal of the injunction is clearly outside the public interest exception to the mootness doctrine, and we address the injunctions no further.

(c) Exonerating Bond

[28] Under the district court's order granting the temporary injunction against New A/C Security, ADT provided security in the amount of $50,000. After the trial on the merits, the district court's opinion provided for a final injunction that would expire in November 2005 and exonerated and released the $50,000 bond posted by ADT. Defendants allege that the district court erred in exonerating ADT's security before a final and unappealable order in ADT's favor was entered. Like the assignment of error regarding the injunctions, we find that the issue of the bond is now moot. Even if the issue was not moot, there can be no liability on the bond when a full trial on the merits results in a final judgment against the party enjoined. *State ex rel. Douglas, supra.* This assignment requires no further discussion.

2. DAMAGES

[29,30] Having concluded that Defendants infringed upon ADT's common-law rights to the trade name "A/C Security," we turn to the assignments of error in Defendants' appeal and ADT's cross-appeal with respect to damages. As stated above, we review the trial court's factual findings under a clearly erroneous standard of review. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). And, we affirm the trial court's damage award unless it is arbitrary and outside the range of the evidence. See *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994). The district court awarded

ADT $88,972.27 in damages. Defendants' assignment of error regarding damages is not particularized, because it simply states: "The Court erred in awarding damages of $88,9[72].27 against the Defendants." Such an assignment could arguably encompass one or more of the following claims: damages were legally impermissible under common law, damages were not proved, or while there was damage, the court's calculation was wrong. Because of the expansive nature of the assignment of error, we have carefully examined Defendants' argument to determine the issue raised. We conclude that the issue raised is whether the proper measure of damages is "pecuniary loss" that ADT proved it suffered from the infringement or whether the measure of damages is an "accounting" of the infringing Defendants' profits.

The heart of Defendants' argument is that ADT was not entitled to recover under the "accounting" method, because ADT had not proved the prerequisites for such method. Defendants' fallback position is that even if accounting was the proper measure of damages, the district court used the wrong time period, and that thus, the damage award should be reduced to $52,522.23.

[31] We must first reach an independent conclusion of law as to whether a party may receive a damage award for a violation of the common-law trade name/service mark. The remedy available in an action is a question of law, not fact. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

It will be helpful in our analysis to detail how the district court arrived at its damage award. Using evidence of New A/C Security's tax returns and profit-and-loss statements for 2001 through the first three quarters of 2003, the district court found that its gross monitoring revenue for such years was $355,899.08. The district court accepted the uncontroverted testimony that New A/C Security's net profit was 25 percent of its gross monitoring revenue, and the district court thus arrived at the sum of $88,972.27 as damages.

The district court correctly noted that the Nebraska appellate courts have not previously addressed the subject of the monetary damages for infringement of a common-law trade name/service

mark. Thus, this is a matter of first impression as to whether damages are appropriate in common-law trade name infringement cases.

[32-40] We note that Nebraska's Trademark Registration Act provides:

> It is the intent of the Legislature that the Trademark Registration Act provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the federal Trademark Act of 1946, as amended [Lanham Trade-Mark Act]. To that end, the construction given the federal act should be examined as persuasive authority for interpreting and construing the Trademark Registration Act.

§ 87-127. Looking to federal authority, the Lanham Trade-Mark Act at 15 U.S.C. § 1117(a) (2000 & Supp. IV) provides that a party, such as ADT, can recover the infringer's profits, any damages sustained, and the costs of the action. Therefore, the Lanham Trade-Mark Act provides for an award of damages under a "profits" theory (also referred to as the "accounting" theory) or a "damages" theory (also referred to as the "pecuniary loss" theory). See, also, 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 30:57 (2007). The trial court has wide discretion in assessing these damages although they may not be susceptible of precise calculation. *Nutrivida, Inc. v. Immuno Vital, Inc.*, 46 F. Supp. 2d 1310 (S.D. Fla. 1998). In *Nutrivida, Inc.*, the court also observed that an award of the infringer's profits has been viewed under the common law as well as under the Lanham Trade-Mark Act as a way of compensating the plaintiff for sales lost to the infringer. The court further stated that the infringer's profits "'are a rough measure of the plaintiff's damages'" and that "'they are probably the best possible measure of damages available.'" 46 F. Supp. 2d at 1315, quoting *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145 (4th Cir. 1987). Such an award serves to deprive the infringer of any unjust enrichment and provides a deterrent against similar activity in the future. *Id.* Indeed, absent an award of monetary damages, it is apparent that an infringer can

violate the law of unfair competition and trade name/service mark protection with relative impunity.

[41-46] Monetary awards for trade name infringement are intended to make it financially futile for a competitor to benefit from another's business identity and to neutralize any financial gain the infringer may realize. See, generally, Restatement (Third) of Unfair Competition §§ 36 and 37 (1995). Whether a monetary award is appropriate in cases of trade name infringement at common law depends upon the particular facts of the case, but even when the infringer acted in good faith, monetary awards may still be recoverable if the trade name owner proves pecuniary harm. See Restatement, *supra*, § 36, comment *g*. These monetary remedies are subject to equitable principles, and the court should consider the particular facts of the case when deciding whether actual damages or accounting of profits is appropriate. Restatement, *supra*, § 36, comment *b*. An award based on the trade name owner's pecuniary loss places the burden of proving actual business damages and the amount of such damages or loss on the trade name owner. Restatement, *supra*, § 36, comment *c*. An award based on the infringer's profits, also referred to as an "accounting," should be reserved for cases in which the infringer engaged in the conduct with the intention of causing confusion or deception. Therefore, it is through the award of damages that the infringer's victim is compensated for its losses, and future infringers are deterred. We hold that an award of monetary damages is an appropriate remedy, in addition to injunctive relief, for infringement of a common-law trade name/service mark.

[47] However, Defendants argue that the infringer's "profits" method of calculating damages cannot be used because of the district court's finding that "'[t]hroughout these proceedings, the Defendants have acted upon a colorable claim that the name/mark had been abandoned and [they] have not acted in bad faith.'" Brief for appellants at 30. But, Defendants misapprehend the meaning of the term "colorable claim" and incorrectly treat this statement from the district court's decision as tantamount to a finding that Defendants' abandonment defense had merit. A "colorable claim" is merely "'a claim that is advanced in good faith on some plausible legal theory.'" *Garcia v. Rubio*, 12 Neb.

App. 228, 237, 670 N.W.2d 475, 482 (2003), quoting *Rogers v. Platt*, 199 Cal. App. 3d 1204, 245 Cal. Rptr. 532 (1988). Thus, the quoted statement by the district court relied upon by Defendants to defeat the damage award is not a factual finding concerning damages, but an observation and rationale which we read as being limited to the district court's rejection of ADT's claim that it should be awarded attorney fees—an issue which is determined on different grounds than the damage issue.

In applying the infringer's "profits" measure of damages, the district court used the Restatement (Third) of Unfair Competition, because the trial court concluded Defendants acted with the intent to cause confusion and deception—the prerequisites for an award based on such methodology. The evidence is abundant that despite selling Old A/C Security and the trade name "A/C Security" for $3 million, Defendants deliberately set upon a course designed to make it appear that Troy and David were "back in business," using the name "A/C Security." The obvious evidence of such course of conduct was the solicitation of their former customers as though Old A/C Security had not been sold. The evidence shows that Defendants succeeded in taking 320 customers from ADT while deceptively using the trade name "A/C Security"—a trade name we have found was ADT's property and protected by the common law of unfair competition. We have previously recited the evidence of confusion, and we will not repeat such here. The district court's prerequisite factual finding for an award of the infringer's profits—intent to cause confusion and deception—is supported by the record and is not clearly erroneous. Therefore, it follows that the district court did not err in applying the infringer's "profits" method of calculating damages.

[48] Under the infringer's "profits" method, the trade name owner must prove gross sales or revenue and then the burden shifts to the infringer to prove the proportion of sales or revenue not attributable to the infringement and the costs properly deductible from the gross revenue in calculating the net profit. See Restatement (Third) of Unfair Competition § 37 (1995). See, also, 15 U.S.C. § 1117(c); *Burger King Corp. v. Mason*, 855 F.2d 779 (11th Cir. 1988). While the undisputed evidence shows that Defendants proved that 25 percent of their gross

profits were net profits, Defendants did not carry their burden to show that any proportion of their gross profits during the timeframe used by the trial court to calculate damages were not derived from their illegal activity of infringing ADT's trade name/service mark. Thus, the award of damages of 25 percent of gross profits was appropriate. However, in Defendants' attack on the damage award, they assert that the district court used an improper timeframe in which to calculate the profits.

The district court used gross profits reduced to net profits based on MRR for 2001 through the first three quarters of 2003. However, Defendants argue that the name "A/C Security" was used only from the time of incorporation of New A/C Security until the district court's issuance of a temporary injunction on April 16, 2002—a period of only 8 months. Therefore, Defendants argue that even applying the district court's methodology, the net profit from MRR is only for the 8 months and amounts to $52,522.23. In support of this argument, Defendants refer us to the exhibit which "the parties agreed [is the list of] the 320 former customers of ADT which became customers of the Defendants in the eight-month period prior to the Defendants' name change." Brief for appellants at 31-32.

ADT does not answer this "improper timeframe" argument except to the extent that in its cross-appeal, ADT claims that damages should have been based on the "pecuniary loss" theory which, according to ADT's evidence, should be the "market value" of these 320 customers taken by New A/C Security from ADT. Thus, for efficiency, we now turn to the damage portion of ADT's cross-appeal.

[49] In its written findings, the district court said it was not persuaded that the evidence was sufficient to "award ADT damages based upon a theory of ADT's pecuniary losses," which, according to the district court, would have been the "value" of the 320 accounts that moved from ADT to New A/C Security, based upon a valuation formula used when security alarm companies are sold. That formulation according to ADT's expert is the MRR from the 320 accounts—$7,563.50—multiplied by a factor between 34 to 40, producing a valuation (and damage) figure of $257,159 to $302,540. Rather, the district court used the Restatement (Third) of Unfair Competition § 37 (1995),

which bases an award of damages on net profits if the infringer acted with intent to cause confusion or deception. The district court found that Troy "acted with the intention of causing confusion and there is no doubt that he benefited from the unlawful conduct." Therefore, the district court calculated damages based upon New A/C Security's monitoring income from 2001 ($17,901.37), 2002 ($172,281), and the first three quarters of 2003 ($165,706.71), 25 percent of which sums was the net profit producing the damage award of $88,972.27. We adopt the view that a monetary award based on the infringer's profits can be awarded to prevent unjust enrichment and to deter future infringement of a trade name. See, Restatement, *supra*, § 37, comment *b*. See, also, *Burger King Corp. v. Mason*, 855 F.2d 779 (11th Cir. 1988).

[50] Given that we review factual findings to determine if such were clearly erroneous and the fact that the method of calculating damages under the infringer's "profits" theory is a permissible method of damage calculation, we affirm the district court's calculation of damages. We recognize that the trial court has broad discretion in determining the proper monetary award for infringement of a trade name. See, generally, Restatement, *supra*, §§ 36 and 37. See, also, *Ramada Inns, Inc. v. Gadsden Motel Co.*, 804 F.2d 1562 (11th Cir. 1986). Given the evidence which we have previously detailed, the district court's damage award was not clearly erroneous from a factual standpoint, nor is it a legally incorrect methodology.

In concluding that the district court's damage calculation was not clearly erroneous, we note that ADT's damage evidence under the pecuniary loss theory has a shortcoming, which is that the evidence of the MRR used in the expert's calculation for the 320 accounts at issue is revealed to be gross revenue and not net revenue, whereas under infringer's profits—an "accounting" theory—the damages were calculated on a net profit basis. This is a key factor because while ADT lost the revenue from the accounts, it also did not have to bear the cost of servicing the accounts. Thus, without this information, the evidence is not persuasive in showing what ADT actually lost, and the figure used by the expert could well have been within a substantial windfall—remembering that other evidence showed

that Defendants' cost of doing business with reference to such accounts was 75 percent of gross revenues. Thus, for this additional reason, the trial court was neither clearly wrong nor arbitrary in declining to use ADT's damage figure calculated under the "pecuniary loss" theory, and the damage award is clearly supported by the evidence.

As to whether the trial court used an improper timeframe by including profits derived after the temporary injunction was entered and Troy changed his company's name, we reject that claim because of the nature of the infringement and the fact that the customers gained by Defendants from the infringement continued to produce MRR for Defendants even after the temporary injunction. In other words, limiting damages to the 8-month time period from when Troy started New A/C Security until the temporary injunction was entered and Troy changed his company's name would not be reflective of what Defendants gained from their infringement, because MRR from those 320 customers obviously continued after the injunction was entered. Accordingly, we affirm the district court's award of damages, reject ADT's cross-appeal with respect to damages, and hold that the trial court did not abuse its discretion when selecting the method of, and time period for, the damage calculation.

We note Defendants contend in their brief that there is no provision for an award of damages under the UDTPA and that the "only relief available for a violation of its provisions is an injunction." Brief for appellants at 26. Having determined that damages were proper under common law and due to the nonparticularized nature of this assignment of error, we need not address whether damages are proper under the UDTPA. See *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

3. Remaining Issues in ADT's Cross-Appeal

(a) Attorney Fees Under UDTPA

ADT alleges that the district court abused its discretion when it failed to award attorney fees to ADT. ADT argues that Defendants' conduct prior to and during the litigation was intentional, willful, and malicious and that ADT should be awarded attorney fees under the UDTPA.

[51,52] The district court made detailed written findings and concluded that Defendants violated the UDTPA, specifically

§ 87-302(a)(1), (2), and (3), and as said earlier, Defendants have not properly challenged such finding. Section 87-303(b) of the UDTPA directs allowance of costs to the prevailing party "unless the court otherwise directs" and authorizes the court, "in its discretion," to award attorney fees to the prevailing party if the party charged with a deceptive trade practice has "willfully engaged in the trade practice knowing it to be deceptive."

In this case, the district court found that Defendants adopted the same name and identical mark as Old A/C Security to increase their profits by "misleading the public's association of the Defendants' services with the services offered by [ADT], who owns the Old A/C [Security] accounts," directly competed with ADT in the same geographic area by offering similar products to ADT, and "intended [and did] create confusion in order to capitalize on the reservoir of surviving goodwill and name recognition of the Old A/C [Security]." However, as discussed earlier, the district court made a specific finding that Defendants' actions were done under a "colorable claim" of abandonment of the trade name/service mark and of good faith. Thus, while the defense was plausible, the court rejected it in deciding the merits of the case but found such to be a "colorable claim," making an award of attorney fees to ADT inappropriate.

[53-55] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005); *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002). Under the UDTPA, it is in the discretion of the trial court to award attorney fees to the prevailing party. See § 87-303(b). Additionally, the general rule is that on appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997).

We note that in addition to finding that Defendants violated the UDTPA, the district court also found Defendants to be in contempt of its April 16, 2002, temporary injunction order three times. On August 29, 2002, the district court entered a contempt order because Defendants had failed to take down

the Old A/C Security sign on the front of New A/C Security's building, but it appears from the record that Defendants purged the contempt by paying $1,000. Then on October 14, 2003, the district court found Defendants in willful contempt of the April 16, 2002, order by failing to cease using the e-mail domain "A/C Security.net" and by failing to take all the steps necessary to make sure that the name "A/C Security" was not listed in the white pages of the telephone book. The district court ordered Defendants to pay $2,000 to ADT in attorney fees for Defendants' willful contempt of court, and there is no further record of any sentencing showing a failure to purge the contempt. Thus, we assume that such amount was paid. Finally, on February 6, 2004, the district court found Defendants in willful contempt of its temporary injunction order for using Old A/C Security decals on the side of a New A/C Security vehicle. The district court ordered that Defendants pay $5,000 to ADT to purge the contempt but denied ADT's request for attorney fees. We assume, for the reasons just stated with reference to the previous contempt, that Defendants paid the $5,000 to purge the contempt. In summary, the district court found Defendants in contempt of its April 16, 2002, temporary injunction order three times, and all three times, Defendants apparently purged the contempts by paying a total of $8,000.

In this case, the district court found that while costs should be awarded to ADT, attorney fees should not be awarded to ADT, even though it prevailed on the deceptive trade practices claim. The district court wrote:

> The Court has carefully considered all of the evidence in this case and is well aware of the numerous hearings held and the conduct of the parties. The Court cannot say that Troy . . . willfully engaged in a deceptive trade practice, knowing it to be deceptive, with the exception of the contempt matters, for which purge amounts have already been imposed. Throughout these proceedings the Defendants have acted upon a colorable claim that the name/mark had been abandoned and have not acted in bad faith. Further, it should be noted that attorneys' fees under the Lanham [Trade-Mark] Act are only awarded in "exceptional cases", 15 U.S.C. §1117(a), and the Court finds that

> this case is not "exceptional" within the meaning of the Lanham [Trade-Mark] Act.

After our study of the record, we cannot conclude that the district court abused its discretion by denying ADT's request for attorney fees, given that Defendants were forced to respond via contempt proceedings for its most egregious conduct; that Defendants had a plausible defense, albeit unsuccessful; and that this case is not an exceptional case, bearing in mind the relative standing of Defendants and ADT in the industry.

(b) Noncompete Agreements

ADT, in its cross-appeal, alleges that the district court erred in refusing to enforce the noncompete agreements that David and Troy entered into in 1997 as a condition precedent to selling Old A/C Security to MCC, the original purchaser, which read:

> **Non-Competition.** The Employee agrees that at all times during the term of his employment hereunder and for a period of three (3) years after the termination of this Agreement, he will not (1) directly or indirectly induce any customers of the Company to patronize any competing business; (2) canvass, solicit or accept any security and/or lock services related business relationship from any customers of the Company; or (3) directly or indirectly request or advise any customers of the Company to withdraw, curtail or cancel such business with the Company.

Under the terms of the stock purchase agreement, MCC paid a total of $3 million. Troy received $17,500 for his shares of stock. Troy and David continued to work for Old A/C Security, which was then a subsidiary of MCC. As we detailed above, ADT was the successor in interest to the original purchaser of Old A/C Security. On March 14, 2003, the district court granted Defendants' motion for summary judgment, finding that the noncompetition provision in the case was contrary to public policy and void because the noncompetition provision's scope was greater than was reasonably necessary to protect the legitimate interests of the buyer. Our standard of review on that issue is that which applies to the review of grants and denials of summary judgment.

[56-58] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is

no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.* A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court. See *Essen v. Gilmore*, 259 Neb. 55, 607 N.W.2d 829 (2000).

The pleadings and the evidence did not disclose a genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, because the pertinent facts were undisputed, which is essentially true of all facts in this case. Accordingly, the issue for this court is whether Defendants were entitled to summary judgment as a matter of law with respect to the noncompetition agreement.

[59-63] Because the noncompetition provision was a provision contained in an employment agreement made ancillary to the sale of a business, we remember that "'[c]ourts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment.'" *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 338, 518 N.W.2d 652, 655 (1994), quoting Restatement (Second) of Contracts § 188, comment *b.* (1981).

> The rationale behind the differential treatment is that in a sale of a business, "[i]t is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits."

H & R Block Tax Servs. v. Circle A Enters., 269 Neb. 411, 417-18, 693 N.W.2d 548, 554 (2005), quoting *Swingle & Co. v. Reynolds*, 140 Neb. 693, 1 N.W.2d 307 (1941).

> "The restraint of trade that is permissible in [connection with the sale of goodwill as a business asset] is no greater

> than is necessary to attain the desired purpose—the purpose of making good will a transferable asset. It is lawful for the seller to restrict his own freedom of trade only so far as is necessary to protect the buyer in the enjoyment of the good will for which he pays. The restraint on his own freedom must be reasonable in character and in extent of space and time."

Chambers-Dobson, Inc. v. Squier, 238 Neb. 748, 755, 472 N.W.2d 391, 397 (1991), quoting 6A Arthur Linton Corbin, Corbin on Contracts § 1385 (1962). Such a contract is binding unless it contravenes the public interest. *Presto-X Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). Regarding the public interest, "[t]he elimination of one competitor from a restricted area for a limited time in the business field . . . does not . . . constitute such a restraint of trade or tendency toward monopoly incompatible with the public interest as to warrant one of the parties to avoid his solemn agreement." *Swingle & Co.*, 140 Neb. at 696, 1 N.W.2d at 309. Given our standard of review, we cannot conclude from the record that the noncompetition provision in the employment agreement made ancillary to the sale of the business was injurious to the public interest.

[64] Our inquiry then turns to whether the noncompetition provision ancillary to the sale of the business is reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. See *Presto-X Company, supra.* Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case. See *id.*

[65,66] As a preliminary matter, in a case dealing with a noncompetition provision ancillary to the sale of a business, the "customer specific" rule is not applicable. *H & R Block Tax Servs., supra.* Instead, in the case of a noncompetition provision ancillary to the sale of a business, a restraint is enforceable if it is reasonable in both time and scope. *Id.* Here, while the 3-year limitation period after the termination of the employment agreement containing the noncompetition provision appears to be a reasonable and thus enforceable restraint, the noncompetition provision did not contain a limit on the

scope. Therefore, the noncompetition provision as a whole is not an enforceable restraint.

[67] ADT argues that *H & R Block Tax Servs., supra*, stands for the proposition that "a specific geographical area is not required for noncompete restrictions that are ancillary to the sale of a business," brief for appellee on cross-appeal at 45, but we find that this is not what the *H & R Block Tax Servs.* court holds. Rather, that holding specifically requires an analysis of both time and scope, because in that case, the court found that the franchise agreement was analogous to a sale of a business for purposes of determining the enforceability of a posttermination covenant not to compete and that a 1-year duration of a covenant not to compete and a geographic limitation of 45 miles from the city where the franchise was located were reasonable. ADT further argues that this court should consider "blue penciling, or reforming the agreement, so as to make it valid under Nebraska law." Brief for appellee on cross-appeal at 46. However, Nebraska jurisprudence "reflects a consistent refusal to strike or alter the language of an integrated covenant not to compete in order to make it enforceable." *H & R Block Tax Servs. v. Circle A Enters.*, 269 Neb. 411, 416, 693 N.W.2d 548, 553 (2005).

In summary, we find that the noncompetition provision was entered into ancillary to the sale of Old A/C Security, that there were no genuine issues as to any material fact or as to the ultimate inferences which may be drawn from those facts, and that Defendants are entitled to judgment as a matter of law because the noncompetition provision did not contain a geographic restriction. Therefore, the noncompetition provision was unenforceable as a matter of law. This assignment of error is without merit.

VI. CONCLUSION

For the above-stated reasons, we affirm the district court's findings that ADT owned and was entitled to trade name protection of the name "A/C Security," that the trade name "A/C Security" had not been abandoned, and that Defendants violated ADT's common-law right to the trade name "A/C Security." We find that the assignments of error with respect to the injunctions

and bond are now moot. We further find that the district court did not err in determining ADT was entitled to a monetary award for Defendants' violations of ADT's common-law right to the trade name "A/C Security," such award calculated by using an accounting of the infringer's profits method, and that the time period used by the trial court for such accounting was not incorrect. Regarding the cross-appeal, we find no error in the district court's denial of attorney fees and in the granting of the summary judgment in favor of Defendants regarding the noncompetition agreements.

AFFIRMED.

PAULA J. MALIN, APPELLANT, V.
BRIAN M. LOYNACHAN, APPELLEE.
736 N.W.2d 390

Filed July 10, 2007. No. A-05-1012.

1. **Divorce: Property Division: Judges: Appeal and Error.** In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion; a "judicial abuse of discretion" exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
2. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions.
3. **Divorce: Property.** Dissipation of marital assets is one spouse's use of marital property for a selfish purpose unrelated to the marriage at a time when the marriage is undergoing an irretrievable breakdown.
4. **Divorce: Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
5. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.

7. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
8. **Property Division.** With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.
9. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified.

Virginia A. Albers and Adam E. Astley, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Brent M. Kuhn and Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Paula J. Malin appeals from an order of the district court for Sarpy County, Nebraska, which dissolved her marriage to Brian M. Loynachan. On appeal, Paula contends that the trial court erred in failing to equally divide the marital estate. For the reasons set forth below, we affirm as modified.

BACKGROUND

In January 2005, Paula filed a complaint seeking the dissolution of the parties' marriage. Trial was held on June 27, 2005. The evidence produced at trial shows that the parties began dating in August 1988 and were married on February 6, 1999, after living together for 3 years. Paula attended medical school from 1996 through 1999 and subsequently completed a 4-year residency. While a medical resident, Paula earned between $39,000 and $44,000 per year. At the time of trial, Paula was employed as the director of psychiatry for Creighton University Medical Center and was making around $135,000 per year.

Brian has a degree in industrial engineering and a master's degree in business administration from Drake University. Brian was employed with Auburn Consolidated Industries, Inc. (ACI), from 1997 through 2004. In October 2004, Brian's employment

with ACI was terminated and Brian received a severance package. This severance package included $11,022.30 in vacation pay, $98,581.08 in severance pay, a bonus of approximately $1,390.60, a $5,000 payment described as "Outsource assistance," and a company vehicle valued at $15,710. After deducting taxes, Brian received $71,000 from his severance package, excluding the vehicle, and he deposited this amount into the parties' joint Charles Schwab investment account. Brian testified that although he had made efforts to find other employment, he remained unemployed at the time of trial.

Shortly after the parties' marriage, they purchased a house and made a $20,000 downpayment. The $20,000 came from Brian's parents, who wrote Brian and Paula each a check for $10,000. In October 2004, the parties sold their home and purchased a larger one. Brian testified that they used the money they received from the sale of the first house and the $20,000 they received from his parents as a downpayment on their second home. The closing statement relating to the purchase of the parties' second home shows that the parties put down $71,582.33 as a downpayment. After Paula filed for divorce, the parties agreed to sell the home and a buyer offered to purchase the home for $359,900. Paula then changed her mind and decided to keep the house. As of March 10, 2005, the mortgage balance on the house was $276,315.88.

Both Brian and Paula have retirement accounts. Brian's 401K at ACI, in December 1998, was worth $122,689.58, but had a loan against it in the amount of $33,829.20. This loan was paid off during the parties' marriage. Brian testified that while he and Paula lived together, Paula was not making enough money to pay her half of the expenses, and so he had to borrow against his 401K. Brian's 401K was worth $226,809.89 as of May 2005. The record shows that Paula has a 403B retirement account through Creighton University with a total balance of $62,008.46 as of January 1, 2005. At the time of trial, Brian was driving his BMW automobile, which he valued at $12,845, and Paula was driving a 2002 Volkswagen Beetle valued at $11,260. Additionally, the parties split the household goods, with Brian receiving goods worth $6,000 and Paula receiving goods worth $6,300.

Paula testified that she had reviewed Brian's credit card statements and that there were a number of charges for things such as trips, jewelry, and lingerie purchases that were not incurred for her benefit. Paula asked that the court take into account this fact when dividing the parties' marital estate. Those credit card statements show that Brian owed $12,526.67 for charges he made from July 2002 to January 2005. Brian testified that he incurred some expenses for someone other than his wife during the marriage, but that he spent only $9,000, not $12,000, for himself and a third party. Brian testified that he paid these credit card charges with his own income.

In an order filed August 4, 2005, the trial court dissolved the parties' marriage. The trial court awarded Paula the house, stating that the fair market value was $359,900 with a mortgage balance of $276,315.88 for equity of $83,584.12. The trial court found that the equity balance should be partially offset by a $20,000 credit to Brian given that he received a gift in that amount from his parents which was used to purchase the family home. The trial court awarded Paula 100 percent of her retirement account at Creighton University and awarded Brian 100 percent of his retirement account at ACI. In calculating the value of Brian's retirement account, the court found the marital portion of Brian's retirement account to be $104,120.31, given that Brian's retirement account had a value of $122,689.58 at the time of the marriage and a present value of $226,809.89.

The trial court ordered that Brian's severance package in the net amount of $71,000, which was placed into the parties' Charles Schwab account, "should be offset to [Brian,] being in the nature of wages." The trial court awarded Brian the balance of the Charles Schwab account, $164,214.53, less the sum of $51,015.31 to be paid to Paula for her portion of the marital funds in this account. The court also awarded each party the vehicle and the personal property in his or her possession at the time of trial and found that this property had approximately equal values. The trial court declined to order Brian to reimburse the marital estate for the $9,000 he admitted spending for the benefit of himself and a third party. The trial court divided the marital estate equally, with each party receiving assets of $197,319.53. Paula appeals.

ASSIGNMENTS OF ERROR

On appeal, Paula contends that the district court erred in failing to equally divide the marital estate. Specifically, Paula argues that the trial court erred in (1) failing to require Brian to reimburse the marital estate for approximately $9,000 in funds dissipated while the marriage was undergoing irretrievable breakdown; (2) failing to deduct a premarital loan balance of $33,829 from the premarital funds in Brian's 401K account with ACI; (3) setting off the first $20,000 of equity in the marital home to Brian as his separate, nonmarital property; and (4) setting off the first $71,000 of the parties' joint Charles Schwab account to Brian as being "in the nature of wages."

STANDARD OF REVIEW

[1] In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion; a "judicial abuse of discretion" exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Nygren v. Nygren*, 14 Neb. App. 1, 12, 704 N.W.2d 257, 266 (2005).

ANALYSIS

Dissipation of Funds.

Paula argues that the trial court erred in failing to require Brian to reimburse the marital estate for approximately $9,000 in funds dissipated while the marriage was undergoing irretrievable breakdown.

[2,3] Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). "Dissipation of marital assets" is one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Id.* at 87, 621 N.W.2d at 501.

In *Brunges v. Brunges*, 260 Neb. 660, 667, 619 N.W.2d 456, 462 (2000), a marital dissolution action, the Nebraska Supreme Court held that the trial court erred in not including in the marital estate certain assets (a retirement fund and proceeds from a sale of real estate) "liquidated" by the husband after the parties had separated and for which he had not properly accounted. Although the husband testified that these assets were "'put towards . . . bills,'" he did not offer any testimony or documentation as to the specific bills that were paid. *Id.* at 665, 619 N.W.2d at 461.

In *Harris v. Harris*, the wife "'asked'" the husband for a divorce in April 1995, but did not file to dissolve the parties' marriage until May 1998. 261 Neb. at 79, 621 N.W.2d at 496. However, the testimony established that the parties were estranged in 1995. Beginning in May 1995, the husband began making large withdrawals from the parties' savings fund. The husband was able to account, through testimonial and documentary evidence, for a portion of the withdrawals as having been used for marital expenses. The balance of the unaccounted-for funds accumulated during the marriage was treated as marital property that the husband had dissipated, and the balance was assigned to the husband in the division.

In *Harris v. Harris*, the parties were estranged at the time of the dissipation of the marital assets, while in *Brunges v. Brunges, supra*, the parties were separated. In the instant case, the parties were not separated or estranged during the time that Brian allegedly dissipated marital assets. We do not conclude that an irretrievable breakdown can be found only when the parties are estranged or have separated. However, in the present case, there is no evidence to support a finding that the parties' marriage was undergoing an irretrievable breakdown during the time period that Brian allegedly dissipated assets. It is true that Brian was spending money on a third party at that time, but that fact, in and of itself, is insufficient to allow us to conclude that an irretrievable breakdown of the parties' marriage was occurring. Therefore, the trial court did not err in failing to require Brian to reimburse the marital estate for approximately $9,000 in funds alleged by Paula to have been dissipated while the marriage was undergoing irretrievable breakdown.

Premarital Loan Balance—Brian's 401K.

Paula also argues that the trial court erred in failing to reduce Brian's premarital 401K balance of $122,689 by the loan of $33,829 repaid with marital funds. Brian contends that equity does not require the deduction of a premarital loan balance from the premarital funds in Brian's 401K account when the proceeds from the loan were used to support Paula.

At trial, the evidence showed that the premarital balance of Brian's 401K was $122,689.58 with an outstanding loan of $33,829.20. The trial court did not deduct the loan balance in determining the premarital balance of Brian's 401K. Rather, the trial court considered Brian's premarital 401K to be worth $122,689.58.

Paula suggests that Brian agreed that the premarital account value of his 401K should be valued by subtracting the loan balance from the account balance, because when asked whether this would be the correct way to value the account, Brian stated, "'You could do it that way.'" Brief for appellant at 25. We note though that on redirect examination, when Brian's counsel asked Brian why he had not deducted the loan balance in arriving at the value of his premarital 401K, Brian stated, "That [loan money] was used while [Paula and I] were in California when I was making enough money to pay for my half of the expenses, but Paula . . . was not. And so I had to borrow against my 401(K) to help her pay her 50 percent of the expenses." Paula did not dispute Brian's testimony, and on this record, we cannot say that the trial court abused its discretion in valuing Brian's premarital 401K at $122,689.58.

Equity in Marital Home.

[4] Specifically, Paula argues that the trial court erred in setting off the first $20,000 of equity in the marital home to Brian as his separate, nonmarital property. The purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 2004); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[5,6] Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third

step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Gangwish v. Gangwish, supra.*

Brian argues that the trial court correctly determined that equity requires that he should be credited for the $20,000 received from his parents. The court granted Brian a $20,000 credit, stating, "[T]he fair thing is that he get at least the credit for the [$]20,000 that helped build up the equity in the first house and transferred over to the new house." We disagree.

In *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002), a husband claimed that a $7,000 check from his father was a gift to him and should be treated as nonmarital property. The record showed that that money was put into a joint checking account and that the parties used the money to purchase the marital home, to which the parties took title as joint tenants with right of survivorship. The husband also argued that he should get appreciation on the $7,000 investment in the house.

[7-9] As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Gangwish v. Gangwish, supra.* With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance. *McGuire v. McGuire, supra.* The burden of proof to show that property is nonmarital remains with the person making the claim. *Gangwish v. Gangwish, supra.*

In *McGuire v. McGuire, supra*, we held that although the husband testified that the check from his father was a gift to him, he failed to meet his burden to show that the check was a gift to him only and not to the marital estate. In *McGuire v. McGuire*, the parties, as well as the husband's father, all agreed that the husband's father gave the parties the $7,000 to help them purchase a home during their marriage. Furthermore, the home was jointly titled in their names. We concluded, "This is not a situation where money should be set off to one party, because [the husband's father's] intent in giving the money was to benefit the marital estate . . . ." *Id.* at 442, 652 N.W.2d at 301. We further stated, "It is the intent of [the father], the donor, and

the method by which the parties used the money that controls [sic]. We therefore conclude that the district court did not abuse its discretion in including this sum of money in the marital estate." *Id.*

In the instant case, the evidence shows that Brian's parents wrote Brian and Paula each a $10,000 check in 1999 for the purpose of helping them finance their first home and that the parties used this $20,000 as a downpayment on their first home. The evidence shows that each check was made out on June 8, 1999, and that the parties purchased their first home in June 1999. The record shows that like the husband's parents in *McGuire v. McGuire*, Brian's father gave the parties several thousand dollars to assist them in purchasing their first home shortly after they married. As in *McGuire v. McGuire*, the person making the claim regarding the gift has failed to meet his burden to show that this money was nonmarital. Given the evidence that Brian's parents intended the parties to use the $20,000 for a downpayment on a marital home and that the money was used for this purpose, the trial court erred in granting Brian a credit in that amount.

Brian's Severance Package.

Paula also argues that the trial court erred in setting off the first $71,000 of the parties' joint Charles Schwab account to Brian as being "'in the nature of wages.'" Brief for appellant at 17. The record shows that after Brian lost his job at ACI, he received a monetary severance package worth $115,993.98 gross and a company vehicle valued at $15,710. After deducting taxes, Brian received approximately $71,000 from his severance package, excluding the vehicle, and he deposited this amount into the parties' joint Charles Schwab investment account.

The trial court considered the company vehicle to be part of the marital estate, but set off the entire $71,000 Brian received as nonmarital property. We note that Brian had the burden to show that this money was nonmarital. See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). After reviewing the evidence, we conclude that Brian did not meet his burden to show that the entire $71,000 should be set off to him as nonmarital property.

Although Nebraska has not addressed the issue of how to divide a spouse's severance package in a dissolution action, several other jurisdictions have done so and have concluded that the question is what portion of the severance package the spouse earned during the marriage and whether the spouse claiming that the severance package is not marital property met his or her burden to establish how much of the severance package is nonmarital. See, *Jewett v. Jewett*, 265 Conn. 669, 830 A.2d 193 (2003); *Grigsby v. Grigsby*, 648 N.W.2d 716 (Minn. App. 2002); *McNamara v. Horner*, 249 Mich. App. 177, 642 N.W.2d 385 (2002).

Applying that rule to the instant case, the evidence shows that Brian's severance package included several amounts: $11,022.30 in vacation pay, $98,581.08 in severance pay, a bonus of approximately $1,390.60, and a $5,000 payment described as "Outsource assistance." The record shows that the $98,581.08 in severance pay consisted of 1 month's salary per year of service. Brian worked at ACI for a total of 7 years 4 months, or 88 months. The record also shows that Brian and Paula were married for 5 years 8 months, or 68 months total, at the time Brian left his job at ACI.

Therefore, for our purposes, Brian earned 77.27 percent of his $98,581.08 severance pay at ACI during the parties' marriage. Given that this $98,581.08 was subject to a tax rate of 38 percent, the marital estate should have included an additional 77.27 percent of $61,120.27 (62 percent of $98,581.08), or $47,227.63. The remainder of the $61,120.27, or $13,892.64, was correctly determined to be nonmarital property and set aside to Brian. Furthermore, Brian produced no evidence to show that the other amounts he received in his severance package—$11,022.30 of vacation pay, $1,390.60 of bonus money, and $5,000 in outsourcing assistance—should be excluded from the marital estate, so we consider an additional $10,796 (62 percent of $17,412.90) to be marital property.

At trial, Brian testified that he placed his entire severance package into the parties' joint Charles Schwab account. The record shows that that account had a balance of $235,214.53 as of the parties' separation. The trial court set aside the entire $71,000 of Brian's net severance package to Brian as his

nonmarital property, and out of the remaining account balance, which was $164,214.53, the court awarded Paula $51,015.31 to balance the estate; Brian received the remainder of $113,199.22. The record shows that instead of $71,000, Brian actually received $71,916.27 after taxes from his severance package (62 percent of ($98,581.08 + $11,022.30 + $1,390.60 + $5,000)).

Given the record before us, we conclude that the trial court abused its discretion in setting off the entire $71,000 balance to Brian. At trial, Brian met his burden to show that a portion of his severance package was earned prior to the marriage, but the remainder should be added back to the balance of the Charles Schwab account. Additionally, as noted above, the trial court erred in granting Brian a $20,000 credit for the downpayment Brian's parents gave the parties for their first home. Therefore, we remove this credit.

Therefore, we subtract Brian's nonmarital portion of his severance pay, $13,892.64, from the total amount of the Charles Schwab account, or $235,214.53, leaving this account with a marital value of $221,321.89. We then divide the funds in that account, keeping in mind that the facts and circumstances of this case dictate an equal division of the marital estate as determined by the trial court. This would leave Brian with $131,752.90 of the marital portion of the Charles Schwab account, while Paula would receive $89,568.99 of the marital funds in that account. The parties would continue to receive the other assets awarded to them by the trial court, with Paula receiving the home with a net value of $83,584.12 and her 403B of $62,720.10 while Brian would receive his 401K valued at $104,120.31. Paula and Brian would also receive the household goods and the vehicle in their respective possession, the values of which are approximately equal. In total, each party would receive half of the marital estate, or $235,873.21, plus the goods in his or her possession and his or her respective vehicle.

CONCLUSION

After reviewing the record, we conclude that the district court did not err in failing to require Brian to reimburse the marital estate for approximately $9,000 in funds allegedly dissipated while the marriage was undergoing irretrievable breakdown or in failing to deduct a premarital loan balance of $33,829 from

the premarital funds in Brian's 401K account with ACI. The trial court did err in setting off the first $20,000 of equity in the marital home to Brian as his separate, nonmarital property and in setting off the first $71,000 of the parties' joint Charles Schwab account to Brian as being "in the nature of wages." We determine that only $13,892.64 of the Charles Schwab account was nonmarital. Accordingly, we modify the marital estate, awarding Paula $89,568.99 of the Charles Schwab account and Brian $131,752.90. In all other respects, the trial court's order is affirmed.

AFFIRMED AS MODIFIED.

LESLIE K. WILD, APPELLEE, V.
BRIAN P. WILD, APPELLANT.
737 N.W.2d 882

Filed July 10, 2007. No. A-06-877.

1. **Child Custody: Appeal and Error.** The grant of temporary permission to remove children to another jurisdiction complicates matters, makes more problematic the subsequent ruling on permanent removal, and encumbers appellate evaluation of the ultimate decision on permanent removal.
2. **Child Custody.** Trial courts are discouraged from granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal and instead are encouraged to promptly conduct a full hearing on permanent removal.
3. ____. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
5. ____. Legitimate employment opportunities may constitute a legitimate reason for leaving the state when there is a reasonable expectation of improvement in the career or occupation of the custodial parent.
6. ____. Legitimate employment opportunities may constitute a legitimate reason for leaving the state when a custodial parent's new job includes increased potential for salary advancement.
7. ____. After clearing the threshold of demonstrating a legitimate reason for leaving the state and removing a minor child to another state, a custodial parent must demonstrate that it is in the child's best interests to continue living with him or her.
8. ____. In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing

the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.

9. ____. The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.

10. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties.

11. ____. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, and in part reversed.

Stephanie Weber Milone for appellant.

Carll J. Kretsinger, P.C., and Ronald E. Reagan for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Prior to the current appeal, in *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005) (*Wild I*), we were presented with Brian P. Wild's appeal from an order of the district court which granted Leslie K. Wild's prior complaint for permanent removal of the parties' minor child, Amber Lynn Wild, to Ohio; in that case, we reversed the order upon finding that the district court abused its discretion in finding that Leslie satisfied her burden of proof with respect to both demonstrating a legitimate reason for removal and showing that removal is in Amber's best

interests. Our mandate in the prior appeal was issued on July 28, 2005, and the district court made a docket entry in conformance with the mandate on August 3. Leslie filed another request for removal of Amber to Ohio on August 5, and the district court again granted permanent removal. Brian appeals from this second order of the district court granting a request by Leslie for permanent removal of Amber from Nebraska to Ohio.

In the present appeal, Brian challenges the district court's grant of Leslie's request for temporary removal of Amber to Ohio pending trial on Leslie's request for permanent removal; the district court's grant of permanent removal again; the district court's findings concerning Brian's visitation rights, child support, and request for attorney fees; and the district court's denial of Brian's counterclaim for a change of custody. We disapprove of the district court's grant of temporary removal of Amber to Ohio. Upon our de novo review of the record, we find that the district court again abused its discretion in finding that Leslie satisfied her burden of proof with respect to both demonstrating a legitimate reason for removal and showing that removal is in Amber's best interests. As such, we again reverse that finding of the district court. We find no abuse of discretion by the district court concerning either Brian's request for a change of custody or his request for attorney fees, and we affirm those rulings of the district court.

II. BACKGROUND

The background of this case is long and complicated. The history of the case involves three requests for permanent removal, trials on two such requests, one grant of temporary removal, two orders granting permanent removal, and one prior decision of this court reversing a grant of permanent removal. As such, in this section of our opinion, we will set forth the history of the first two requests for permanent removal, the district court's first order granting permanent removal, and our prior reversal of that order as the "History of *Wild I*." We will set forth the history of the case following our opinion in *Wild I*, including Leslie's third request for permanent removal, trial on that request, and the district court's grant of that request, in the remaining subdivisions of this section.

1. History of *Wild I*

We recounted the relevant background of this case in our opinion in *Wild I*. As we noted in that opinion, Brian and Leslie were married on April 3, 1993. Brian was a member of the U.S. Air Force during the marriage, stationed at Offutt Air Force Base in Bellevue, Nebraska (Offutt), while Leslie was employed as a civil service employee working at Offutt. Amber was the only child born to the parties during the marriage, and her date of birth is October 12, 1994. The marriage was dissolved by a decree entered on February 20, 2003, which decree incorporated a "'settlement agreement to all issues presented to include custody, visitation and support.'" *Wild I*, 13 Neb. App. at 498, 696 N.W.2d at 891. Leslie was awarded custody, Brian was awarded visitation rights, and Brian was ordered to pay child support.

On October 7, 2003, Brian filed an application and affidavit for citation in contempt, alleging that Leslie had taken Amber to Idaho on vacation for one 8-day period and one 12-day period during the summer of 2003—during which periods Brian was supposed to have had visitation in accordance with the decree—despite Brian's notification to Leslie that he objected to Leslie's taking Amber. The district court ordered Leslie to appear and show cause why she should not be held in contempt for taking Amber to Idaho. The record presented to us did not reflect any further disposition of the application for contempt.

On November 7, 2003, approximately 8½ months after the decree was entered, Leslie filed her first request to permanently remove Amber from Nebraska. Leslie alleged that she faced uncertainty concerning her future employment at Offutt, that she had secured new employment in Ohio that would pay less than her existing employment at Offutt but would afford opportunities for upward mobility, that Ohio provided an opportunity for an improvement in housing, that the schools in Ohio would be "'equal to or better than'" Amber's school in Nebraska, that Amber desired to move to Ohio, and that removal would be in Amber's best interests. *Id.* at 499, 696 N.W.2d at 892. Leslie withdrew this first request for permanent removal

less than 2 weeks later, when her employment opportunity in Ohio was eliminated.

On April 23, 2004, Leslie filed a second request to permanently remove Amber from Nebraska. Leslie alleged that she had been offered and had accepted a position of employment to begin June 1 in Dayton, Ohio, which would provide a substantial increase in salary. At the trial on Leslie's second request to permanently remove Amber, Leslie testified that she had already moved to Ohio and that she had chosen to go to Ohio because of a relationship with a man who was described as her fiance, and because of rumors of uncertainty concerning her future employment at Offutt. *Id.* On July 21, the district court granted Leslie's second request to permanently remove Amber.

In our opinion in *Wild I*, we reversed the district court's grant of Leslie's second request to permanently remove Amber from Nebraska. We concluded first that the district court abused its discretion in finding that Leslie had carried her burden to demonstrate a legitimate reason for removal, because the evidence in the record failed to demonstrate that the new job Leslie had accepted—prior to seeking court approval to remove Amber and move to Ohio—provided a reasonable improvement in her career or an opportunity for career advancement. There was no evidence to indicate that the increase in salary would provide any benefit to the interests of Amber, especially when considering cost-of-living differences between Nebraska and Ohio and Leslie's responsibility to pay for transportation costs associated with bringing Amber back to Nebraska for visitation with Brian. There was also no evidence to indicate that the new employment provided any opportunity for career advancement.

In our opinion in *Wild I*, we also set forth in detail the relevant test for determining whether Leslie had demonstrated that removal was in Amber's best interests. We reviewed each factor individually, including each parent's motives for seeking or opposing removal, the eight considerations that constitute a determination of whether removal will enhance Amber's quality of life, and the impact of the move on the relationship between Amber and Brian. We concluded that nearly every factor and consideration did not weigh in favor of allowing removal, and

we concluded that the district court abused its discretion in finding that Leslie had sufficiently demonstrated that removal was in Amber's best interests.

We noted in *Wild I*, 13 Neb. App. at 518, 696 N.W.2d at 904, that "Leslie testified that if the court denied her request to remove Amber to Ohio, she would return to Nebraska." The mandate in *Wild I* was issued to the district court on July 28, 2005, and the district court made a docket entry in conformance with the mandate on August 3.

2. Post-*Wild I* Procedural Background

On August 5, 2005, just 2 days after the district court made a docket entry in conformance with the mandate in *Wild I*, Leslie filed a third request to permanently remove Amber from Nebraska. Leslie alleged that "there ha[d] occurred a material and significant change in circumstances" since the time of the district court's prior grant of Leslie's second request to permanently remove Amber. Leslie alleged "said circumstances [to be], amongst other things," that Amber had attended school in Ohio during the 2004-05 school year and that such attendance was consistent with the now reversed grant of permanent removal ordered by the district court in *Wild I*; that the employer Leslie had worked for at Offutt prior to her previous requests for permanent removal had been "placed on the Department of Defense Base Closure list and [was] scheduled for relocation to another location outside the State of Nebraska"; that if Leslie would leave her employment in Ohio to return to her employment at Offutt, she "would be compelled to relocate with [her employer] to it's [sic] new location outside of the State of Nebraska"; that Amber's half sister, who had formerly been residing with Brian, was under the jurisdiction of the juvenile court and had been placed outside Brian's home; and that Amber was enrolled in a school in Ohio that operates on a traditional school year calendar and which meets Amber's educational needs. Leslie did not make any other allegations related to a legitimate reason for removal or related to Amber's best interests' being served by removal.

Also on August 5, 2005, Leslie filed a motion for temporary removal of Amber from Nebraska. In support of the request,

Leslie pointed to several matters, including the fact that the district court had previously granted Leslie's second request to permanently remove Amber, which grant was reversed by this court in *Wild I*; the fact that Leslie and Amber had moved to Ohio, again in accordance with the prior grant of permanent removal reversed by this court in *Wild I*; the fact that Leslie had accepted employment in Ohio and had received a raise in salary, apparently referring to the employment Leslie accepted in Ohio prior to even filing her second request for permanent removal that was at issue in *Wild I*; the fact that the mandate in *Wild I* reversing the district court's prior grant of permanent removal was not issued until July 28; and the fact that Leslie had already made living and school arrangements in Ohio. Additionally, Leslie alleged that to temporarily remove Amber to Ohio, "rather than have a temporary placement in Nebraska followed by a permanent move to the State of Ohio if [the] application [for permanent removal] is granted," was in Amber's best interests.

On September 16, 2005, Brian filed a response to Leslie's motion for temporary removal and, in the same filing, moved for enforcement of his visitation rights. Brian also filed an affidavit in support of his motion to enforce visitation. In that affidavit, Brian indicated that Leslie had taken physical custody of Amber on August 20 and had brought her back to Ohio; that he had sent a letter on August 29 demanding that Leslie return Amber to Nebraska in accordance with our opinion in *Wild I*; that his visitation rights, pursuant to the decree, included visitation every other weekend from Friday night until Sunday night, every Thursday overnight, and one evening every other week on either Monday or Tuesday; and that he had been afforded no physical contact with Amber since August 20.

On September 29, 2005, the district court entered an order ruling on Leslie's request for temporary removal of Amber and Brian's motion for enforcement of his visitation rights. The district court held in part:

> The Court having received the Decree and Modification thereto on the issue of visitation and the affidavit does not see any claim by [Brian] that he attempted to physically exercise his visitation and was refused by [Leslie]. The

> visitation schedule does not require [Leslie] to transport [Amber] to [Brian].
>
> Therefore the Motion to Enforce Visitation is denied.
>
> The Court sustains the Motion for Temporary Removal and fixes the matter for trial on **NOVEMBER 16, 2005** at the hour of 9:00 a.m. in District Courtroom #1.

As such, the court denied Brian's request to enforce visitation rights guaranteed in the decree—the only operative visitation order then in effect—because Brian had not indicated an attempt to physically visit with Amber and because the visitation order did not require Leslie to provide transportation; the district court did not make any findings of what impact Leslie's removal of Amber to Ohio without court permission in August should have had on Brian's visitation rights, however. Additionally, the court sustained Leslie's motion for temporary removal, without explanation.

On October 7, 2005, Brian filed an answer and counterclaim. In his counterclaim, Brian requested that the court modify the decree and award custody of Amber to him.

On December 22, 2005, the district court entered an order continuing the scheduled trial in this matter, by stipulation of the parties. Pursuant to a stipulation of the parties, temporary custody of Amber was awarded to Brian, to commence on December 30.

3. Trial in Present Case

On June 20, 2006, the district court conducted a trial. Although on September 29, 2005, the district court had sustained Brian's motion to dismiss Leslie's application for modification constituting her third request to permanently remove Amber from Nebraska, and although the record does not indicate that Leslie ever filed any subsequent pleading requesting permanent removal of Amber, it is apparent that the trial was specifically on Leslie's request for permanent removal and Brian's counterclaim for a change in custody. During the trial, a number of witnesses were called. For ease of presentation, we set forth the relevant testimony by way of the "template" for analyzing removal cases set forth in our opinion in *Wild I*.

(a) Legitimate Reason for Removal

Considering Leslie's third request for permanent removal of Amber from Nebraska, it appears that Leslie's purportedly legitimate reasons for removal at the time of trial concerned Amber's educational opportunities and her own employment opportunities. Although Leslie did not plead any employment opportunity as a material change in circumstances and did not have a new employment opportunity until several months after she filed her third request to permanently remove Amber, her testimony at trial suggests that she was attempting to establish such as a reason for allowing permanent removal. To that end, Leslie presented evidence in the form of her own testimony, an Omaha area human resources director's testimony, and Amber's testimony.

(i) Educational Opportunity for Amber

Leslie alleged in her application that she had enrolled Amber in a school with a traditional school year calendar, rather than the year-round calendar that was discussed in our opinion in *Wild I*. Leslie testified that Amber's school in Ohio is "a very good school" and is located approximately 3 miles from their home. Leslie testified that Amber rides a bus to get to school in Ohio, leaving at 6:55 or 7 a.m. and returning home at approximately 3 p.m. Leslie does not get home from work until approximately 4:30 or 4:45 p.m., and she leaves Amber unsupervised at home in the interim between Amber's arrival at home and Leslie's.

Leslie's and Brian's respective attorneys did not ask Amber, who was 11 years old at the time of trial, questions about the quality of the school in Ohio. Amber testified, in response to questioning by Brian's attorney, that she was receiving special help with her reading disorder from teachers at her school in Nebraska. Amber also testified, in response to questioning by Brian's attorney, that she was not receiving a very good grade in reading at her school in Nebraska, but that she was getting mostly "As and Bs" in her other classes.

Although Leslie's attorney did not elicit any testimony from Amber about the quality of her school in Ohio, the court did question Amber about it. The court stated to Amber, "I'm going

to let you measure the school systems for me." The court then asked Amber, "Do you feel you're getting a better education at one than the other?" Amber answered that she thought she was getting a better education in Ohio and explained that she thought such "[b]ecause [she had] a special class there for reading and it's an easier class than [she] had here." When the court asked Amber to explain whether she meant the class was "easier" or "more helpful," Amber testified that "[i]t's more helpful and easier." There was no evidence presented to indicate how the "special class" in Ohio compares to or differs from the "special help" provided in Nebraska to address Amber's reading disorder.

(ii) Employment Opportunity for Leslie

Leslie testified that prior to April 2004, which is when Leslie filed her second request for permanent removal, she had been employed as a civil service employee at "the Defense Finance and Accounting Service" at Offutt (DFAS). She had been employed as a "security manager" and had been earning approximately $40,000 per year. In April 2004, however, Leslie was offered and accepted a job in Dayton, and she voluntarily terminated her employment with DFAS. Leslie made that employment decision and took that action prior to being granted permission from the court to remove Amber from Nebraska. We noted in *Wild I* that Leslie's employment in Ohio paid approximately $7,000 per year more than her position at DFAS.

As noted in our opinion in *Wild I*, Leslie had asserted in support of her second request for permanent removal of Amber from Nebraska that there was rumor and speculation concerning the future of DFAS. In the June 2006 trial, Leslie testified that DFAS is now, since May 2005, on a list compiled by a "Base Realignment and Closing Commission" and is scheduled to be closed in February 2008.

Leslie's testimony establishes that since the trial and the district court's grant of removal in *Wild I*, she has again changed employment. Leslie testified that she was contacted by a new employer in October 2004, but that she did not receive an offer until "the fall of 2005" and did not begin her new employment until January 2006. As such, it is apparent that

this new job is not the employment that Leslie pled as a legitimate reason for removal in her application for modification filed on August 5, 2005, as she did not have this employment when she made her third request for permanent removal of Amber from Nebraska.

Nonetheless, Leslie testified that her new employment paid her approximately $70,000 per year and afforded insurance benefits. Beyond stating that she had been promoted after 19 months and explaining that such promotions do not "happen very often," Leslie did not testify about career advancement opportunities associated with the new job. The evidence indicates that her new job is a position that is terminable at will, however. An Omaha area human resources director testified that at-will employment provisions are "[a]bsolutely not" uncommon.

The human resources director testified that she is a director of human resources for a defense contractor in the Bellevue area. She confirmed that DFAS was scheduled to close and that civil service employers are not obligated to find a new position for employees if the civil service office closes or moves. She also testified that the cost of living is approximately 9.61 percent higher in Dayton than in Omaha. Finally, she testified that Leslie's employment skills are in a very specific area in program security and that "those jobs are far and few between [sic]" in the Omaha area and would likely be limited to positions with government contractors. She did not indicate the likelihood of Leslie's being able to secure a position with a government contractor in the Omaha area, and she did not testify about her knowledge of the civilian job market in the Omaha area. She did testify that if Leslie sought employment in the "civilian" sector in the Omaha area, Leslie "would probably be able to get maybe an executive administrative position" and "be able to make maybe [$50,000]."

(b) Amber's Best Interests

Both Leslie and Brian provided evidence concerning the various factors of the best interests analysis detailed in our opinion in *Wild I*. Consistent with our organization of the testimony at trial, we continue to follow the template from that opinion.

(i) Each Parent's Motives

Leslie did not specifically testify about her motives for seeking, for a third time, to permanently remove Amber from Nebraska. She did testify about the employment opportunity she obtained after she filed this request for permanent removal, however. Similarly, Brian did not specifically testify about his motives for resisting removal. He did testify about his relationship with Amber, however.

(ii) Quality of Life Factors

a. Emotional, Physical, and Developmental Needs

There was no evidence presented to indicate that either party in this case is incapable of or deficient in any way in providing for Amber's emotional, physical, and developmental needs.

b. Amber's Opinion or Preference

Leslie testified that Amber had said in April 2006 that she no longer wished to stay in Nebraska. Leslie acknowledged that Amber had testified in a deposition in May that she "didn't care" whether she lived in Ohio or Nebraska.

Amber testified at trial that she wants to live with Leslie. Amber testified, "I think it's a good choice because, uhm, I think I'll be safer there than here." Amber testified, "I think — I think I'm safer with my mom than my dad sometimes." Amber testified, "It's just a feeling that I get sometimes." She provided no further explanation for her desire to reside with Leslie, and she was not specifically asked if she preferred Ohio to Nebraska.

c. Enhancement of Income or Employment

As noted above, Leslie presented evidence concerning her new employment in Ohio. The new employment was not pled as a reason why Amber's best interests would be served by permanent removal, because the new employment postdated Leslie's third request for permanent removal of Amber from Nebraska; but evidence was adduced about Leslie's higher income, about the status of her previous job at DFAS, and about one human resources director's opinion concerning the Omaha area job market.

d. Housing or Living Conditions

Leslie testified that her new housing in Ohio was in a three-bedroom duplex, with both a frontyard and backyard. Leslie testified that there is also a park "just a little ways up the road." There was no evidence presented this time concerning where Leslie and Amber would live if they remained in Nebraska, but we noted in our opinion in *Wild I* that Leslie had previously lived in a large apartment in Nebraska.

e. Educational Advantages

As we noted in our opinion in *Wild I*, Amber suffers from a learning deficiency and requires special educational opportunities to benefit her reading difficulties. As discussed above, the record indicates that Amber was receiving special attention at the schools in both Ohio and Nebraska to help her with her reading difficulties. Additionally, Brian testified that he had spoken with a school counselor, and had "team meetings" with Amber's English, reading, and special education teachers and the school's director of special education, to discuss Amber's reading difficulties. There is nothing in the record to indicate that Amber was not receiving appropriate attention for her reading difficulties in both Ohio and Nebraska.

f. Relationship Between Child and Parents

As was true in *Wild I*, there was no specific evidence presented to indicate that Amber had a stronger relationship with either parent. The record indicates that Amber still has a good relationship with both parents.

g. Ties to Community and Extended Family

As was true in *Wild I*, the record indicates that Amber has no other family in Ohio, but has some extended family here in Nebraska, including one of Leslie's brothers, his wife, and their children. The record in this case indicates that in Nebraska, Amber attends school with one of her cousins, but that she does not have a significant relationship with that cousin outside of the school setting.

The record indicates that Amber's half sister, Andrea Wild, is also in the community in Nebraska. Leslie alleged in her application to modify that a material change of circumstances

was that Andrea was no longer residing in Brian's home and was now under the jurisdiction of the juvenile court in Nebraska. The record indicates that Andrea is still in the Omaha area, residing at Girls and Boys Town, and that she still has regular contact with Brian and Amber. Specifically, Brian testified that Andrea regularly returns to his home for visits, including overnight visits, and that Andrea and Amber are still very close. Amber also testified that she spends time with Andrea frequently, indicating that she had "lost count" of how much time she had spent with Andrea between December 2005 and the trial date in June 2006. No evidence was presented concerning the reason for Andrea's placement at Girls and Boys Town or about the expected length of such placement; Brian testified that "the plan [is] to try to get [Andrea] back living with [him]."

h. Hostilities Between Parents

The record again indicates that the parties have experienced some disagreements and some communication problems. However, neither party specifically testified about hostilities between them or about any such hostilities' impacting Amber.

(iii) Impact of Move on Contact Between Child and Noncustodial Parent

Neither party presented specific evidence concerning the impact of permanent removal on the relationship between Brian and Amber. There was evidence presented about visitation, both physical and by telephone. In our opinion in *Wild I*, we noted that there was, in that case, uncertainty about whether Amber would be attending a school in Ohio with a traditional school calendar or a school with a year-round calendar, and it was impossible to determine what kind of extended summer visitation might be available to Brian. As noted above, Leslie testified this time that Amber's school in Ohio is on a traditional school calendar.

4. Visitation Issues

In addition to the evidence presented on the specific issue of permanent removal, the parties adduced testimony concerning visitation issues and communication problems between the parties. We feel compelled to discuss some of this testimony,

as it helps to understand the posture of this case at trial and provides a more complete picture of Leslie's third request for permanent removal of Amber from Nebraska. Leslie's attorney elicited testimony concerning alleged visitation problems, specifically concerning spring break and Memorial Day weekend in 2006 and concerning telephone visitation. Brian's attorney also elicited testimony on these issues.

With respect to spring break visitation, Leslie testified that she had written Brian a letter indicating she "would be in Nebraska Saturday to pick [Amber] up," that she called Brian's cellular telephone on Friday "when [she] was driving in [from Ohio]," and that Brian told her she could not have Amber for spring break visitation until Monday "because spring break didn't start until Monday." Leslie picked Amber up on Monday, returned to Ohio, and then returned to Nebraska the next weekend and returned Amber to Brian on Sunday morning. Brian testified that "according to the agreement" in effect, Leslie could have visitation with Amber "either spring break or Easter," and that he first heard from Leslie that she desired to have Amber over spring break when he received a certified letter on the Friday before spring break was to begin. Brian testified that he had no problem with Leslie's taking Amber over spring break, but that because he had not heard anything from Leslie indicating that she desired to exercise visitation over spring break instead of Easter, he had purchased tickets for Amber to see a Broadway production in Omaha on the Sunday before spring break week.

With respect to Memorial Day weekend visitation, Leslie testified that she expressed a desire to Brian the first week of May 2006 to exercise some visitation with Amber over Memorial Day weekend. Leslie testified that she received a message on her cellular telephone from Brian in response, but that she accidentally deleted the message and had to contact Brian again; she then received another message from Brian indicating that Brian and Amber had plans over Memorial Day weekend. Brian and Amber had made plans to visit Brian's parents in Colorado. Brian testified that he heard from Leslie that because he and Amber had plans to visit family in Colorado, she did not want visitation over Memorial Day weekend after all.

Finally, Leslie testified about her telephone visitation with Amber while Amber was residing in Nebraska with Brian. Leslie testified that she talked to Amber "[p]robably four, five times a week" on the telephone. Leslie testified that she placed telephone calls to Amber and Amber placed telephone calls to her. Leslie testified that when she called Amber, Brian would put Amber on the telephone if she was in the house when Leslie called, and that if Amber was not in the house, Brian "would tell [Leslie] that she's outside." Leslie testified that when that happened, Amber would not call her back. Leslie testified, however, that she did not ask Brian to have Amber call back, and, rather, that she would "say good-bye, and [would] call back [later]."

5. District Court Order Granting Permanent Removal

On July 11, 2006, the district court entered an order granting Leslie permission to permanently remove Amber from Nebraska, again. In that order, the district court made no finding about what, if anything, constituted a legitimate reason for Leslie to remove Amber from Nebraska, as we noted as a threshold requirement to granting removal in our opinion in *Wild I*. The district court also made no findings concerning the motives of the parents in seeking or resisting removal or the impact of removal on the relationship between Brian and Amber, as noted as factors to be considered in our opinion in *Wild I*. Instead, the district court addressed what it characterized as "quality of like [sic] issues," "the best interest of the child issues," and issues that constitute the considerations under the quality of life factor of the best interests analysis we set forth in our opinion in *Wild I*.

The district court found that the enhancement of income or employment consideration weighed in favor of removal. The court noted that Leslie had "now changed her employment at a substantial increase in salary" and that "[t]he evidence further clearly now shows that her job at [DFAS], if she were able to be rehired, would be eliminated no later than 2008, with no guarantee of transfer and clearly not at her current salary."

The district court found that the educational advantages consideration weighed in favor of removal. Specifically, the

court relied on Amber's "testi[mony] that in her opinion the school she attended in Ohio offered her more opportunities and she had more specific individualized help in areas she was having problems with."

The district court combined the quality of the relationship between Amber and her parents consideration and the opinion or preference of Amber consideration for purposes of discussion. The court acknowledged that Amber had a good relationship with both parents. The court found, however, that Amber's testimony requesting that she be permitted to live with Leslie "weighs heavily in favor of removal."

The district court found that the ties to the community and extended family consideration "is now neutral on removal." The court acknowledged that Amber has friends in both Nebraska and Ohio, but placed no greater need upon maintaining one set of friends than it placed upon maintaining the other. The court also recognized that one of Leslie's brothers and his family still reside in the Omaha area, and it acknowledged that Amber's half sister, Andrea, is still in Omaha and that Amber and Andrea still have a close bond. However, the court emphasized the fact that Andrea is now at Girls and Boys Town in Omaha, instead of in Brian's home, and that Amber's and Andrea's "contacts with each other have now been limited."

With respect to the hostility between the parents consideration, the district court made no specific conclusion about whether it weighed in favor of removal. The court recognized that "there is still significant hostility between [Leslie] and [Brian]." The court found, however, that Leslie "has made every effort to minimize [the hostility] by her actions" and "has made every attempt to do what is in the best interest of Amber." The court also indicated that "[i]t is very evident to th[e] Court which parent would be more inclined to allow the other parent parenting time and access to Amber, and that is [Leslie]."

The district court found that the other quality of life considerations were "balanced" or "neutral" and did not weigh in favor of removal. The court found, however, that considering all of the evidence, it was "in the best interest of Amber that the Application for Removal now be granted." The court then set forth a visitation schedule, including "telephonic visitation

a minimum of two times per week"; ordered Brian to pay child support; and ordered each party to pay his or her own attorney fees. The court dismissed Brian's counterclaim for a change of custody. This appeal followed.

III. ASSIGNMENTS OF ERROR

Brian has assigned, inter alia, that the district court erred in granting Leslie's motion for temporary removal of Amber from Nebraska, in granting Leslie's third request for permanent removal of Amber from Nebraska, in setting Brian's visitation rights, in setting Brian's child support obligation, in denying Brian's request for a change of custody, and in denying Brian's request for attorney fees.

IV. ANALYSIS

1. Standard of Review

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Wild I*. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *McLaughlin v. McLaughlin, supra*; *Brown v. Brown, supra*; *Wild I*. See, *Vogel v. Vogel, supra*; *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*.

2. Temporary Removal of Amber From Nebraska

Brian first asserts that the district court erred in granting Leslie's motion for temporary removal of Amber from Nebraska. Brian argues that the court erred in granting the motion and in

not setting forth any reasons supporting granting the motion or supporting a conclusion that granting the motion was in Amber's best interests. We agree that the court erred in granting this motion, but we also agree with Leslie that no relief may be provided for this error.

[1,2] In *Jack v. Clinton*, 259 Neb. at 210, 609 N.W.2d at 336, the Nebraska Supreme Court specifically addressed, in a section with a subheading that reads, "Temporary Removal Prior to Ruling on Permanent Removal Discouraged," the unnecessary and unfortunate complications that arise when a trial court grants a motion for temporary removal of a minor pending resolution of an application for permanent removal. In addition to necessarily causing the record to include facts pertaining to the periods prior to and after relocation, an ultimate denial of the application for permanent removal will necessitate ordering the minor, who may have already recently adjusted to one move, to move again and return to the jurisdiction. See *id.* The Supreme Court held, "The grant of temporary permission to remove children to another jurisdiction complicates matters and makes more problematic the subsequent ruling on permanent removal and encumbers appellate evaluation of the ultimate decision on permanent removal." *Id.* at 210, 609 N.W.2d at 337. As such, the Supreme Court specifically "discourage[d] trial courts from granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal and *instead* encourage[d] them to promptly conduct a full hearing on permanent removal." *Id.* at 210-11, 609 N.W.2d at 337 (emphasis supplied).

We disagree with Leslie's argument on appeal that *Jack v. Clinton* "does not prohibit the temporary removal of a child in a pending trial on [the] issue [of permanent removal], it merely directs the trial court's [sic] that if the temporary removal is granted . . . the trial court should '. . . promptly conduct a full hearing on permanent removal.'" Brief for appellee at 28. We do not believe that the Supreme Court's comments in *Jack v. Clinton* can be read to suggest that granting temporary removal is acceptable so long as a full hearing is promptly conducted. Rather, we read the Supreme Court's comments in *Jack v. Clinton* as recognizing the unnecessary complications that are

caused by allowing temporary removal pending a ruling on an application for permanent removal.

In the present case, the district court was provided with a motion for temporary removal of Amber 2 days after the district court made a docket entry acting on this court's reversal of the district court's improper grant of Leslie's second request for permanent removal of Amber from Nebraska. Doing so was directly contrary to the Supreme Court's discouragement on this very issue in *Jack v. Clinton*. Nonetheless, inasmuch as the order was a temporary order, we agree with Leslie that no relief can now be afforded to Brian for this improper ruling by the district court.

3. Permanent Removal of Amber From Nebraska

Brian next asserts that the district court erred in granting Leslie's third request to permanently remove Amber from Nebraska. We find that Leslie again failed to carry her burden to demonstrate a legitimate reason for removing Amber from Nebraska, in that none of the grounds for removal alleged in Leslie's application constitute a legitimate reason for removing Amber. We further find that Leslie again failed to carry her burden to demonstrate that allowing removal would be in Amber's best interests, because the record fails to demonstrate that Ohio provides benefits to Amber under the various factors considered in the best interests analysis. As a result, we conclude, on the record provided, that the district court again abused its discretion in allowing Leslie to remove Amber to Ohio.

[3] The relevant test to be applied in cases where a custodial parent seeks court permission to remove a minor child from the state has been set forth by the Nebraska Supreme Court on numerous occasions. See, *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Wild I*. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the

custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id.* Under Nebraska law, the burden has been placed on the custodial parent to satisfy this test. See *Brown v. Brown, supra.*

(a) Legitimate Reason to Leave State

Leslie did not specifically assert in the pleading comprising her third request to permanently remove Amber from Nebraska that there existed a legitimate reason to leave Nebraska. Leslie asserted that "there ha[d] occurred a material and significant change in circumstances" that supported removing Amber from Nebraska, and she asserted a number of such alleged changes in circumstances, including (1) that DFAS had been placed on a base closing list; (2) that Andrea, Amber's half sister, had been placed in a setting other than Brian's home; (3) that Amber was enrolled in a school in Ohio that operated on a traditional school year calendar; and (4) that Amber had attended school in Ohio during the 2004-05 school year pursuant to the district court's prior grant of Leslie's second request for permanent removal of Amber. Leslie's third request to permanently remove Amber included no mention of any employment opportunities for Leslie as a reason for leaving Nebraska, beyond noting in passing that she had originally moved to Ohio "for a much better paying position with greater opportunity for advancement."

As noted above, the district court made no finding concerning whether Leslie had demonstrated a legitimate reason for leaving Nebraska. Despite our indication in *Wild I* that such is a threshold matter for the court to determine prior to evaluating the best interests factors, the court failed to address the legitimate reason element in even a cursory fashion. As such, our review of the court's decision to grant removal is made more difficult by not knowing which, if any, of the alleged material changes in circumstances the court deemed to constitute a legitimate reason for removal. It appears likely that, as the parties argue on appeal, the court implicitly believed that Leslie's newest career opportunity was the legitimate reason for removal, despite that career opportunity's not being pled and, in fact, not existing at the time Leslie filed her third request for permanent removal of Amber.

(i) Potential Reasons Pled by Leslie

None of the alleged material changes in circumstances pled by Leslie constitute a legitimate reason for permanently removing Amber from Nebraska. The status of DFAS is not relevant to the present inquiry, and neither Andrea's placement outside of Brian's home nor Amber's enrollment in school in Ohio constitutes a legitimate reason for leaving Nebraska.

As we noted in our opinion in *Wild I*, in granting Leslie's second request for permanent removal of Amber the district court placed significant emphasis on the fact that Leslie's position in Nebraska at DFAS was subject to potential reassignment or relocation. The evidence in that case indicated a "rumor" that Leslie's position at DFAS was going to be eliminated and a possibility that she could be reassigned or relocated by the military. However, by the time of trial in that case, Leslie had already voluntarily terminated her employment with DFAS, had accepted a job in Ohio, and had moved from Nebraska.

In the present case, Leslie presented evidence that DFAS has now been placed on an official base closing list and that DFAS is scheduled to be closed in 2008. Leslie also presented evidence that when a civil service employer, such as DFAS, closes or relocates, there is no obligation by the employer to provide or obtain other employment for the employee.

We find that the status of DFAS now is irrelevant to the discussion of whether Leslie has demonstrated a legitimate reason for leaving Nebraska. Prior to receiving permission to remove Amber in the trial which led to the appeal in *Wild I*, Leslie voluntarily terminated her employment with DFAS. There is no evidence to indicate that Leslie could return to DFAS, in Nebraska, even if she wanted to. As such, because DFAS is no longer Leslie's employer, nor is there evidence indicating that she could return to DFAS, the future status of DFAS has no impact on Leslie or her employment opportunities. Whether DFAS continues to operate forever or closes tomorrow, it will have no impact on Leslie, because of her voluntary decision to terminate her employment with DFAS prior to being granted relief by the trial court as recounted in *Wild I*.

Andrea's placement outside of Brian's home does not provide a legitimate reason for Leslie to leave Nebraska, either.

The record contains no evidence concerning the reason for Andrea's being placed at Girls and Boys Town in Omaha. Further, contrary to the district court's explicit finding in its order granting removal, the record does not indicate how long Andrea will remain placed outside of Brian's home; Brian's testimony actually indicated that "the plan [is] to try to get [Andrea] back living with [him]." The fact that Andrea is not now currently living with Brian has no bearing on whether Leslie has a legitimate reason to leave Nebraska. This fact may have a bearing on the best interests analysis, as discussed below.

Similarly, Amber's enrollment in school in Ohio cannot be considered a legitimate reason for removal. Although one factor in our best interests analysis in *Wild I* was that Leslie had not enrolled Amber in school in Ohio and it was unclear whether school there would be on a traditional or a year-round calendar, the fact that Amber is now enrolled in a school with a traditional calendar does not provide a legitimate reason for leaving Nebraska. This fact may have a bearing on the best interests analysis, as discussed below.

Finally, the fact that Amber attended school in Ohio during the 2004-05 school year cannot be considered a basis for finding a legitimate reason to leave Nebraska. Amber attended school in Ohio during that school year because the district court incorrectly granted Leslie's second request to permanently remove Amber from Nebraska. It would be incongruent to allow such an incorrect ruling to form the basis for a third request to permanently remove Amber.

(ii) Leslie's New Employment

Although Leslie did not plead it as a material change in circumstances, it is apparent from a reading of the record and the briefs on appeal that Leslie's newest employment opportunity might also be considered a legitimate reason for leaving Nebraska. Leslie did not begin the new employment until January 2006, so it was not even in existence when Leslie filed her third request to remove Amber from Nebraska. Nonetheless, the new employment was in existence at the time of trial.

[4-6] Legitimate employment opportunities for the custodial parent may constitute a legitimate reason for leaving the state. *Wild I*. See, *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70

(2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Carraher v. Carraher*, 9 Neb. App. 23, 607 N.W.2d 547 (2000). Such legitimate employment opportunities may constitute a legitimate reason "where there is a 'reasonable expectation of improvement in the career or occupation of the custodial parent.'" *Farnsworth v. Farnsworth*, 257 Neb. at 252, 597 N.W.2d at 600, quoting *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). See, also, *Jack v. Clinton, supra*. Such legitimate employment opportunities may constitute a legitimate reason "where the custodial parent's new job include[s] increased potential for salary advancement." *Id.* at 205, 609 N.W.2d at 333. See, also, *Farnsworth v. Farnsworth, supra*.

As we noted in our opinion in *Wild I*, the Nebraska Supreme Court found in *Jack v. Clinton, supra*, that the custodial parent had met the threshold requirement of proving a legitimate reason for leaving Nebraska and removing the minor children to Pennsylvania. In that case, the evidence included testimony that the new employment opportunity in Pennsylvania offered greater potential for salary advancement, required less overtime, and allowed the custodial parent to spend more time with the minor children. In addition, the custodial parent provided evidence that a significant additional reason for moving from Nebraska to Pennsylvania was to be closer to extended family.

Similarly, in *Farnsworth v. Farnsworth, supra*, the custodial parent met the threshold requirement of proving a legitimate reason for leaving Nebraska and removing the minor child to Colorado. In that case, the custodial parent presented evidence that she had conducted an unsuccessful search for better employment in Nebraska and, having failed, obtained a job in Colorado that provided greater income, benefits, and career advancement potential than her employment in Nebraska.

The present case is, in some significant ways, distinguishable. The entirety of Leslie's testimony on direct examination concerning her new employment was that she was contacted by the employer in October 2004, that she first received an offer in the fall of 2005, that she accepted in December 2005, that she began in January 2006, that her salary was approximately

$70,000 per year, that she worked a 40-hour week, and that she had health and dental insurance, but that Amber was not covered by her insurance. On cross-examination, Leslie testified that she does not generally work any overtime, except in the case of an emergency situation.

Leslie presented no evidence concerning any attempts to determine whether there was comparable employment available in Nebraska. She presented the testimony of a human resources director from a defense contractor, but that witness did not testify to or indicate any knowledge about the job market in Nebraska outside of her field of defense contracting. Additionally, Leslie presented no evidence concerning possibilities for career advancement, future salary increases, or whether benefits would be available for Amber. Leslie presented no evidence to compare the amount of time she is able to spend with Amber now to either what she was able to spend with Amber during her former employment in Nebraska or what she may be able to spend during any other employment that might be available in Nebraska. The only evidence in this regard indicated that in Ohio, Amber spends between 1½ and 2 hours at home unsupervised after school before Leslie returns home from work. Finally, the record indicates that there is no extended family in the area to buttress Leslie's new employment as a legitimate reason.

The most that can be gleaned from the record about Leslie's new employment is that she makes more money than she did during her former employment in Nebraska, and more than the defense contractor human resources director opined Leslie could make as an executive administrative assistant in Nebraska. We think it important that this new employment was not even in existence at the time Leslie filed her third request to permanently remove Amber and was clearly not a basis for her request to remove Amber. We also iterate that the district court made no finding about whether this constituted a legitimate reason, or the legitimate reason, for allowing removal. Nonetheless, in light of the financial benefit apparent from the new employment, we conclude that this employment could constitute a legitimate reason for leaving Nebraska.

(b) Amber's Best Interests

As noted, we conclude that Leslie failed to demonstrate that any of the pled alleged changes in circumstances constituted a legitimate reason for leaving Nebraska. We further conclude that even if the employment opportunity Leslie secured after filing her application could be considered a legitimate reason for leaving Nebraska, Leslie further failed to meet her burden to prove that removal from Nebraska is in Amber's best interests, because the evidence adduced by Leslie does not indicate that the relevant factors weigh in favor of Ohio over Nebraska.

[7,8] After clearing the threshold of demonstrating a legitimate reason for leaving the state and removing the minor child to another state, the custodial parent must demonstrate that it is in the child's best interests to continue living with him or her. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Wild I*. In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Id.*

In our opinion in *Wild I*, we noted that the district court had not elaborated on any of the best interests factors or given any indication of why the court had determined that it was in Amber's best interests to be removed from Nebraska. We then discussed, in great detail, each factor and consideration that should be considered in evaluating the child's best interests. In the present case, the district court, for some reason, "grouped" the various factors and considerations "in two basic categories" and indicated that "[o]ne is quality of like [sic] issues, and the other [is] the best interest of the child issues." The court then discussed only the quality of life factor set forth in our opinion in *Wild I* and did not address either of the other

factors before concluding that the court "finds it to be in the best interest of Amber that the Application for Removal now be granted." We find that the evidence, again, does not support this conclusion.

(i) Each Parent's Motives

The first factor that must be considered is each parent's motives for seeking or opposing the removal of the minor child from the jurisdiction. We conclude that at most, the evidence demonstrates that the parties' motives are balanced; this factor does not weigh in favor of a finding that removal is in Amber's best interests.

[9] The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *McLaughlin v. McLaughlin, supra*; *Wild I*. See, also, *Vogel v. Vogel, supra*; *Brown v. Brown, supra*; *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*.

The evidence in the present case indicates that Brian is an involved noncustodial father who has regularly exercised his visitation and who willingly took custody of Amber by agreement of the parties between December 2005 and trial. On the other hand, we found in *Wild I* that Leslie was motivated to seek removal to be nearer her fiance and to explore a different employment opportunity. In this case, the evidence indicates that Leslie is no longer in a relationship with the man who was described as her fiance in *Wild I* and has left the employment opportunity described in *Wild I*. Two days after the district court made a docket entry acting on the mandate reversing the prior grant of permission for permanent removal, Leslie filed a third request for permanent removal, and she took Amber back to Ohio prior to receiving any authorization from the court to do so. Although it appears that Leslie is still motivated by yet another employment opportunity, it is difficult to conclude that such opportunity was a motivating factor for Leslie to seek removal, because she did not have the current employment opportunity until approximately 5 months after she filed her third request to permanently remove Amber.

As is true of the other cases decided by the appellate courts of Nebraska concerning this factor, we do not find that either

party was acting in bad faith or with ill motives. See, *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). We conclude that at most, the motives of the parties are balanced. As such, this factor does not weigh in favor of a finding that it is in Amber's best interests to be removed from Nebraska.

(ii) Quality of Life

The second factor that must be considered is the potential that the move holds for enhancing the quality of life for the child and the custodial parent. This factor requires an analysis of a number of other considerations which bear upon the potential enhancement of the child's quality of life. The evidence in the record in this case fails to demonstrate that the proposed removal from Nebraska will significantly enhance Amber's quality of life. Leslie failed to adduce sufficient evidence to support a finding that this factor weighs in favor of removal.

[10,11] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. *Wild I.* See, *McLaughlin v. McLaughlin, supra*; *Vogel v. Vogel, supra*; *Brown v. Brown, supra*; *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*. This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted. *Id.*

a. Emotional, Physical, and Developmental Needs

As in *Wild I*, the record indicates that both parties in this case are capable of providing for the emotional, physical, and developmental needs of Amber. The record suggests that both are loving parents genuinely concerned about Amber's needs. There was no evidence presented to suggest that either party is incapable of or deficient in any way in providing for Amber's emotional, physical, and developmental needs. As such, this consideration is equally balanced and does not weigh in favor of removal.

b. Amber's Opinion or Preference

At the time of trial in this matter, Amber was 11 years old. Amber testified that she wants to live with Leslie. Although Amber's preference is entitled to some weight in favor of removal, we disagree with the district court's conclusion that this factor "weighs heavily in favor of removal," because we disagree with the court's finding that Amber provided "reasonable and persuasive reason[s] for her decision."

In custody determinations, the desires and wishes of the minor child if of an age of comprehension are entitled to consideration, although they are not controlling. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). The Nebraska Supreme Court has recognized this proposition of law is applicable to the child's opinion or preference consideration of the best interests analysis in removal cases. See *id.* The Supreme Court has recognized that in those cases where the child's preference was given significant consideration, the child was typically over 10 years old. See *id.* Additionally, the child's preference is entitled to consideration if the child is of sufficient age and has expressed an intelligent preference. See *id.*

In this case, Amber was asked to tell the judge "where [she wanted] to live." In response, Amber replied, "My mom's." When asked to tell the judge "any particular reason why [she would] like to live with [her] mom," Amber replied, "Uhm, because I think it's, uhm — I think it's a good choice because, uhm, I think I'll be safer there than here." Amber testified, "Yeah, because I think — I think I'm safer with my mom than my dad sometimes." When asked to explain why she felt that way, Amber testified, "It's just a feeling that I get sometimes."

Contrary to the conclusion of the district court, our de novo review of Amber's testimony does not lead us to conclude that Amber "was able to give reasonable and persuasive reason[s] for her decision." Indeed, Amber was not able to explain why she preferred to live with Leslie, other than to indicate "a feeling" that she would be safer; there is nothing in the record to indicate that Amber is in any way unsafe when with Brian. Nonetheless, as we concluded in *Wild I*, we conclude that Amber's preference is entitled to some recognition, and this consideration weighs in favor of removal, albeit not "heavily in favor of removal."

c. Enhancement of Income or Employment

As fully addressed above in our discussion of Leslie's new employment opportunity, the record in this case does indicate that Leslie has secured another new job, again at a higher income than the last employment she held in Nebraska. Leslie did not present any evidence to directly indicate how her increased income would be beneficial to Amber's best interests. The most that can be said from the record presented is that Leslie now makes more money than she did when she last lived in Nebraska. Although increased income certainly provides the potential for benefits to Leslie, the record does not indicate that Leslie was having difficulty making ends meet in Nebraska, that Amber was in need of anything that Leslie was unable to provide because of her income level in Nebraska, or any other explanation of how Leslie's increased income will benefit Amber. The record does indicate that Leslie's new employment has resulted in her leaving Amber at home alone and unsupervised for 1½ to 2 hours after school every day. Nonetheless, we recognize that the increase in income provides the potential for benefits to Amber, and we conclude that this factor weighs in favor of removal.

d. Housing or Living Conditions

As we noted in our opinion in *Wild I*, Leslie's last housing in Nebraska was in a large apartment. In the present case, Leslie testified that her housing in Ohio was in a duplex. She testified that the neighborhood consisted of rented duplexes and houses and that there was a park "just a little ways up the

road." There was, again, no evidence presented concerning the quality of the neighborhoods for housing in either Nebraska or Ohio, and there was, again, no evidence presented to indicate that the housing in Ohio will provide any benefit to Amber's best interests. There was no evidence presented to indicate that the available housing in Nebraska was in any way deficient or that the current housing in Ohio was in any way superior. This consideration does not weigh in favor of removal.

e. Educational Advantages

In the present case, Brian testified that Amber's school here in Nebraska tested and evaluated Amber after she enrolled, to facilitate Amber's reading education. Brian testified that he spoke with a school counselor and the director of special education at Amber's school, and Brian stated that he had participated in "team meetings" with a special education teacher, Amber's reading teacher, and at least one other teacher concerning her progression. Brian testified that it was decided Amber was not falling behind her peers and that she was kept in class with the other students and progressed on to seventh grade. Amber testified that she was receiving special help from her teachers in Nebraska with reading.

Leslie specifically testified that she could not testify about any educational advantages that Amber might enjoy by being in the Ohio schools over the schools in Nebraska. Leslie testified that in Ohio, Amber was in a special reading and English class and a special math class.

The district court appeared to recognize that Leslie had not provided sufficient evidence to indicate that the Ohio schools afforded an educational advantage over the Nebraska schools, as the court asked Amber to "measure the school systems" for the court. In response to the court's question about where Amber felt she was getting a better education, Amber testified, "I think I'm getting a better education in Ohio." Amber elaborated by indicating that she felt that way "[b]ecause [she has] a special class there for reading and it's an easier class than [she] had [in Nebraska]." When the court asked Amber if she meant that the class was "easier or . . . more helpful," Amber answered, "It's more helpful and easier."

Reviewing the record de novo, we find that Leslie failed to demonstrate that removal to Ohio afforded Amber any significant educational advantages. In both locations, Amber was receiving special assistance for her reading, and Leslie was not able to testify about any educational advantages. We do not find that 11-year-old Amber's testimony that the Ohio school was providing her a better education because it was "easier" significantly tips the balance on this consideration. This consideration does not weigh in favor of removal.

f. Quality of Relationship Between Child and Parents

With regard to this consideration, the record in the present case, like the record in *Wild I*, indicates only that Amber has a good relationship with both parties and that by necessity, removal will impact her relationship with Brian and the amount of time she is able to spend with Brian. In this trial, as in the trial in *Wild I*, there was no evidence presented to indicate that Amber has a stronger relationship with either parent. There was again no expert evidence produced indicating that removal should be allowed because of a stronger bond with Leslie. Compare *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002) (expert recommended granting removal because of bond with custodial parent). As in *Wild I*, it is clear that Amber's relationship with Brian will suffer, at least to the extent of a reduction in time spent together and in the frequency and ease of Amber's and Brian's contact with each other. This consideration, then, also does not weigh in favor of removal.

g. Ties to Community and Extended Family

As in *Wild I*, there was again little evidence presented concerning Amber's ties to either community. The record again indicates that Amber has some extended family in Nebraska. Specifically, one of Leslie's brothers, his wife, and their children are in the community in Nebraska. The record indicates that Amber does not have significant contact with this family outside of school, but that when she attended school in Nebraska, she did attend school with one of her cousins. The record again indicates that there is no extended family in Ohio.

Still of importance is the fact that Amber's half sister, Andrea, is located in the community in Nebraska. The district

court concluded that Andrea no longer resides with Brian and is now placed at Girls and Boys Town. The district court further found "from the evidence" that Andrea "will remain [at Girls and Boys Town] until she reach's [sic] the age of majority, with visits at home." We find no support in the record for this conclusion.

Instead, the record indicates that Andrea is currently living at Girls and Boys Town. There is no evidence in the record to indicate what prompted Andrea's placement at Girls and Boys Town, but the record does indicate that Andrea still has overnight visitation in Brian's home and that Amber and Andrea had frequent contact while Amber was back in Nebraska. Amber testified that she had so much contact with Andrea that she had "lost count" of the number of times they had seen each other.

The district court concluded that "the weight of this issue is now neutral on removal." We disagree. The record indicates that Amber has extended family in the community in Nebraska, including a cousin she attended school with and a half sister who is not living with Brian but with whom Amber did have frequent contact. Amber has no extended family in Ohio. The evidence on this consideration is not neutral, and this consideration does not weigh in favor of removal.

h. Hostilities Between Parties

As in *Wild I*, the record indicates that the parties have experienced some disagreements and some communication problems, but there was no evidence to indicate that any of the hostilities between the parties have adversely affected Amber. The district court held that Leslie "has made every effort to minimize [hostilities] by her actions" and pointed to Leslie's allowing Amber to live with Brian between December 2005 and the trial in the present case. The district court also pointed to the occasion on which Brian "determined spring break to commence on Monday . . . knowing [Leslie] would be [in Nebraska] on Friday." Finally, the district court held that "[i]t is very evident" Leslie "would be more inclined [than Brian] to allow the other parent parenting time and access to Amber" and that "[d]uring the entire proceeding [Leslie] has made every attempt to do what is in the best interest of Amber." Upon our

de novo review, we disagree with the district court's characterization of the record.

The record does not indicate that Leslie has made every effort to minimize hostilities between her and Brian by her actions. The record indicates that we reversed the district court's grant of Leslie's second request for permanent removal of Amber and that the district court made a docket entry on the mandate on August 3, 2005. Two days later, Leslie filed a third request for permanent removal, and then took Amber back to Ohio prior to obtaining any court permission to do so. Brian was left to file a motion seeking enforcement of his visitation rights under the operative court order, the dissolution decree—which granted him overnight visitation on weekends and during the week, as well as other visitation during the week. The district court, rather than recognizing that Leslie had taken Amber to Ohio without court permission, held that Brian had not demonstrated he had physically attempted to exercise those visitation rights and that the decree did not require Leslie to provide transportation.

The record further indicates that we awarded Brian attorney fees as a result of our decision in *Wild I*. When Brian's counsel approached Leslie's counsel about securing payment of the fees, the transcript indicates that Leslie's counsel responded, "The attorney fee is a judgment against [Leslie] and you have the right to avail yourself of any legal remedies to collect the judgment." Leslie testified that she paid the attorney fee award in May 2006—approximately 1 year after the fees were awarded —although Brian testified that she still had not paid the full amount even as of trial in June 2006.

We do not interpret Leslie's actions of taking Amber to Ohio without court permission, filing a third request for permanent removal at a time when there had been no change of circumstances from those litigated in the trial on her second request for permanent removal, and taking nearly 1 year to pay the attorney fee award as making "every effort to minimize [hostilities]." Rather, we interpret those actions as further contributing to the hostilities.

Finally, as fully set forth in our discussion of the background of this case above, the evidence does not indicate that Brian's

actions related to Leslie's request for spring break visitation constituted an attempt to further hostilities between the parties. Rather, contrary to the district court's finding that Brian "attempt[ed] to thwart" Leslie's visitation or its finding that "[h]e determined spring break to commence on Monday . . . knowing [Leslie] would be [in Nebraska] on Friday," Brian testified that "according to the agreement" in effect, Leslie could have visitation with Amber "either spring break or Easter," and that he first heard from Leslie that she desired to have Amber over spring break when he received a certified letter on the Friday before spring break was to begin. Brian testified that he had no problem with Leslie's taking Amber over spring break, but that because he had not heard anything from Leslie prior to the Friday she planned on arriving indicating that she desired to exercise visitation over spring break instead of Easter, he had purchased tickets for Amber to see a Broadway production in Omaha on the Sunday before spring break week.

The district court did not make a specific finding that this consideration weighed in favor of removal. However, it is apparent from the court's characterization of the record—a characterization we disagree with—that the court did find this factor weighed in favor of removal. On our de novo review, our reading of the record indicates that Leslie has not acted to minimize the hostility between the parties, and this consideration does not weigh in favor of removal.

i. Conclusion on Quality of Life

Our de novo review of the record leads us to conclude that the quality of life considerations do not weigh in favor of allowing Leslie to permanently remove Amber from Nebraska. In the present case, the various considerations almost uniformly fail to weigh in favor of removal. Leslie failed to prove an enhancement in the quality of life for Amber from leaving Nebraska and, at most, established that she is now making more money than she previously did in Nebraska. Because Leslie failed to adduce sufficient evidence to support a finding that Amber's quality of life would be enhanced, we find that this factor weighs against removal.

(iii) Impact of Move on Contact Between Child and Noncustodial Parent

In this case, there can be no doubt that removal will impact the amount of contact between Brian and Amber. Prior to Amber's removal, Brian enjoyed a liberal visitation schedule that included every other weekend, one overnight visitation during the week every week, and one other evening every other week. Instead of being in the same community as Amber and able to have frequent and regular physical contact with her, Brian will be forced to rely upon electronic and telephone visitation and visitation on holidays and summer breaks, and Amber will now be located almost 750 miles away.

Although it is true that the district court granted Brian all but the final 2 weeks of summer vacation and ordered Leslie to bear the costs of transportation, it is apparent that this amount of visitation will still be significantly less than the total amount of time Brian spent with Amber under the visitation order in place under the decree while Amber was residing in Nebraska. Compare *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002) (noncustodial parent still able to enjoy weekend visitation because of short distance of custodial parent's relocation). Although it appears that the district court attempted to minimize the negative impact removal would have on contact between Brian and Amber, the court's attempts do not entirely eliminate that negative impact.

(iv) Conclusion on Best Interests

The record does not demonstrate sufficient support for the district court's conclusion that it is in Amber's best interests to be removed from Nebraska to Ohio. None of the factors to be considered in evaluating Amber's best interests weighs in favor of allowing removal except Amber's preference and Leslie's enhanced income, as noted above. Leslie failed to adduce sufficient evidence to demonstrate how allowing removal of Amber from Nebraska would serve Amber's best interests. Because Leslie failed to meet her burden of proof on this issue, we conclude that the district court abused its discretion in finding that allowing removal would be in Amber's best interests.

(c) Conclusion on Removal

As we noted of *Wild I* in our opinion in that appeal, this case is another in the growing line of difficult cases in Nebraska courts where a custodial parent seeks the opportunity to leave the state and relocate with a minor child. As was true of the record in *Wild I*, the record in this case does not contain negative evidence about the noncustodial parent, Brian. The record again suggests that Brian is a capable and loving father who has vigorously opposed Leslie's removal of Amber from Nebraska. Leslie began attempting to remove Amber from Nebraska fewer than 10 months after the parties entered into a stipulated settlement agreement, and has continually attempted to do so, despite an inability to demonstrate that doing so is in Amber's best interests.

We conclude, as we did in *Wild I*, that Leslie has failed to adduce sufficient evidence to support the district court's grant of Leslie's request for permanent removal of Amber from Nebraska. The record indicates that Leslie had no legitimate reason for seeking removal in the present case and that the only arguably legitimate reason did not come into existence until several months after Leslie filed her third request. The record indicates that the various factors used to evaluate whether removal is in Amber's best interests do not collectively weigh in favor of allowing removal. The district court again abused its discretion in finding that Leslie had satisfied her burden of proof. We again reverse the district court's order granting Leslie's request to remove Amber from Nebraska.

4. Visitation and Child Support

In light of our resolution of Brian's assignment of error concerning the district court's grant of Leslie's third request for permanent removal of Amber from Nebraska, we need not further address the district court's visitation and child support orders that related to such removal.

5. Change in Custody

Brian asserts that the district court erred in denying his counterclaim seeking a change in custody. We conclude that Brian has not proven a material change in circumstances showing that

Leslie is unfit or that the best interests of Amber require such action. We find no merit to this assignment of error.

As we noted in our opinion in *Wild I*, the issue of a change in custody must be considered separately and apart from the custodial parent's request to remove the child to another state. Ordinarily, a request for change of custody will not be granted unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. See *Wild I*.

In the present case, as in *Wild I*, Leslie testified that if the court denied her request to remove Amber to Ohio, she would return to Nebraska. Despite Leslie's response to this court's denial of her request in *Wild I*, the record in the present case contains no evidence to demonstrate a material change of circumstances which would warrant changing custody. As such, we find this assignment of error to be without merit.

6. Attorney Fees

Finally, Brian asserts that the district court erred in denying his request for attorney fees. The district court ordered each party to pay his or her own fees. We do not find such a determination by the district court to be an abuse of discretion.

The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Wild I*. There is not sufficient evidence to attribute bad faith or ill motives to either party in this case, and the record does not establish that the district court abused its discretion in ordering each party to pay his or her respective attorney fees. We find this assignment of error to be without merit.

V. CONCLUSION

We find that the district court again abused its discretion in granting Leslie's request to permanently remove Amber from Nebraska. We find that Leslie failed to meet her burden of proof to demonstrate that the pled reasons for leaving Nebraska constituted legitimate reasons for removal. Even if Leslie's new employment opportunity, obtained several months after she instituted this action, could be considered a legitimate reason for removal, we find that Leslie failed to meet her burden of proof

to demonstrate that removal from Nebraska would be in Amber's best interests. Accordingly, we reverse the district court's order granting permanent removal.

We find no abuse of discretion by the district court with respect to Brian's requests for a change of custody and for attorney fees. Accordingly, we affirm those findings by the district court. We do not further address Brian's assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE ESTATE OF THOMAS JOSEPH MALLOY, DECEASED.
STATE OF NEBRASKA, APPELLEE, V.
THOMAS A. WELSH, APPELLANT.

736 N.W.2d 399

Filed July 17, 2007. No. A-06-178.

1. **Decedents' Estates: Taxation: Appeal and Error.** The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.
2. **Decedents' Estates: Parent and Child: Taxation: Appeal and Error.** Factual findings necessary in determining if the requisite acknowledged parent-child relationship of Neb. Rev. Stat. § 77-2004 (Reissue 2003) exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong.
3. **Witnesses: Appeal and Error.** In determining whether the trial court was clearly wrong in its findings, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.
5. **Decedents' Estates: Parent and Child: Taxation: Words and Phrases.** The language "acknowledged relationship of a parent," as used in Neb. Rev. Stat. § 77-2004 (Reissue 2003), extends beyond blood relatives to persons standing "in loco parentis" with the taxpayer.
6. **Decedents' Estates: Parent and Child: Taxation.** Even though a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits of Neb. Rev. Stat. § 77-2004 (Reissue 2003) should be allowed.
7. ____: ____: ____. In determining whether a person stands in loco parentis to another within the context of Neb. Rev. Stat. § 77-2004 (Reissue 2003), a person may stand in loco parentis despite other sources of support for the child.
8. **Decedents' Estates: Taxation.** For purposes of Neb. Rev. Stat. § 77-2004 (Reissue 2003), an appellate court's determination of the nature of the relationship between

the testator and the taxpayer is not limited to an examination of the childhood years of the taxpayer.

9. **Parent and Child.** The factors that a trial court should consider in arriving at the determination that an acknowledged relationship of a parent does or does not exist include, but are not limited to, the following guideposts: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

Appeal from the County Court for Holt County: ALAN L. BRODBECK, Judge. Affirmed.

James D. Gotschall and Andrew J. Hoffman, of Strope, Krotter & Gotschall, P.C., for appellant.

Thomas P. Herzog, Holt County Attorney, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Thomas Joseph Malloy died on June 19, 2003, and he devised a substantial amount of his estate to his nephew, Thomas A. Welsh. As part of an amended petition for determination of inheritance tax, although Welsh would ordinarily be subject to taxation in accordance with Neb. Rev. Stat. § 77-2005 (Reissue 2003), Welsh sought to be taxed at the lower rate provided for in Neb. Rev. Stat. § 77-2004 (Reissue 2003), claiming that Malloy, for not less than 10 years before his death, stood in an acknowledged relationship of a parent to Welsh. Finding that the evidence was insufficient to show the necessary parental relationship existed between Malloy and Welsh, the county court determined that Welsh did not qualify for preferential tax treatment under § 77-2004. From this order, Welsh perfected the instant appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

When Malloy died, he owned 1,280 acres of real estate. Malloy bequeathed Welsh 320 acres of land outright and gave him an option to purchase 640 additional acres. In addition, Welsh received a per stirpes share of the residuary estate. On August 31, 2004, Welsh filed a petition for determination of

inheritance tax as copersonal representative along with one other copersonal representative. On September 28, the county court assessed inheritance tax against the named parties in its order, including Welsh. The value of Welsh's gross estate from Malloy totaled $496,232.91. The court taxed Welsh at the rate for an immediate relative of the decedent under § 77-2004. The inheritance tax assessed against Welsh was $4,009.17.

On the county court's own motion, the court scheduled a hearing to redetermine the inheritance tax. On December 13, 2005, Welsh filed an amended petition for determination of inheritance tax alleging that Welsh qualified as a "Class I" heir, falling under the provisions of § 77-2004, because Malloy, for 10 years prior to his death, stood in an acknowledged relationship of a parent to Welsh. The amended petition further provided that Welsh's gross estate was then valued at $570,307.56.

The hearing was held on December 13, 2005. The court received into evidence seven exhibits, including the first inheritance tax worksheet signed by the State, which allowed Welsh to be taxed as a Class I heir, under § 77-2004, and numerous affidavits attesting to the close relationship between Malloy and Welsh. The parties entered a stipulation that prior to signing the inheritance tax worksheet that allowed Welsh to be taxed as a Class I heir, under § 77-2004, the State was aware that Welsh was being treated as a Class I heir. As part of the stipulation, the State also admitted that Welsh had provided the State with the above-mentioned affidavits attesting to the existence of Malloy and Welsh's close relationship prior to the State's signing the first inheritance tax worksheet. The State admitted to the court that it made a mistake when it agreed to the initial inheritance tax worksheet by signing it.

Welsh's affidavit stated that his mother was Malloy's sister and that he was one of the copersonal representatives of Malloy's estate. Welsh explained that when his father died in 1966, Welsh was 26 years old, and that after Welsh's father's death, Malloy took Welsh "under his wing and stood in the shoes of [his] father for the remainder of his life." According to Welsh, since 1945, he has lived 1.5 miles from Malloy's home, and when he was young and the road conditions were poor, he stayed with Malloy during the school year. Welsh further

explained that since 1945, Malloy cut his hair, and that since 1952, he cut Malloy's hair. Even though Malloy had nine nieces and nephews, when Malloy died, he owned 1,280 acres and bequeathed 320 acres outright to Welsh and gave him an option to purchase 640 additional acres. Malloy also left Welsh's son an option to purchase the final 320 acres and "wanted him to have an option to purchase his 'home place.'" Welsh also stated that in 1998, Malloy appointed him as his attorney in fact, and that Welsh acted as Malloy's durable power of attorney and health care power of attorney until the time of his death on June 19, 2003. Welsh stated that Malloy gave him advice on ranching operations, on how to deal with "certain family members" and his personal life, and on which bulls to buy. According to Welsh, Malloy told him how to raise his children. Welsh stated that Malloy gave him financial support by assisting him with purchasing equipment and real estate. In his affidavit, Welsh gave one example from 1974 when Malloy and Welsh "drove all over the state looking for a stackmover" and they "bought one in Plainview." According to Welsh, he saw Malloy 6 or 7 days a week and he and Malloy spent 3 to 4 days a week together working until Malloy moved to a nursing home in 2002. Welsh stated that Malloy spent his holidays with Welsh and that Malloy spent his recreational time with Welsh fishing and brewing beer. Welsh drove Malloy to church on Sundays as well as to all of his doctor appointments. Malloy had a place of honor at Welsh's children's weddings. Welsh stated that during the last 20 years of Malloy's life, Welsh did nearly all of Malloy's chores and took care of Malloy's ranching operations without being paid.

In his affidavit, Dr. Robert Randall, Malloy's physician, friend, and neighbor, stated that Malloy "depended upon . . . Welsh and relied upon him like a son" and that Malloy treated and acknowledged Welsh "like a son." According to Dr. Randall, while Malloy "had no biological sons, . . . Welsh was treated by . . . Malloy as the son he never had." Dr. Randall is not related to Malloy or Welsh.

Dale Mlinar stated in his affidavit that he was Malloy's neighbor and close friend. According to Mlinar, he spoke with Malloy at least once a week from 1937 until the time when

Malloy moved to the nursing home. Mlinar stated that Malloy acknowledged Welsh like a son, praised Welsh like a son, and for 10 years prior to his death, treated Welsh like a son. Mlinar stated that "Malloy's verbal acknowledgments of . . . Welsh being like a son were carried out by his actions." Mlinar is not related to Malloy or Welsh.

According to her affidavit, Juli McCumber lived near Malloy and had known Malloy for 10 to 15 years. McCumber stated that whenever Malloy had a problem, he relied upon Welsh for help. According to McCumber, "Malloy, by his words and actions, acknowledged . . . Welsh like a son . . . ." McCumber is not related to Malloy or Welsh.

Applying the factors of *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996), the court found that for purposes of computing inheritance taxes, the evidence presented failed to show that Malloy for not less than 10 years prior to his death stood in the acknowledged relationship of a parent to Welsh, and ordered that the property passing to Welsh from Malloy be taxed pursuant to § 77-2005. Welsh now appeals.

ASSIGNMENT OF ERROR

Welsh asserts that the county court erred in finding that pursuant to § 77-2004, the evidence did not establish that he is a person to whom the deceased for not less than 10 years prior to death stood in an acknowledged relationship of a parent.

STANDARD OF REVIEW

[1,2] The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record. See *In re Estate of Ackerman, supra*. Factual findings necessary in determining if the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong. *In re Estate of Ackerman, supra.*

ANALYSIS

Welsh argues that "[w]hen comparing the facts of this case to the predecessor cases, it[']s hard to find any meaningful distinctions." Brief for appellant at 30. Welsh requests that this court reverse the county court's denial of the amended petition

for determination of inheritance tax and allow him to be taxed at the lesser rate prescribed by § 77-2004.

[3,4] Two statutes are relevant to this appeal. Section 77-2004 provides, in pertinent part:

> In the case of . . . any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent, or the spouse or surviving spouse of any such persons, the rate of tax shall be one percent of the clear market value of the property in excess of ten thousand dollars received by each person.

In contrast to the beneficial tax rate of § 77-2004, § 77-2005 provides:

> In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, or the spouse or surviving spouse of any of such persons, the rate of tax shall be six percent of the clear market value of the property received by each person in excess of two thousand dollars and not exceeding sixty thousand dollars; and on all the excess over sixty thousand dollars, the rate of tax shall be nine percent.

The question we must answer in this appeal, keeping in mind that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another, see *Allied Mut. Ins. Co. v. Midplains Waste Mgmt.*, 259 Neb. 808, 612 N.W.2d 488 (2000), is whether the county court was clearly wrong in determining that Welsh failed to prove that the testator, Malloy, for not less than 10 years prior to his death, stood in the acknowledged relationship of a parent to Welsh. We note that statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute. *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000). See, also, *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996). Accordingly, Welsh has the burden to show that his relationship with Malloy warrants application of § 77-2004.

[5-8] The scope of the statutory language, "'acknowledged relation[ship] of a parent,'" extends beyond blood relatives to persons standing in loco parentis with the taxpayer. See *In re Estate of Kite*, 260 Neb. at 140, 615 N.W.2d at 485. See, also,

In re Estate of Ackerman, supra, citing *In re Estate of Dowell*, 149 Neb. 599, 31 N.W.2d 745 (1948). Additionally, even though a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits of § 77-2004 should be allowed. See *In re Estate of Ackerman, supra*. In determining whether a person stands in loco parentis to another within the context of § 77-2004, a person may stand in loco parentis despite other sources of support for the child. *In re Estate of Ackerman, supra*. For purposes of § 77-2004, our determination of the nature of the relationship between the testator and the taxpayer is not limited to an examination of the childhood years of the taxpayer. See *In re Estate of Ackerman, supra*.

[9] As in this case, the factors that a trial court should consider in arriving at the determination that an acknowledged relationship of a parent does or does not exist include, but are not limited to, the following guideposts:

> (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

In re Estate of Ackerman, 250 Neb. at 674, 550 N.W.2d at 684.

Applying the criteria set forth in *In re Estate of Ackerman, supra*, to the instant case, we conclude, for the reasons that follow, that the county court did not err in denying Welsh the status he seeks under § 77-2004. We note that our review is for error appearing on the record, considering all of the circumstances of a particular case, and we do not disturb the lower court's factual findings unless they are clearly wrong.

Regarding the first and third guideposts, the county court found and the record demonstrated that when Welsh was a child and the roads were bad, he and his sister would stay at Malloy's home and Malloy provided subsistence for Welsh and his sister when they stayed at his house. The county court further found

that the evidence demonstrated that after Welsh's biological father passed away when Welsh was 26 years old, Malloy would tell Welsh if he disapproved of Welsh's actions.

With respect to the second and fourth guideposts, the county court found and the record established that Malloy gave Welsh moral support and unspecified financial support as well as advice on equipment purchases. In Welsh's affidavit, the only specific reference to how Malloy financially supported Welsh was when Malloy assisted Welsh in purchasing a stackmover in 1974. The record established that Welsh had a relationship with Malloy by blood, because Welsh was Malloy's nephew.

The record contained evidence of the fifth guidepost, giving advice and guidance, in that Malloy gave Welsh advice on his ranching operations, including choosing Welsh's bulls for him and choosing which equipment to purchase. Between 1962 and 2003, Welsh saw Malloy 6 or 7 days a week, and between 1962 and 1992, Malloy and Welsh worked 3 to 4 days a week side by side together. Malloy also guided Welsh on how to maintain his biological father's ranching operation. The county court further found the evidence demonstrated that Malloy gave advice to Welsh about certain family members and about how to conduct his personal life and that Malloy gave Welsh advice on how to raise his children.

Lastly, regarding the sixth and seventh guideposts, the county court noted and the record is replete with evidence of the close relationship between Malloy and Welsh, and it is obvious that they shared time and affection with one another. The county court found that Malloy and Welsh fished together and brewed beer together. In addition to the above findings, the court also found that Malloy and Welsh spent the holidays together. Welsh also drove Malloy to church every Sunday and to his doctor's appointments as well as to the hospital when Malloy needed medical attention. Malloy sat at a place of honor with Welsh's mother at Welsh's children's weddings. From 1945 until 2003, Malloy cut Welsh's hair, and since 1952, Welsh cut Malloy's hair. Welsh acted as Malloy's attorney in fact under a durable power of attorney for approximately 5 years at the end of Malloy's life. The county court noted and the record reflects the following with respect to Malloy and Welsh's relationship:

Mlinar stated that Malloy "'acknowledged (Welsh) like a son'" and that Malloy's "'verbal acknowledgments of (Welsh) being like a son were carried out by his actions'"; Dr. Randall stated that Malloy depended on Welsh like a son and treated Welsh like "the son he never had"; and McCumber stated that Malloy "relied upon . . . Welsh for everything" and that "by his words and actions," Malloy acknowledged Welsh like a son. The court found and the record provides that the only written document evincing Malloy's intent to act as a parent was Malloy's will, the provisions of which support an inference that Malloy gave Welsh and Welsh's son deferential treatment in his will.

In reaching its decision that Malloy did not stand in the acknowledged relationship of a parent to Welsh, the county court determined that there were no actual quotations from Malloy in which he directly acknowledged his relationship with Welsh as anything more than a close uncle-nephew relationship, and Malloy's will did not acknowledge the requisite relationship. Regarding the will and what inferences could be drawn from the large bequest given to Welsh, the court wrote:

> The bequest is a two edged sword. On the one hand, Welsh is given some property outright. On the other hand, he is only given an option to buy other property. Since the will is silent, the court cannot speculate or determine the intentions of the decedent as to whether he meant this as saying he was giving much of his property to Welsh because he viewed him as his son or as a dutiful nephew who had for years helped maintain the land.

The court found that as a child, Welsh went to his biological parents' home for permanency; that the financial aid given to Welsh by Malloy was not "out of the ordinary" for family members in rural society; that the issue of guidance and discipline was not really an issue in the case because the primary relationship was an adult relationship; and that "[t]he evidence of Malloy advising and counseling Welsh is insufficient to show the type of parent/child relationship required by the statute." The court concluded that while there "may be some evidence under each category" of the guideposts set forth in *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996), this "does not prove that the requisite acknowledgment existed." The court

explained, "It is the weight of the evidence in terms of quality not quantity that determines an issue."

Clearly, Malloy and Welsh shared a close relationship, one that is not uncommon among families who farm and ranch in close proximity to one another. Welsh took over his father's ranching operation, which was quite near to Malloy's, when he was 26 years old after his father's death. Thus, the time he and Malloy spent together appears to be a rather natural consequence of such fact and the fact that they were related. The care that Welsh took of Malloy as he aged also seems a natural consequence of such relationship. But, the record lacks evidence of Malloy's written intent to act as Welsh's father. While not holding or suggesting that such written evidence of intent is mandatory, without such we cannot say that the county court erred in finding that a father-son relationship had not been proved from this record. Therefore, we find that there was no error appearing on the record regarding the county court's inheritance tax determination and that the county court was not clearly wrong in its factual findings. We affirm the county court's order finding that the evidence failed to show that Malloy for not less than 10 years prior to his death stood in the acknowledged relationship of a parent to Welsh.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
RICHARD W. THOMPSON, APPELLEE.

735 N.W.2d 818

Filed July 17, 2007. No. A-06-612.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Plea Bargains.** Plea bargaining is an essential component of the administration of justice.

4. **Plea Bargains: Prosecuting Attorneys.** When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.
5. **Prosecuting Attorneys: Sentences: Appeal and Error.** The prosecuting attorney in a felony case has a statutory right to appeal a sentence as excessively lenient if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.
6. **Plea Bargains: Contracts.** A plea bargain is a contract.
7. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
8. **Waiver: Appeal and Error.** The waiver of the right to appeal must be express and unambiguous.
9. **Waiver: Words and Phrases: Appeal and Error.** The court decides whether the language of a plea agreement constitutes a waiver of appellate rights, which typically employs more precise terms like "waiver" and "appeal."
10. **Plea Bargains: Sentences: Appeal and Error.** Agreeing to remain silent at sentencing does not clearly and unambiguously give up the State's statutory right to seek appellate review of a sentence imposed.
11. **Plea Bargains: Contracts.** Plea agreements are subject to contract law principles insofar as their application will ensure the defendant what is reasonably due him or her.
12. **Plea Bargains: Sentences: Appeal and Error.** If a defendant wishes to condition his or her plea on the conferral of an incremental benefit—the prosecution's agreement to forgo its right to appeal any sentence imposed—he or she could insist that such a term be made part of the plea agreement.
13. **Plea Bargains: Waiver: Appeal and Error.** To read a plea agreement, ex silentio, to include a waiver by the government of its right of appeal would give the defendant more than is reasonably due.
14. **Plea Bargains.** While the government must be held to the promises it made in a plea agreement, it will not be bound to those it did not make.
15. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
16. **Sentences: Appeal and Error.** The same scope of review applies in the lenient sentence context as in the excessive sentence context.
17. ____: ____. In excessively lenient sentence cases, an appellate court does not review the sentence de novo and the standard is not what sentence the appellate court would have imposed.
18. ____: ____. Neb. Rev. Stat. § 29-2322 (Reissue 1995) provides that an appellate court, upon a review of the record, shall determine whether a sentence imposed is excessively lenient, having regard for (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct; (b) to protect the public from further crimes of the defendant; (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective

manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.

19. **Presentence Reports.** A presentence investigation and report shall include information regarding the offender's physical and mental condition.
20. **Judges: Sentences.** In imposing a sentence, the characteristics of the defendant shall be considered by the sentencing judge.
21. ____: ____. A sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed.
22. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
23. **Sentences: Probation and Parole.** Pursuant to Neb. Rev. Stat. § 29-2260 (Reissue 1995), the trial court may withhold a sentence of imprisonment unless, having regard for the nature and circumstances of the crime as well as the history, character, and condition of the offender, the court finds imprisonment is necessary for protection of the public because (1) there is a substantial risk that during the period of probation, the offender will engage in additional criminal conduct; (2) the offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or (3) a lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law.
24. **Sentences.** In determining whether a sentence of anything less than incarceration depreciates the seriousness of a crime, it is the function of the sentencing judge to evaluate the crime and the offender.
25. **Sentences: Appeal and Error.** An appellate court's review for an abuse of discretion by the sentencing judge also includes consideration of the crime and the offender.
26. **Sentences.** A sentence should fit the offender and not merely the crime.
27. ____. A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.
28. **Sentences: Probation and Parole.** Justice may certainly be served by a sentence of probation. Whether justice is so served is a matter that is, in the first instance, properly left to the trial court.
29. **Sentences.** Neb. Rev. Stat. § 29-2260(3) (Reissue 1995) contains considerations which shall be accorded weight in favor of withholding a sentence of imprisonment, including, inter alia, whether the crime neither caused nor threatened serious harm, whether the offender acted under strong provocation, whether substantial grounds were present tending to excuse or justify the crime, and whether the victim induced or facilitated the commission of the crime.

Appeal from the District Court for Cheyenne County: KRISTINE R. CECAVA, Judge. Affirmed.

Jon Bruning, Attorney General, Jeffrey J. Lux, Special Assistant Attorney General, and Paul B. Schaub, Cheyenne County Attorney, for appellant.

Clarence E. Mock, of Johnson & Mock, and Donald J.B. Miller, of Matzke, Mattoon & Miller, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Richard W. Thompson pled no contest to two counts of sexual assault of a child, and the district court for Cheyenne County sentenced Thompson to 5 years' intensive supervision probation on each count, to run consecutively. The State of Nebraska appeals the sentences imposed on Thompson as excessively lenient. The first impression issue presented by this case is Thompson's claim that the State, by agreeing to "remain silent" at sentencing, has waived its right to appeal the district court's sentences as excessively lenient. We conclude that the State did not waive its right to appeal, and therefore, we address the merits of the State's contention on appeal that the sentences are excessively lenient.

FACTUAL BACKGROUND

On October 31, 2005, Thompson was charged with count I, sexual assault of a child; count II, sexual assault of a child; and count III, first degree sexual assault. Thompson was arraigned on November 8 and entered a plea of not guilty. Thereafter, a plea agreement was reached. Thompson's counsel put the plea agreement on the record, stating: "Thompson is prepared to enter a no contest plea to counts I and II, in exchange count III is going to be dismissed and at the time of sentencing the county attorney is going to remain silent." The Cheyenne County Attorney affirmed that such was the plea agreement by the simple statement, "That's right." And, upon inquiry by the court as to whether such was "your agreement," Thompson responded affirmatively on the record. Thompson pled no contest to the two counts of sexual assault of a child, a factual basis was provided on the record, and the trial court accepted the plea and scheduled the sentencing hearing. We shall discuss the details of the crimes in our discussion of the sentences in the analysis section of our opinion.

On May 23, 2006, a sentencing hearing was held. When the court asked if there was any evidence or recommendations to

present, the State said that there was "no argument from the State." The State noted that this was "part of [the plea] agreement." The district court then sentenced Thompson as stated above, and the State has timely appealed.

ASSIGNMENT OF ERROR

The State contends that the district court abused its discretion by imposing excessively lenient sentences upon Thompson.

STANDARD OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Did State Waive Appellate Sentence Review by Agreeing to Remain Silent at Sentencing?

We begin with Thompson's assertions that the State, by complaining on appeal that his sentences were excessively lenient after agreeing to stand silent at the sentencing hearing, is in violation of the parties' plea agreement and that "[t]his Court should enforce the plea agreement between Thompson and the State by dismissing this appeal." Brief for appellee at 9.

[3-5] It is well established that plea bargaining is an essential component of the administration of justice. See, *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). "'[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" *State v. Gonzalez-Faguaga*, 266 Neb. at 77, 662 N.W.2d at 588, quoting *Santobello v. New York, supra.* There is no assertion that the prosecution did not live up to its agreement to "remain silent" at the time of sentencing. The

State is given a statutory right to appeal a sentence as excessively lenient pursuant to Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2006). Section 29-2320 provides that the prosecuting attorney in a felony case may appeal the sentence imposed "if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient."

Our research has not revealed any Nebraska precedent addressing Thompson's argument that the State, after agreeing to remain silent at a defendant's sentencing hearing as part of a plea bargain, waives its right to appeal as excessively lenient a sentence which is within the statutory parameters. Thompson and the concurrence cite the following three cases from other jurisdictions to support the claim of waiver: *Com. v. Fruehan*, 384 Pa. Super. 156, 557 A.2d 1093 (1989); *People v Arriaga*, 199 Mich. App. 166, 501 N.W.2d 200 (1993); and *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988). We find these cases to be distinguishable, unpersuasive, or both.

In *Fruehan*, the defendant entered a guilty plea under a plea bargain in which the Commonwealth of Pennsylvania (the Commonwealth) agreed to stand mute with respect to the sentence to be imposed. After the sentence was imposed, the Commonwealth petitioned the trial court to reconsider the sentence, alleging that such sentence was excessively lenient. The *Fruehan* court noted: "The issue of first impression in this appeal is whether the Commonwealth should be allowed to appeal the discretionary aspects of a sentence after it agreed as part of a negotiated plea agreement to stand mute with respect to the sentence to be imposed by the trial court." 384 Pa. Super. at 157, 557 A.2d at 1093. The court first observed that "the sentence imposed by the trial court is within the limits authorized by the legislature and is not illegal" and noted that "the only attack which the Commonwealth has leveled against the sentence is that it represented an abuse of the sentencing court's discretion." *Id.* We note that under the applicable Pennsylvania statute, the "[a]llowance of an appeal from the discretionary aspects of sentencing may be granted at the discretion of the [appellate court] where there appears to be a substantial question that an inappropriate sentence has been imposed." *Id.* at

158, 557 A.2d at 1093. However, in Nebraska, the State's appeal is a matter of right, whereas in Pennsylvania, the appellate court has discretion whether to even consider the appeal.

The *Fruehan* court further noted: "In determining whether a particular plea agreement has been breached, we look to 'what the parties to this plea agreement reasonably understood to be the terms of the agreement.'" *Id.* at 160, 557 A.2d at 1094, quoting *Paradiso v. United States*, 689 F.2d 28 (2d Cir. 1982). Ultimately, the *Fruehan* court found that "to allow the Commonwealth's appeal would be to permit it to breach its plea agreement and deprive the defendant of the benefits thereof." *Id.* at 157, 557 A.2d at 1093. The court specifically noted:

> [W]e have no difficulty in determining that the Commonwealth's post-sentencing motion was contrary to "what the parties to [the] plea agreement reasonably understood to be the terms of the agreement." The Commonwealth had agreed to "stand mute" with respect to the sentence to be imposed; it could not consistently therewith move post-sentencing to have the [trial] court modify its sentence by changing a sentence of probation to a sentence of incarceration. That the request was made post-sentencing does not minimize the breach. A sentence is not final until the right of review has been exhausted or waived. *Commonwealth v. Anderson*, 304 Pa.Super. 476, 482, 450 A.2d 1011, 1014 (1982).
>
> The Commonwealth cannot consistently with its agreement seek to effect a harsher sentence by using the back door of post-sentence review. To permit the Commonwealth in the instant case to importune the sentencing court post-sentencing to increase the sentence which it imposed would be to permit the Commonwealth to deprive the defendant-appellee of his bargain. . . . The Commonwealth agreed to stand mute with respect to the discretionary aspects of the sentence to be imposed by the court, and the defendant-appellee is entitled to have the Commonwealth abide by its agreement.

Com. v. Fruehan, 384 Pa. Super. 156, 160-61, 557 A.2d 1093, 1095 (1989). Thus, in *Fruehan*, the discretionary appeal that

the prosecution sought was "disallowed." *Id.* at 161, 557 A.2d at 1095. In *Fruehan*, the Commonwealth was found to have breached the plea agreement by a postsentence request of the sentencing court to increase the sentence. No such breach at the trial court level is involved in the present case, and making such a request of the sentencing court is a fundamentally different matter than the exercise of the State's statutorily granted right to have an appellate court—a different and higher court—review a sentence for an abuse of discretion. As a result, we find *Fruehan* to be distinguishable.

In *People v Arriaga*, 199 Mich. App. 166, 501 N.W.2d 200 (1993), the defendant pled guilty pursuant to a plea agreement. As part of the agreement, the prosecution agreed to take no position on the defendant's request for a sentence below the mandatory minimum. However, at the sentencing hearing, the prosecution argued that there were no substantial and compelling reasons for the court to depart from the mandatory minimum sentence. It is obvious that in *Arriaga*, a breach of the plea agreement by the prosecution occurred at the trial level, but as said, no such breach is present here.

The trial court in *Arriaga* concluded that the defendant had presented substantial and compelling reasons to depart from the mandatory minimum sentence, and the prosecution appealed, alleging that the trial court abused its discretion in its findings. However, the *Arriaga* court declined to reach that issue on appeal. The court, finding the rationale set forth in *Fruehan* to be persuasive, noted: "The prosecution in this case promised to take no position on the proposed sentencing departure. Although it is entitled to appeal from an unlawful sentence, the sentence imposed here was not unlawful. The trial court had discretion to depart from the statutory mandatory minimum sentence." *Arriaga*, 199 Mich. App. at 169, 501 N.W.2d at 201. Thus, the court "refuse[d] to condone the breach [of the plea agreement] by evaluating the trial court's discretion in sentencing [the] defendant as it did." *Id.* at 169, 501 N.W.2d at 202. Therefore, the court in *Arriaga* simply held the prosecution to its agreement—a holding with which we have no disagreement. Because of a materially different

procedural background, as well as an obvious breach of the plea agreement in the trial court, *Arriaga* is not persuasive authority on the issue before us.

[6,7] In *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988), the prosecution promised in a plea agreement not to invoke the provisions of its habitual criminal act and to recommend that the sentences on three counts of theft and two counts of burglary run concurrently. The prosecution complied with the agreement, which would have yielded a total sentence of 3 to 10 years' imprisonment on all counts, but the trial court imposed a total sentence of 6 to 20 years' imprisonment on all counts. The defendant moved to modify the sentence in the trial court. At the hearing on such motion, when asked for its view on the motion, the prosecution referred to a Kansas "Reception and Diagnostic Center" report as "'not what you would call a good report'" and then concluded: "'It does not appear that a modification is in order.'" *Id.* at 63, 765 P.2d at 1115. The trial court denied the modification. On appeal, the Kansas Supreme Court stated that "a plea agreement which is silent as to post-sentence hearings is ambiguous." *Id.* at 68, 765 P.2d at 1119. The Kansas Supreme Court, after finding the plea agreement ambiguous, reasoned that "[w]here a statute is ambiguous, we require that it be strictly construed in favor of the accused." *Id.* at 69, 765 P.2d at 1120, citing *State v. Magness*, 240 Kan. 719, 732 P.2d 747 (1987). The court said it found no compelling reason to adopt a different rule in interpreting ambiguous plea agreements. In our view, such conclusion throws aside any number of basic contractual principles that logically are applicable, given that plea agreements are contracts. See *State v. Howe*, 2 Neb. App. 766, 514 N.W.2d 356 (1994) (finding that plea bargain is contract). One such basic principle which the *Wills* decision would obviously negate is that a court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001).

The Kansas court in *Wills, supra*, concluded that the defendant was entitled to have his motion to modify his sentence reheard by a different trial judge and that at the hearing, the prosecution would be bound by the plea agreement. In

summary, not only is *Wills* procedurally and factually different than the instant case, the court in *Wills* finds an ambiguity regarding appeal when such was not mentioned. *Wills* simply holds that the prosecution must live up to its plea agreement—a broad principle which is unassailable but which is not determinative in the present case, given the Kansas court's finding of ambiguity which is not present in the plea agreement before us. Thus, *Wills* is not persuasive authority in this case.

[8-10] Given the general principle that courts are not to rewrite contracts to include what the parties did not, we find that what the plea agreement between Thompson and the State did not say is of the greatest import in resolving this issue when we note the general principle that the waiver of the right to appeal must be express and unambiguous. *U.S. v. Hendrickson*, 22 F.3d 170 (7th Cir. 1994) (rejecting defendant's claim that government's appeal of sentence was breach of plea agreement on grounds of waiver and estoppel, when language of plea agreement did not demonstrate intent by either Hendrickson or government to waive right to appeal sentence imposed by district court). See, also, *U.S. v. Wiggins*, 905 F.2d 51 (4th Cir. 1990). Furthermore, the U.S. Court of Appeals for the Eighth Circuit in *U.S. v. Pepper*, 412 F.3d 995, 997 (8th Cir. 2005), decided that the language of the plea agreement in that case was not "a waiver of appellate rights, which typically employs more precise terms like 'waiver' and 'appeal.'" Accordingly, in the instant case, agreeing to "remain silent at sentencing" does not clearly and unambiguously give up the State's statutory right to seek appellate review.

The simple and straightforward agreement of the prosecutor to remain silent at the time of sentencing does not in any way implicate, explicitly or implicitly, the prosecutor's statutory right to seek appellate review of a sentence that he or she believes is excessively lenient. Obviously, making such a waiver part of a plea agreement is a matter of the addition of a sentence or two to the agreement, be it oral or written. But we simply cannot manufacture a waiver of this important appellate right possessed by the State from language as straightforward and unambiguous as this plea agreement. With all due respect to our concurring colleague, we submit that Thompson's approach

would create a waiver from thin air when none was expressed or even implied. The effect of such a position is that a prosecutor who agrees only to stand silent or mute at sentencing has somehow blithely agreed to accept whatever sentence the sentencing judge hands down—no matter how inappropriate it might be in a particular case for a particular defendant—even though the sentence is within statutory parameters. In so holding, we bear in mind that Nebraska sentencing statutes provide a broad range of sentencing options in order to tailor sentences to the crime, the criminal, and societal interests.

[11-14] Perhaps the most logical and clearly reasoned decision supporting our view is found in *U.S. v. Anderson*, 921 F.2d 335 (1st Cir. 1990), although it involves a written plea agreement detailing the charges to which James Dean Anderson would plead. In *Anderson*, the written plea agreement provided that the government would urge the trial court to apply the mandatory sentence of at least 15 years on each of several firearms possession counts under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (1988). The court dealt with two arguments from Anderson as to why the government was foreclosed from its appeal of the sentences imposed by the district court. The second argument advanced by Anderson was that the government had waived its right to appeal by not explicitly referencing that right in the agreement, contending that whereas Anderson insisted on including language in the written agreement reserving his right to appeal the sentences imposed, the government made no such reservation and therefore waived recourse to a higher court. Because *Anderson* is so pertinent to our reasoning in this case, we quote at considerable length from the opinion of the U.S. Court of Appeals for the First Circuit as follows:

> It seems to us that this argument stands logic on its ear. It is black letter law that plea agreements, "though part and parcel of criminal jurisprudence, are subject to contract-law standards in certain respects." [*U.S.*] *v. Hogan*, 862 F.2d 386, 388 (1st Cir.1988); *see also United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) ("plea agreements are subject to contract law principles insofar as their application will [e]nsure the defendant what is reasonably due him"). Consistent with contract-law

principles, we look to the language of the document, focusing squarely within its four corners. *See Hogan*, 862 F.2d at 388. In this case, such scrutiny reveals an utter absence of any language conditioning defendant's plea on the government's waiver of appellate rights. To be sure, Anderson—citing the contract-law canon that any ambiguity will be construed against the drafter—contends that such a condition should be inferred from the absence of language anent the government's right to appeal. But this is a bootstrap argument, conjuring up an ambiguity where none legitimately exists.

On its face, the terms of the [plea agreement] are clear enough: the government promises to drop the "firearms transportation" charge in exchange for defendant's admission of guilt on the two "firearms possession" charges. If defendant had wanted to condition his plea on the conferral of an incremental benefit—the prosecution's agreement to forgo its right to appeal any sentence imposed—he could have insisted that such a term be made part of the [plea agreement]. He did not do so. Under the circumstances, we find no reason to grant him after the fact the benefit of a condition he failed to negotiate before the fact. To read the [plea agreement], *ex silentio*, to include a waiver by the government of its right of appeal would give defendant more than is reasonably due. *See, e.g., United States v. Fentress*, 792 F.2d 461, 464 (4th Cir.1986) ("While the government must be held to the promises it made [in a plea agreement], it will not be bound to those it did not make.").

We believe it would open Pandora's jar to adopt so free-form an interpretation of plea bargains as Anderson urges. The Court has cautioned in connection with plea agreements that it is error for an appellate court "to imply as a matter of law a term which the parties themselves did not agree upon." *United States v. Benchimol*, 471 U.S. 453, 456, 105 S.Ct. 2103, 2105, 85 L.Ed.2d 462 (1985) (per curiam). Under traditional contract principles, we should take an opposite tack, treating a plea agreement as a fully integrated contract and enforcing it according to its tenor,

> unfestooned with covenants the parties did not see fit to mention.

U.S. v. Anderson, 921 F.2d 335, 337-38 (1st Cir. 1990).

In the present case, the very simple and basic plea agreement, albeit oral but on the record, was not festooned with a waiver of the State's right of appellate review. There is such a substantial and longstanding body of Nebraska jurisprudence according substantial discretion to the sentencing judge that citation of authority is superfluous. But, if that discretion is to be unfettered and "unexaminable" discretion, the State's waiver of its right of appellate review must actually be part of the agreement rather than judicially created from a plea agreement that fails to even mention such a condition. In short, we enforce the agreement that was made rather than expand it by judicial fiat, and we hold that the State did not waive its statutory right to appellate review of the trial court's sentences.

Sentences.

We cannot pretend to be unaware that the sentences imposed, in conjunction with certain comments made by the trial judge at sentencing, created a brief nationwide firestorm of critical publicity. After a complete review of the record, particularly the presentence investigation report (PSI), we find that the sentences were not an abuse of the trial judge's discretion, and we therefore affirm the district court's sentences for the reasons that follow.

[15-17] When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). In *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984), the court held that the same scope of review applies in the lenient sentence context as in the excessive sentence context. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. See *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998). In cases such as this, we do not review the sentence de novo and

the standard is not what sentence we would have imposed. See *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

The State attacks the sentences on a variety of grounds, although we do not detail nor dissect all arguments advanced in their lengthy brief. The State's principal arguments, summarized, appear to be that (1) the trial judge's comments evidence consideration of an improper factor—Thompson's physical stature, (2) Thompson is a sexual predator who "groomed" his victim, (3) Thompson is at risk to reoffend, (4) Thompson is an abuser of his girlfriend and did not complete the counseling he was to get to avoid prosecution for that offense, and (5) Thompson is unrepentant.

Sentencing Judge's Comments.

[18] After listening to comments from defense counsel at the sentencing hearing, the district judge commented as follows before imposing the probationary sentences:

> What you have done is absolutely inexcusable. Absolutely wrong. You will never have any idea of how deeply you have harmed this child. You are an adult. You betrayed the trust and you betrayed it not only at a psychological but a physical level . . . . You've earned your way to prison. So, I'm sitting here thinking this guy has earned his way to prison but then I look at you and I look at your physical size. I look at your basic ability to cope with people and, quite frankly, I shake to think of what might happen to you in prison because I don't think you'll do well in prison. . . . I was relieved to know that the people who evaluated you — you are a sex offender, okay. You did this and you did it to a child. That means that at some level you have a sexual preference to children. That doesn't make you a hunter, the predator that we hear about on [television] all the time. I was very relieved to know that you do not fit in that category of human being because that gives me more leeway to not send you to prison. But you need to understand I am going to try to put together some kind of order that will keep you out of prison. But you need to understand that if you don't follow it right to the "T" I have to put you in prison. If you can't structure your behavior so that you are safe and

> other people are safe out in the community then I have to structure it with prison.

Neb. Rev. Stat. § 29-2322 (Reissue 1995) states in relevant part:

> [T]he appellate court, upon a review of the record, shall determine whether the sentence imposed is excessively lenient, having regard for:
>
> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and
>
> (4) Any other matters appearing in the record which the appellate court deems pertinent.

[19-21] Neb. Rev. Stat. § 29-2261(3) (Cum. Supp. 2006) provides that "[t]he presentence investigation and report shall include . . . the offender's . . . physical and mental condition . . . ." And, § 29-2322(2) mandates consideration of the "characteristics of the defendant." Therefore, the State's proposition that the trial court improperly considered Thompson's physical stature, or that we cannot, is simply incorrect given this statutory language. Additionally, a sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed. *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

Thompson stands 5 feet 2 inches tall and weighs 125 to 130 pounds. Thompson's size and how that "physical condition" will affect him in a prison setting is a relevant consideration. However, given other matters found in the PSI, which matters we will detail shortly, we have no doubt that Thompson's physical stature, although specifically mentioned, was but a

minor point in the trial court's sentencing decision. However, before turning to the PSI, we note that because probation rather than imprisonment was imposed, Neb. Rev. Stat. § 29-2260 (Reissue 1995) is implicated. Section 29-2260 provides in pertinent part:

> [T]he court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;
>
> (e) The victim of the crime induced or facilitated commission of the crime;
>
> (f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;
>
> (g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;
>
> (h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

[22] Clearly, our considerations found in § 29-2322, when addressing an excessively lenient sentence appeal, and the trial court's considerations found in § 29-2260, when withholding imprisonment and imposing probation, overlap. That said, we have considered the PSI in light of the considerations in both statutes. We now set forth the most important information found in the comprehensive PSI. But, at the outset, we recognize that parts of the PSI support probationary sentences while other aspects of the PSI suggest that incarceration is appropriate. In other words, this sentencing decision, like many such judicial decisions, is not formulaic, nor is it simply a matter of doctrine. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992).

Thompson was born out of wedlock in Sidney, Nebraska, on July 10, 1955. He never knew his father and had no siblings. His mother never married and died in late 2005 at the age of 80. Thompson described a good and loving relationship with his mother and said that her passing was extremely hard on him. Thompson is a high school graduate, but according to testing, he has less than average intelligence. He has been employed throughout his life since age 17, and his employer at the time of the PSI indicated that if Thompson was not incarcerated, he would retain his employment with them. He was earning approximately $1,100 per month.

Before these convictions, Thompson had two convictions in the 1980's for driving under the influence, but no conviction since 1988 for even so much as a traffic ticket. In April 2005, as a result of a domestic altercation between Thompson and the woman with whom he was living, C.G., he was charged with third degree assault and cruelty toward a child, but he was not

prosecuted on the condition that he seek counseling and abide by the counselor's recommendations. The record indicates that during this domestic altercation, Thompson pushed C.G., causing her to fall and sustain a bruise; shook his fist at her; and pushed C.G.'s daughter when she tried to intervene. While the State argues that Thompson's failure to complete this required counseling militates against probation in this case, the record shows that he contacted a counselor and had four sessions with the counselor before the current situation arose in October 2005.

The victim in this case, E.G., was the daughter of C.G., the woman who began dating Thompson and subsequently lived with him upon moving to Sidney with her two children in April 2004. E.G. was 12 years old at the time she, her younger brother, and her mother began living with Thompson. E.G. reported six occasions of sexual contact by Thompson between July 2005 and September of that year, when the living arrangement between Thompson, C.G., and her children ended.

E.G. recounted that Thompson rubbed her vaginal area outside of her clothing on two occasions and that during one such occasion, he attempted to briefly penetrate her digitally, but he stopped when she asked him to stop. There were three occasions recounted by E.G. when Thompson, who was clothed, laid on top of her and rubbed against her genital area through her clothes. E.G. recounted that on two of those occasions, Thompson kissed her breasts. Thompson also kissed E.G. on the mouth a number of times. E.G. did not describe any attempt at penile penetration. E.G. described Thompson as gentle and said that he did not threaten her in any way. She also described these encounters as being very brief in duration and stated that such ended when he voluntarily stopped and left. No ejaculation was reported by E.G. When taken in for questioning by police, Thompson was highly emotional, was crying, and ultimately admitted the core of the allegations to the officer.

E.G. completed a victim impact statement in which she recounted the following:

> I don't trust men. I worry about what they want to do to me. I'm afraid to live with mom and her new boyfriend because of what [Thompson] did to me.

> . . . I worry about other kids knowing what [Thompson] did to me. This makes me feel different.
>
> . . . .
>
> . . . I think [Thompson] should go to prison so he doesn't do it to any other girls.

A licensed mental health professional who saw E.G.—although we cannot discern from the PSI the nature, length, or frequency of any therapy—also completed a victim impact statement form, on which she stated:

> [E.G.] does not trust her own judgment. This is directly related to [Thompson's] gradual grooming and seduction of [E.G., who] truly believed [Thompson] cared about her and would not harm her or do anything that was wrong. [E.G.] is also having a multitude of social problems that stem from her feelings of being different now that this has happened. She is still suffering from feelings of shame, embarrassment and guilt that will take a great deal of time to work through. [E.G.] was horrifically used, abused and betrayed by this man and will continue to need extensive therapy to help her recover from this tragic violation. He not only violated her physically but emotionally and spiritually.

This therapist also offered the following opinions to the trial court on the victim impact statement form:

> I think that [Thompson] should be sentenced to 10 years in prison. I realize that this is his first offense that he has been arrested for but I have every reason to believe that this is not the first time that he has molested a child.
>
> After listening in great detail to the seduction and molestation of [E.G.,] I have no doubt that [Thompson] has molested other children in the past. If he is not held accountable for this he will continue to molest other girls. But rest assured he will get better at it.

Other than this statement, there is absolutely no evidence to support the conclusion that Thompson has victimized any other child or adult female, and the claim that he purposefully "groomed" E.G. is contradicted by others involved in the presentence evaluation of Thompson.

The psychologist who performed a mental status examination of Thompson which included the "Minnesota Multiphasic Personality Inventory" considered Thompson's results to be valid. The psychologist stated as follows regarding the result of such testing:

> Persons with [Thompson's] profile are often seen as rather dependent and often unable or unwilling to meet their own needs but instead looking for others to do so. A history of repressed hostility and anger is common in this profile type. Denial is usually the defense mechanism of choice. A difficulty in treatment of individuals with this profile type is getting them to accept responsibility for their own behavior. The profile indicates that [Thompson] is likely to be suspicious of others, overly sensitive to rejection, impulsive, and lacking in insight. The profile does not indicate that [Thompson] is presently suffering from psychotic disorder or thinking impairment. He is likely to keep to himself and have difficulty establishing and maintaining relationships. This profile does not show a high potential for substance abuse/alcohol addiction.
>
> . . . .
>
> . . . [Thompson's] tendency is to act without thinking in a rather immature reaction style. He does not appear to meet criteria for pedophilia. The present offense appears to be one more of impulse control and lack of judgment and does not appear to include any violence or "grooming". There are no known previous sexual offenses with adults or children. It is noted that the victim in this case is post pubescent. Testing shows [Thompson] to be rather immature and self-centered, but he does not show indications of psychopathy or psychosis. Sexual offenders with this profile are usually best managed by requiring no unsupervised contact with vulnerable potential victims, requirement of lack of use of drugs and alcohol to prevent further diminishment of judgment, and long term probation/parole oversight to ensure compliance. He can be characterized as an immature/opportunistic offender rather than an aggressive offender. Ongoing counseling services may be of benefit to this individual if he is able

> to work through his denial. . . . As noted in the diagnostic impression this patient does not appear to meet criteria for classification as a sexual psychopath, sexual predator, or similar classifications.

As part of the probation officer's investigation, the probation officer administered the "Sexual Adjustment Inventory" (SAI) to Thompson. Pertinent scores and comments from the SAI report are as follows:

> SEXUAL ADJUSTMENT SCALE:LOW RISK RANGE
> RISK PERCENTILE:8
>
> This person's score on the Sexual Adjustment Scale is in the Low Risk (zero to 39th percentile) range. This response pattern indicates a rather normal and generally satisfactory sexual adjustment. . . .
>
> CHILD MOLEST SCALE:PROBLEM RISK RANGE
> RISK PERCENTILE:73
>
> This offender's response pattern on the Child Molest Scale is in the Problem Risk (70 to 89th percentile) range. Problematic child molest behavioral (pedophilia) indicators are present. Review court-related records carefully for prior sex-related offenses or convictions. . . .
>
> SEXUAL ASSAULT SCALE:MEDIUM RISK RANGE
> RISK PERCENTILE:69
>
> This person's score on the Sexual Assault (Rape) Scale is in the Medium Risk (40 to 69th percentile) range. Some indicators of sex-related anger, hostility and aggression are evident. However, an established pattern of sexual assaultive behavior is not present. . . .
>
> INCEST SCALE:LOW RISK RANGE
> RISK PERCENTILE:0
>
> This individual's score on the Incest Scale is in the Low Risk (zero to 39th percentile) range. Low risk scorers reveal few, if any, indicators of incestuous behavior.
>
> EXHIBITIONISM SCALE:LOW RISK RANGE
> RISK PERCENTILE:0
>
> This person's response pattern on the Exhibitionism Scale is in the Low Risk (zero to 39th percentile) range. Low risk range scorers typically do not expose their sex organs to unsuspecting persons. This is a Low risk exhibitionism profile.

The SAI report also contains scores and comments for an alcohol scale, a drug scale, a violence scale, and an antisocial scale. Thompson's risk percentiles were classified as low in all four of these categories with scores of 6, 0, 8, and 0, respectively. Significantly, the antisocial scale and its accompanying comments provide in part:

> ANTISOCIAL SCALE:LOW RISK RANGE
> RISK PERCENTILE:0
>
> Few, if any, indicators of repeated lying, deceit, or chronic inability to conform to society are present. A moral or ethical blunting is not evident. This person is capable of affection, sympathy and remorse. Low risk usually is not associated with antisocial tendencies. Indeed, low risk is characterized by responsibility, emotional stability and capability of maintaining significant relationships and loyalties.

Within the PSI is Thompson's handwritten statement that contains his admission of wrongdoing and his acknowledgment that he hurt E.G. as well as family and friends. It contains a number of assertions that he will never repeat this mistake. The State argues that his letter is overly focused on his own pain and suffering from these events rather than on that of his victim. There is certainly an element of that in his letter. For example, he stated:

> I know that I will never ever do something like this again [be]cause what it has done to me mentally and how bad it has hurt me, and it isn't worth the pain to go through it again because I have suffered in my mind and hurt so much that I know I would not do it again.

However, his letter expresses his remorse and acknowledges that he hurt E.G. For example, he wrote: "And knowing that I have also hurt [E.G.] too because the way she loved me as her dad[d]y . . . ."

Finally, we quote in part the "Summary/Evaluation" section of the report by the district probation officer:

> With regards to the sentence in this case, it does not appear a term of imprisonment at the Nebraska Correctional Complex would be required, rather [Thompson] may benefit from services that could be

> provided during a term of Intensive Supervised Probation (ISP). In addition to the standard terms of ISP, this officer would ask the Court that specific conditions of probation be included. [Thompson] should be ordered to complete a letter of apology to the victim and her family. Additional conditions would include [Thompson's] being prohibited from becoming involved in a relationship with someone who has young children or with someone who is around and/or caring for young children. A condition of probation that prohibits [Thompson] from purchasing or being in possession of pornographic material would also be recommended.

[23] We now turn to § 29-2260, which provides that the trial court may withhold a sentence of imprisonment unless, having regard for the nature and circumstances of the crime as well as the history, character, and condition of the offender, the court finds that imprisonment is necessary for protection of the public because (1) there is a substantial risk that during the period of probation, the offender will engage in additional criminal conduct; (2) the offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or (3) a lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law.

The first of the three factors addresses whether there is a substantial risk that during the period of probation the offender will engage in additional criminal conduct. In this regard, the only assertion that Thompson will reoffend is that made by E.G.'s counselor, but she has had no contact with Thompson and her information comes solely from the victim. In contrast, the psychologist who evaluated Thompson found no evidence of violence or grooming and found no known previous sexual offenses with either adults or children. The psychologist concluded that Thompson is not a pedophile, but, rather, that Thompson's offenses in this case stem from poor judgment and a lack of impulse control. The psychologist unequivocally stated that Thompson does not meet the criteria for classification "as a sexual psychopath, sexual predator, or similar classifications." Additionally, Thompson's score on the SAI indicates

"a rather normal and generally satisfactory sexual adjustment." While the SAI indicates some risk for child molestation, Thompson's SAI shows that he is at low risk for incest, exhibitionism, alcohol problems, drug problems, and violence and that he does not show any antisocial tendencies. The SAI also found that Thompson is capable of affection, sympathy, remorse, responsibility, and emotional stability.

The second factor under § 29-2260 is that the offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility. The PSI reveals and the probation officer specifically recommends that intensive supervision probation, not incarceration, is appropriate in this case. There is no showing in the PSI that the assistance Thompson needs is most effectively provided at a correctional facility.

The third factor addresses whether a lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law. Of the statutory considerations to withhold imprisonment, this is obviously the most subjective. Clearly, the victim and her counselor seek imprisonment, and we assume that they would hold the view that anything less than imprisonment depreciates the seriousness of Thompson's crimes and promotes disrespect for the law. However, the statute requires consideration of the history, character, and condition of the offender, which, when summarized, reveals a person of low to average intelligence who has been a law-abiding citizen, other than two youthful driving while intoxicated convictions and the current conviction, and a person who has remained employed and has had meaningful relationships with his mother, extended family, friends, and his employer. In short, while Thompson's molestation of E.G. has clearly been hurtful and harmful to her, he is not a person who has led an irresponsible life; nor does the PSI suggest that at his core, he is an inherently bad, evil, or dangerous person. He did, however, commit horrific acts violating a young girl's trust and affection for him.

[24-28] While there is a temptation on a visceral level to conclude that anything less than incarceration depreciates the seriousness of crimes of this sort, it is the function of the sentencing judge, in the first instance, to evaluate the crime and the

offender. Our appellate review for an abuse of discretion also includes consideration of the crime and the offender. It has long been recognized that a sentence should fit the offender and not merely the crime. See *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). As stated by the Nebraska Supreme Court in *State v. Harrison*, 255 Neb. 990, 1005, 588 N.W.2d 556, 565 (1999):

> Indeed, this court has repeatedly recognized the importance of probation to our system of criminal justice, stating that "'"[a] sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary." . . .'" *State v. Javins*, 199 Neb. 38, 40-41, 255 N.W.2d 872, 874 (1977), quoting *State v. Shonkwiler*, 187 Neb. 747, 194 N.W.2d 172 (1972). Thus, "justice" may certainly be served by a sentence of probation. Whether justice is so served is a matter that is, in the first instance, properly left to the trial court.

[29] Section 29-2260(3) contains considerations which shall be accorded weight in favor of withholding a sentence of imprisonment, including, inter alia, whether the crime neither caused nor threatened serious harm, whether the offender acted under strong provocation, whether substantial grounds were present tending to excuse or justify the crime, and whether the victim induced or facilitated the commission of the crime. The record does not support a conclusion that any of these factors are present, which conclusion would militate in favor of withholding imprisonment, and thus, the probationary sentences are not justified by these factors. But the inquiry does not end here.

With respect to our obligation upon review of a sentence claimed to be excessively lenient, we are to have regard for the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from the defendant, and to reflect the seriousness of the offense and provide just punishment as well as to provide the defendant with needed correctional treatment in the most effective manner. See § 29-2322. We have already discussed these factors at various points in our analysis, except

we have not examined in any detail the sentences imposed, beyond simply stating that they are two 5-year terms of intensive supervision probation, to run consecutively. It is important to detail some of the requirements of Thompson's probationary sentences so that the reader knows that it is not simply a "get out of jail free card."

Under the terms of Thompson's probation, he must be employed or attend school and he must avoid contact with persons having criminal records. He cannot leave Cheyenne County without the permission of his probation officer. He must abstain from the use and possession of alcohol and submit, upon request of his probation officer, to a chemical test of his blood, breath, or urine. He cannot associate with anyone who possesses firearms. He must serve up to 180 days of electronic monitoring. He is subject to a curfew set by his probation officer. He cannot frequent premises specializing in the sale or consumption of alcohol. He shall enroll in and successfully complete counseling for sexual behavior, as directed by his probation officer. He shall write an apology to his victim. He shall never be unsupervised when a person under the age of 18 is present. He cannot have a dating relationship with anyone who has children under the age of 18 or who cares for children under such age, nor can he live with anyone under the age of 18. He shall not possess any pornography and shall have no computer access in his home. Finally, Thompson is to serve 30 days in the Cheyenne County jail, which was to begin January 1, 2007, and serve another 30 days beginning on January 1 of each year that he is on probation, although such imprisonment may be waived by his probation officer. If Thompson violates the terms of his probation—which is not only supervised, but strict and demanding—he is subject to the filing of a motion to revoke his probation and be sentenced anew. Thompson has agreed to each and every one of these conditions of his probation.

CONCLUSION

The PSI that was in the hands of the district judge before imposition of these sentences contains abundant and logical justification for ordering probation—the terms of which are strict and demanding—rather than incarceration. After our review of

the crimes, the sentences, and the information in the PSI, we have no hesitancy in saying that the sentences are not an abuse of discretion and, therefore, are not excessively lenient.

We have taken great care for a specific reason to detail information in the PSI, which information has not been, and would not otherwise be, available to the public and media. Our reason for doing so is to illustrate that if the sentencing judge went awry in this case, it was only in failing to provide a more detailed explanation on the record of the multiple factors in the PSI which clearly justified the probationary sentences she imposed. Such failure caused the trial judge's brief mention of Thompson's small physical stature to become the focus of attention, when in reality it was but a minor point. Of far greater consequence is the fact that the examination by a clinical psychologist and the results of the SAI all strongly indicate that Thompson is neither a pedophile nor a sexual predator, but, rather, that his crimes stemmed from poor judgment and a lack of impulse control. Of equal importance is the fact that the probation officer recommended the sentences imposed by the trial judge. By saying this, we by no means minimize the seriousness of the crimes or the pain and damage which Thompson has inflicted upon his victim. Nonetheless, the PSI reveals that he is unlikely to reoffend—and the terms of his probationary program are strictly structured to ensure that this does not happen—and he was told in no uncertain terms that he would be treated harshly if he fails probation.

Because the trial judge did not abuse her discretion in sentencing Thompson, we affirm.

AFFIRMED.

INBODY, Chief Judge, concurring.

I respectfully concur with the result reached by the majority; however, I write separately because I reach this result for different reasons than those of the majority.

The State alleges that the sentences imposed upon Thompson by the district court were excessively lenient. In support of this allegation, the State contends that the district court abused its discretion when it considered impermissible, irrelevant, and inappropriate factors in imposing its sentences, such factors as Thompson's physical size and "his ability to 'cope' with

other inmates in prison." Brief for appellant at 20. Conversely, Thompson asserts that the State, by complaining that his sentences were excessively lenient after agreeing to stand silent at the sentencing hearing, is in violation of the parties' plea agreement, and asserts that "[t]his Court should enforce the plea agreement between Thompson and the State by dismissing this appeal." Brief for appellee at 9.

It is well established that plea bargaining is an essential component of the administration of justice. See, *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). The benefits to be derived from plea bargaining, however, presuppose fairness in securing agreement between an accused and a prosecutor. *Id.* Thus, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Id.*

A plea bargain is a contract, the terms of which necessarily must be interpreted in light of the parties' reasonable expectations. The resolution of each case depends upon the essence of the particular agreement and the government's conduct relating to its obligations in that case. *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

My research has not revealed any Nebraska cases directly on point with the issue of whether the State waives its right to appeal a discretionary sentence as excessively lenient when it agrees to stand silent at the defendant's sentencing hearing as part of a plea bargain. In support of Thompson's proposition that the State waived its right to appeal his sentences as excessively lenient, he cites three cases from other jurisdictions: *Com. v. Fruehan*, 384 Pa. Super. 156, 557 A.2d 1093 (1989); *People v Arriaga*, 199 Mich. App. 166, 501 N.W.2d 200 (1993); and *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988). Out of these three cases, I believe that *Fruehan* presents the factual situation most similar to that seen in the instant case.

In *Fruehan*, the court indicated that "[t]he issue of first impression in this appeal is whether the Commonwealth should be allowed to appeal the discretionary aspects of a sentence after it agreed as part of a negotiated plea agreement to stand mute

with respect to the sentence to be imposed by the trial court." 384 Pa. Super. at 157, 557 A.2d at 1093. The court, noting that "the sentence imposed by the trial court is within the limits authorized by the legislature and is not illegal," provided that, similar to our case, "the only attack which the Commonwealth has leveled against the sentence is that it represented an abuse of the sentencing court's discretion." *Id.*

The court noted that "a plea agreement by the Commonwealth to make no sentencing recommendation does not preclude it from correcting misinformation presented to the court by the defendant" and that it does not "prevent the Commonwealth from resisting a post-sentencing request by a defendant to reduce the sentence imposed by the court." *Id.* at 159, 557 A.2d at 1094. However, the court further noted that "[i]n determining whether a particular plea agreement has been breached, we look to 'what the parties to this plea agreement reasonably understood to be the terms of the agreement.'" *Id.* at 160, 557 A.2d at 1094, quoting *Paradiso v. United States*, 689 F.2d 28 (2d Cir. 1982).

In the end, the *Fruehan* court found that "to allow the Commonwealth's appeal would be to permit it to breach its plea agreement and deprive the defendant of the benefits thereof." *Id.* at 157, 557 A.2d at 1093. The court further provided:

> [W]e have no difficulty in determining that the Commonwealth's post-sentencing motion was contrary to "what the parties to [the] plea agreement reasonably understood to be the terms of the agreement." The Commonwealth had agreed to "stand mute" with respect to the sentence to be imposed; it could not consistently therewith move post-sentencing to have the [trial] court modify its sentence by changing a sentence of probation to a sentence of incarceration. That the request was made post-sentencing does not minimize the breach. A sentence is not final until the right of review has been exhausted or waived. *Commonwealth v. Anderson*, 304 Pa.Super. 476, 482, 450 A.2d 1011, 1014 (1982).
>
> The Commonwealth cannot consistently with its agreement seek to effect a harsher sentence by using the back door of post-sentence review. To permit the Commonwealth

> in the instant case to importune the sentencing court post-sentencing to increase the sentence which it imposed would be to permit the Commonwealth to deprive the defendant-appellee of his bargain. The trial court, understandably, declined to consider the Commonwealth's petition. If this Court were to allow the Commonwealth's appeal and thereafter conclude that the defendant-appellee should be resentenced, we, too, would thereby condone the Commonwealth's breach of its plea agreement and aid in depriving appellee of the benefits of his agreement. In that event, the Commonwealth would have been allowed to say, in effect, that only a sentence of imprisonment was satisfactory. We decline to permit this. The Commonwealth agreed to stand mute with respect to the discretionary aspects of the sentence to be imposed by the court, and the defendant-appellee is entitled to have the Commonwealth abide by its agreement.

Com. v. Fruehan, 384 Pa. Super. 156, at 160-61, 557 A.2d 1093, 1095 (1989).

In *People v Arriaga*, 199 Mich. App. 166, 501 N.W.2d 200 (1993), as part of a plea agreement, the prosecution agreed to take no position on the defendant's request for a sentence below the mandatory minimum. However, at the sentencing hearing, the prosecution argued that there were no substantial and compelling reasons for the court to depart from the mandatory minimum sentence. The trial court concluded that due to the plea agreement, the prosecution could take no position regarding the defendant's sentencing request. The trial court concluded that the defendant had presented substantial and compelling reasons to depart from the mandatory minimum sentence.

On appeal, the prosecution alleged that the trial court abused its discretion in its findings. However, the *Arriaga* court declined to reach that issue on appeal. The court, citing *Fruehan*, noted: "The prosecution in this case promised to take no position on the proposed sentencing departure. Although it is entitled to appeal from an unlawful sentence, the sentence imposed here was not unlawful. The trial court had discretion to depart from the statutory mandatory minimum sentence." *Arriaga*, 199 Mich. App. at 169, 501 N.W.2d at 201. Thus, the

court "refuse[d] to condone the breach [of the plea agreement] by evaluating the trial court's discretion in sentencing [the] defendant as it did." *Id.* at 169, 501 N.W.2d at 202.

In *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988), as part of a plea agreement, the prosecution promised, in part, to recommend that the sentences imposed upon the defendant run concurrently. The trial court chose not to follow the prosecution's recommendation and imposed consecutive sentences upon the defendant. The defendant then filed a motion to modify the sentence imposed, and at the hearing on such motion, the prosecution noted: "'It does not appear that a modification is in order.'" *Id.* at 63, 765 P.2d at 1115. The defendant's motion to modify was denied. The defendant then sought to withdraw his guilty plea, contending that the prosecution had violated the defendant's due process rights by failing to comply with the terms of the plea agreement. The motion was overruled.

The *Wills* court framed the issue as this: "[I]s the [prosecution] bound by the plea agreement at the hearing on [the] defendant's motion to modify the sentence?" *Id.* The court noted that "[t]he issue of whether the prosecution may deviate from the terms of the plea agreement during post-sentence proceedings" was an issue of first impression in Kansas. *Id.* at 66, 765 P.2d at 1117. In its consideration of the issue, the court stated: "'[I]t is reasonable to expect continuing prosecutorial adherence to the [plea] agreement: a prosecutor's commitment to a specified sentence recommendation would be of little value if the government's tongue is to be freed at a later, related proceeding.'" *Wills*, 244 Kan. at 68, 765 P.2d at 1119.

Ultimately, the *Wills* court concluded that "the [prosecution's] promise to make favorable sentence recommendations binds the [prosecution] at the subsequent hearing on the defendant's motion to modify sentence, absent language in the plea agreement limiting the [prosecution's] promise to the original sentencing hearing." *Id.* at 69-70, 765 P.2d at 1120. The court found that absent language in the plea agreement to the contrary, "the defendant would reasonably expect the [prosecution] to be bound by its promise at all hearings which affect the determination of his sentence." *Id.* at 69, 765 P.2d at 1119-20.

In the instant case, the State suggests that a trial court abuses its discretion by imposing a sentence based on impermissible considerations or mistaken rationale. See *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). This certainly is true. However, in an effort to buttress its argument regarding Thompson's sentences, the State also suggests that the sentences were illegal. The State points out language from *People v Arriaga*, 199 Mich. App. 166, 169, 501 N.W.2d 200, 201 (1993), in which the court noted that the prosecution was "entitled to appeal from an unlawful sentence." However, the sentences imposed in the instant case were not unlawful or illegal. A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime. *U.S. v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002); *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

The majority finds that *Com. v. Fruehan*, 384 Pa. Super. 156, 557 A.2d 1093 (1989); *Arriaga, supra*; and *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988), are all distinguishable from this case. However, in my opinion, *U.S. v. Anderson*, 921 F.2d 335 (1st Cir. 1990), cited by the majority as "the most logical and clearly reasoned decision supporting our view," is also factually distinguishable from our case. The First Circuit Court of Appeals found that the sentence imposed in *Anderson* was in violation of the law. The sentences in the instant case were within the statutory limits for the crimes committed by Thompson, and they were neither unlawful nor illegal. Rather, the issue is whether the sentences were an abuse of the trial court's discretion, and in my opinion, we need not reach the issue of whether or not the district court abused its discretion when sentencing Thompson.

After reviewing each of the aforementioned cases, it appears to me that in the plea agreement in the instant case, the State agreed to submit to the trial court's discretion by agreeing to stand silent regarding Thompson's sentences. The situation is not unlike that seen in *Fruehan*, where the court noted that the Commonwealth "agreed to stand mute with respect to the discretionary aspects of the sentence to be imposed by the court, and the defendant-appellee is entitled to have the

Commonwealth abide by its agreement." 384 Pa. Super. at 161, 557 A.2d at 1095. As previously mentioned, there are factual distinctions between our case and *Fruehan*. However, in my opinion, with regard to the actual questions presented in these cases, these are distinctions with no real differences. Despite the factual distinctions, I find the reasoning employed by the *Fruehan* court to be persuasive. To permit the State in the instant case to appeal Thompson's sentences as excessively lenient and to allege that the trial court abused its discretion, after the State submitted to the court's discretion, would be to permit the State to deprive Thompson of the benefit of his bargain and would defeat his reasonable expectations of the plea agreement.

Therefore, I would find that the State should not be allowed to complain about the discretionary aspects of sentences imposed when it bargained away the right to take a position on the sentences in the first place, and I would hold that the State has waived its right to appeal the discretionary aspects of Thompson's sentences. Since Thompson's sentences were neither illegal nor unlawful, I would affirm the judgment of the district court on these grounds, rather than on those expressed by the majority.

IN RE ESTATE OF LEO STRAKA, DECEASED.
STATE OF NEBRASKA, APPELLEE, V. MARY ANN KENNEDY AND PATRICK KENNEDY, APPELLANTS.

736 N.W.2d 406

Filed July 17, 2007. No. A-06-1047.

1. **Decedents' Estates: Taxation: Appeal and Error.** The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.
2. **Decedents' Estates: Parent and Child: Taxation: Appeal and Error.** Factual findings necessary in determining if the requisite acknowledged parent-child relationship of Neb. Rev. Stat. § 77-2004 (Reissue 2003) exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong.
3. ____: ____: ____: ____. In making the determination whether the requisite acknowledged parent-child relationship of Neb. Rev. Stat. § 77-2004 (Reissue

2003) exists, an appellate court considers that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

4. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.
5. **Decedents' Estates: Parent and Child: Taxation: Words and Phrases.** In order to determine whether the evidence establishes the existence of a parental relationship such as that contemplated by Neb. Rev. Stat. § 77-2004 (Reissue 2003), it is necessary to analyze the scope of the statutory language, "acknowledged relationship of a parent."
6. ____: ____: ____: ____. The language "acknowledged relationship of a parent," as used in Neb. Rev. Stat. § 77-2004 (Reissue 2003), extends beyond blood relatives to persons standing "in loco parentis" with the taxpayer.
7. **Decedents' Estates: Parent and Child: Taxation: Domicile.** Residency in the testator's home is not required to be a person to whom the testator for not less than 10 years prior to death stood in the acknowledged relationship of a parent, pursuant to Neb. Rev. Stat. § 77-2004 (Reissue 2003).
8. **Decedents' Estates: Parent and Child: Taxation.** Although a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits of Neb. Rev. Stat. § 77-2004 (Reissue 2003) should flow.
9. ____: ____: ____. In determining whether a person stands in loco parentis to another within the context of Neb. Rev. Stat. § 77-2004 (Reissue 2003), a person may stand in loco parentis despite other sources of support for the child, and an appellate court's determination of the nature of the relationship between the testator and the taxpayer is not limited to an examination of the childhood years of the taxpayer.
10. ____: ____: ____. The factors that a trial court should consider in arriving at the determination that an acknowledged relationship of a parent does or does not exist include, but are not limited to, the following guideposts: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

Appeal from the County Court for Holt County: ALAN L. BRODBECK, Judge. Affirmed.

Jason D. Mielak, of Fehringer, Mielak & Fehringer, P.C., L.L.O., for appellants.

Thomas P. Herzog, Holt County Attorney, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Mary Ann Kennedy and Patrick Kennedy appeal from the judgment of the county court for Holt County, Nebraska. The county court found that Mary Ann failed to provide evidence showing the necessary parental relationship existed between testator Leo Straka and Mary Ann and determined that Mary Ann did not qualify for preferential tax treatment under Neb. Rev. Stat. § 77-2004 (Reissue 2003). For the reasons set forth herein, we affirm the judgment of the county court.

STATEMENT OF FACTS

On May 30, 2006, Mary Ann and Patrick, as successor co-trustees of the Leo Straka Trust, filed a petition for determination of inheritance tax. In the petition, Mary Ann and Patrick asserted that they had calculated tentative inheritance tax based on Mary Ann's classification as a "Class 2" beneficiary, "on the condition the Order may be amended, altered or modified by subsequent Order of the Court if it is determined by the Court that Mary Ann . . . qualifies as a Class 1 beneficiary as provided in . . . §77-2004 due to her 'in loco parentis' relationship with [Leo]." Thus, Mary Ann and Patrick requested a hearing to determine whether Mary Ann qualified as a "Class 1" beneficiary, i.e., one as provided for by § 77-2004.

A hearing was held on July 25, 2006, to determine whether Mary Ann qualified as a beneficiary under § 77-2004 due to her alleged "in loco parentis" relationship with Leo. Dr. Robert Randall, a physician practicing in Atkinson, Nebraska, testified on behalf of Mary Ann and Patrick. Dr. Randall testified that he had known Leo for over 20 years and had been his physician. Dr. Randall stated that Mary Ann usually brought Leo to appointments and that she "sometimes [was] actually . . . present at the visits."

Dr. Randall described his observations of the interactions between Mary Ann and Leo:

> Well, she was always very caring of him and concerned and actually took responsibility for every single bit of the transport of him for his visits. And then even over at the nursing home, making arrangements for everything there.

> She would be over at the nursing home when I went over there. She was always the one that was facilitating all the trips to Norfolk or wherever they had to go for specialty treatments. So she . . . was just the general caretaker of [Leo].

Dr. Randall stated that when Leo lived in Atkinson, he lived with Bill Straka, his brother, and Gertrude Straka, his sister, who is Mary Ann's mother; he stated that he observed Mary Ann's vehicle at their home almost daily. Dr. Randall testified that Leo relied on Mary Ann:

> Well, she was the one that had to bring him for his treatments or took care of everything related to the finances at the [nursing home]. She took care of all that. And I think that she was even over helping at the house out in the lawn as he got older. . . . [S]he would be even helping with that because he just got frail and very — just couldn't do it. So those are the general types of things.

Dr. Randall testified that he believed the relationship between Leo and Mary Ann "seemed very much like a father/daughter relationship, you know, like other people would take care of their parents just as she was taking care of him." He stated, "It would seem to me that [Leo] would . . . have seen [Mary Ann] as a daughter, having lived there all the time. I never heard [Leo] call [Mary Ann] his daughter but certainly my feeling would be that he saw her as a daughter."

On cross-examination, Dr. Randall again noted that he never heard Leo refer to Mary Ann as his daughter, and he added that Mary Ann did not call Leo "Dad." On redirect examination, however, Dr. Randall said that the relationship between Mary Ann and Leo was "much more like a father and a daughter" than like an uncle and a niece.

Mary Ann testified in her own behalf. She testified that Leo was her uncle and that she had never "known or had a relationship with [her] biological father." She said that Leo neither married nor had biological children. As she was growing up, she and Leo lived in the same house. She described her relationship to Leo as she was growing up:

> As a child my first memory of Leo was sitting on my grandfather's lap and — and having Grandpa read letters

> from Leo and I remember that every letter he asked about me and — and referred to me as how's the kid or how's little Mary [Ann]. I remember his times being home on leave from the service and how special those times were. Then when he came home from the service he was injured — his back was — [h]e had a bad back for awhile [sic]. I recall just taking care of him already then. And then he became self-sufficient and . . . we worked on the farm. I — I followed him daily. I spent more time with - with Leo. When he plowed a field with horses, I ran behind and would pick up the worms and then we'd get to go fishing together. When he cultivated corn the same thing. I carried water jugs out to him. He'd help me to drive the team of horses home at noon when we'd — he would come home for lunch. He taught me everything I knew about the farm. And as I got a little bit older I — I participated in — in doing farm chores. We milked 30 to 40 cows. I did that night and morning with him. My mother[, Gertrude,] did that also. We — [e]very time they went to town for anything, I was with 'em. Usually my mom wasn't going, it was always me with Leo. He was doing all the driving because Leo — or Uncle Bill didn't see well enough to drive. He had had an accident and so his vision was kind of limited and — [b]ut I was always with them.

Mary Ann stated that as she grew up, Leo would discipline her, and that she "always had great respect for anything that he said." Leo provided her with a vehicle after she graduated from high school. When Leo did discipline Mary Ann, he did not ask Mary Ann's mother, Gertrude, first. Mary Ann also said that on one occasion when she was 9 or 10 years old, she and Leo took a vacation to Omaha alone together. She stated that she had chores and worked directly with Leo and that he taught her how to do the chores. Mary Ann testified that as she grew up, "the expenses for [her] clothing, food, utilities and shelter [were] a shared expense between" Leo, Gertrude, and one of her other uncles, Bill. Mary Ann testified that while she was still a child, when she asked Gertrude if she could do something, Gertrude would say, "'Well, I don't know, if Leo thinks that's okay. I suppose if it's okay with Leo.'"

Mary Ann testified that she eventually got married and moved to Lincoln, but that Leo "advised [her] with regard to living arrangements in Lincoln." She lived in Lincoln for approximately 23 years, and she operated a home daycare. Mary Ann said that while she lived in Lincoln, she would visit Leo and Gertrude "[u]sually once a month and always for holidays." In 1983, Mary Ann moved back to Atkinson. Leo built a house in town, and Mary Ann and her family moved into the house that Leo, Gertrude, and Bill had lived in prior to building the new house. Mary Ann testified that after she moved back to Atkinson, she saw Leo nearly every day. She stated that she "was helping [Leo and Gertrude] with laundry, helping 'em keep the house clean, doing meals, taking — sometimes taking meals into [sic] them, helping them grocery shop."

Mary Ann testified that Leo entered a nursing home in October 2003 and that she "was there for every meal and almost throughout the day because he had a couple of really, really bad weeks and he did not want [her] to leave." She stated, "I was with him constantly." She was also helping Gertrude, and she "would have to go stay with her at night and keep her kind of calm." This lasted for approximately 1 month, until Gertrude went to live at the nursing home also. Mary Ann handled all of Leo's financial affairs, beginning 2 to 3 years before he entered the nursing home and lasting until his death. She also handled his health care decisions when he entered the nursing home, as she had a durable power of attorney for both financial and health care decisions. She made all of Leo's medical appointments, and she usually attended the appointments with Leo. She stated that she "consider[ed] Leo . . . to be like a father" to her and that it was her "perception that Leo . . . considered [her] to be like a daughter to him."

On cross-examination, Mary Ann conceded that she told Fr. LuVerne Steffes that she considered several men father figures, stating, "Not as much as Leo, not as much as Bill, but there were two other uncles, two of [Gertrude's] brothers." She stated that Leo made a will in 1991, after Bill had died in 1989, and that the will "left most everything" to Patrick, who is her son, and her. When Bill died, all of the ranch land and farming and ranching equipment went to Leo. Mary Ann then testified that

"if Bill had been the one that lived the longest instead of Leo [she would] have claimed that [she] had a father[-daughter] relationship with Bill."

Scott Kaup next testified on the behalf of Mary Ann and Patrick. Kaup testified that he owned a business providing "investment adviser service and investment sales and service, income tax preparation and planning, and all lines of insurance." Kaup said that Leo was one of his clients for approximately 15 years. Kaup was asked how often Mary Ann accompanied Leo to business appointments, and Kaup replied:

> Early on Leo did most of his business by himself. I'd say [probably] the first five years. Starting after that, maybe in the last 10, Mary Ann used to accompany him on the meetings, and in the last five, six years, maybe a little longer, she was there at all of the — all of the appointments or meetings I had with Leo.

Kaup said that there was a point in time that he believed that Mary Ann was Leo's biological daughter, because he knew that Gertrude, Mary Ann's mother, lived with Leo and Bill and he "assumed [Leo or Bill] was her father."

Kaup said that he observed the interactions between Leo and Mary Ann, and he described their interactions:

> Early on Leo [and] Mary Ann would come in and Leo would make the decisions, would sometimes ask Mary Ann what she thought. . . . I'd say in the last five, six, seven years, she became more involved. He would ask her early on what she thought. At the end it was I think relying a lot more on do you think this is [what] I need to do and we'll do it.

Kaup stated that Leo relied on Mary Ann and that he could not "recall any other uncle/niece relationships similar to this one." He stated that Leo provided "substantial financial assistance" to Mary Ann, including substantial gifts. Kaup stated that he would not have expected Leo "to make expressions verbally or in writing referring to Mary [Ann] as, quote, his daughter or words to that effect." Kaup stated that Leo never referred to Mary Ann as his daughter, but that "in the relationship . . . how they handled investment decisions and even some of the estate planning [Kaup] was involved in [was] very

similar to what [Kaup] worked with with other clients who work with their children." On cross-examination, Kaup stated that Bill was one of his clients as well and that Mary Ann had "a similar relationship to Bill as she did to Leo."

Patrick then testified on the behalf of Mary Ann and himself. He stated that Leo had been his great-uncle and that Mary Ann was his mother. He described Leo's relationship with Mary Ann: "Well, they — he's basically taking care of her and she's taking care of him in the later years." Patrick testified that Leo "always looked out for [Mary Ann]" financially and that "she was always there for him." He stated, "It seemed like whenever he had to go to the doctor or anything it was — [Mary Ann] always took care of Leo. The meals, everything . . . the last 20 years she's been there every day."

Patrick said that he grew up in Lincoln and that he first came to know Leo "on holidays and in the summertime." Patrick stated that in the summer, he came back and helped Leo work on the ranch, and that he would "stay out there at the ranch all summer." Patrick said that Leo gave Mary Ann advice, such as "always save your money and how to invest it and don't spend it . . . on silly stuff." After high school, Patrick moved back to Atkinson to work on the ranch, and he had contact with Leo on a daily basis. Patrick said that Leo was like a father to Mary Ann and that "he was the . . . main figure," the one who "made the final decisions."

On cross-examination, Patrick stated that both Bill and Leo cared about Mary Ann and that on most days, Mary Ann would see Bill, Leo, and Gertrude. Patrick was asked if there "[w]as . . . something that would cause [him] to say that Bill or Leo was more of a father figure to Mary Ann, that one of the two was more of a father figure than the other one," and Patrick stated, "Just that Leo was more of the boss . . . . He made the final call." Patrick said that Bill and Leo were equally loving and affectionate toward Mary Ann.

The State called Father Steffes to testify on its behalf. Father Steffes stated that he was personally familiar with both Mary Ann and Leo. He stated that upon Mary Ann's request, he had written a letter dealing with Mary Ann's relationship with Leo. Father Steffes testified that he had written that Mary Ann had

told him "having several men playing the father figure was normal to her," and he testified that Mary Ann had told him she viewed more than one of her uncles as a father figure. Father Steffes stated that he never discussed with Leo whether he was in a father-daughter relationship with Mary Ann.

On cross-examination, Father Steffes stated that he "looked upon [the relationship between Mary Ann and Leo] as [a father-daughter relationship] just simply because Mary Ann looked after him all those years and she was close to him . . . and cared about him and all that stuff and took good care of him as she did [Gertrude]." Father Steffes said that the relationship "was closer than [uncle and] niece just because she . . . became [Leo's and Gertrude's] caretaker from what I could see." On examination by the court, Father Steffes conceded that he never thought of Mary Ann's relationship with Leo as a father-daughter relationship, "because I knew it was uncle/niece." Father Steffes' letter was entered into evidence, and the letter contains the following statement: "From what I can gather, Gertrude, Leo and the others served in the parental role for Mary Ann . . . . In later years, Mary Ann and Pat[rick] took over the role of caring for Gertrude and Leo as one would do for aging parents." At the conclusion of all evidence, the county court discussed several procedural matters, heard closing argument, and then took the matter under advisement.

On August 28, 2006, the county court filed an order in the instant case. In its order, the county court, after "having reviewed the evidence presented at the hearing[, found] that [Mary Ann and Patrick had] fallen short in their burden of showing that [Leo] for not less than 10 years prior to his death stood in the acknowledged relation of a parent to Mary Ann." In so finding, the county court specifically noted:

> While Mary Ann . . . resided in the home of [Leo], the evidence indicated that [she] was actually residing with her mother[, Gertrude,] who was cohabiting with her two brothers, [Mary Ann's] uncles, in a sort of communal type of setting. The Court further finds that [Leo] assumed some responsibility for the support of Mary Ann . . . and may have exercised some parental authority and discipline over [Mary Ann]. It does not appear to the Court that the

> amount of support and parental authority is of such a great extent that the Court is convinced that [Mary Ann] stood in the relation of a daughter.
>
> While not the only factor, the Court certainly notes that [Leo] apparently never acknowledged in writing or even orally that [Mary Ann] stood in the relationship of a daughter to [him].
>
> The cases cited by [Mary Ann and Patrick] when read in comparison to the factual situation in this particular case show an overwhelming and compelling basis for making a presumptive parent-child relationship. Such evidence is wanting in the present case.

Mary Ann and Patrick have timely appealed to this court.

ASSIGNMENT OF ERROR

Mary Ann and Patrick allege that the county court erred when it failed to find that the requisite acknowledged parent-child relationship as required by § 77-2004 existed between Leo and Mary Ann for not less than 10 years prior to his death.

STANDARD OF REVIEW

[1,2] The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record. *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000). See *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996). Factual findings necessary in determining if the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong. *In re Estate of Kite, supra*. See *In re Estate of Ackerman, supra*.

[3] In making this determination, an appellate court considers that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. See *In re Estate of Kite, supra*.

ANALYSIS

Mary Ann and Patrick allege that the trial court was clearly wrong in determining that Mary Ann had failed to carry her burden of showing that Leo, for not less than 10 years prior to his death, stood in the acknowledged relation of a parent to Mary Ann.

Section 77-2004 provides, in relevant part, that "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent" shall receive an inheritance tax exemption of $10,000 and shall be taxed at the rate of 1 percent of the clear market value of the inherited property thereafter. Conversely, Neb. Rev. Stat. § 77-2005 (Reissue 2003) provides:

> In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, or the spouse or surviving spouse of any of such persons, the rate of tax shall be six percent of the clear market value of the property received by each person in excess of two thousand dollars and not exceeding sixty thousand dollars; and on all the excess over sixty thousand dollars, the rate of tax shall be nine percent.

[4] Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute. *In re Estate of Ackerman, supra*. Therefore, the burden of proof at the trial level was on Mary Ann and Patrick to clearly establish that Mary Ann was a person to whom Leo for not less than 10 years prior to death stood in the acknowledged relation of a parent.

[5-9] In order to determine whether the evidence establishes such a parental relationship, it is necessary to analyze the scope of the statutory language, "'acknowledged relation[ship] of a parent.'" *In re Estate of Kite*, 260 Neb. 135, 140, 615 N.W.2d 481, 485 (2000). This language has been held to extend beyond blood relatives to persons standing "'in loco parentis'" with the taxpayer. *Id.* Residency in the testator's home is not required to be a person to whom the testator for not less than 10 years prior to death stood in the acknowledged relationship of a parent. *Id.* Although a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits of § 77-2004 should flow. *In re Estate of Kite, supra*. In determining whether a person stands in loco parentis to another within the context of § 77-2004, a person may stand in loco parentis despite other sources of support for

the child, and our determination of the nature of the relationship between the testator and the taxpayer is not limited to an examination of the childhood years of the taxpayer. *In re Estate of Kite, supra.*

In making its determination that Mary Ann had not carried her burden of showing that she was entitled to the aforementioned inheritance tax exemption, the county court specifically found:

> While Mary Ann . . . resided in the home of [Leo], the evidence indicated that [she] was actually residing with her mother[, Gertrude,] who was cohabiting with her two brothers, [Mary Ann's] uncles, in a sort of communal type of setting. The Court further finds that [Leo] assumed some responsibility for the support of Mary Ann . . . and may have exercised some parental authority and discipline over [Mary Ann]. It does not appear to the Court that the amount of support and parental authority is of such a great extent that the Court is convinced that [Mary Ann] stood in the relation of a daughter.
>
> While not the only factor, the Court certainly notes that [Leo] apparently never acknowledged in writing or even orally that [Mary Ann] stood in the relationship of a daughter to [him].
>
> The cases cited by [Mary Ann and Patrick] when read in comparison to the factual situation in this particular case show an overwhelming and compelling basis for making a presumptive parent-child relationship. Such evidence is wanting in the present case.

[10] In *In re Estate of Ackerman*, 250 Neb. 665, 674, 550 N.W.2d 678, 684 (1996), the Nebraska Supreme Court concluded that the factors that a trial court should consider in arriving at the determination that an acknowledged relationship of a parent does or does not exist include, but are not limited to, the following guideposts:

> (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and

> guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.

The Supreme Court further noted that "[a]ny list of suggested criteria is not meant to be exhaustive, nor will every factor necessarily be present in each case." *Id.* Thus, in light of the preceding factors, we must examine the record to determine if the county court was clearly wrong in its determination that Mary Ann did not qualify for the inheritance tax exemption provided in § 77-2004.

The trial court specifically found that Leo did not exactly take Mary Ann into his home; rather, the court believed that Mary Ann primarily lived with her mother, Gertrude, and that Leo, Bill, Gertrude, and Mary Ann all lived together in a "communal type of setting." There is evidence in the record to support this finding, and we are unable to say that this factual finding is clearly wrong.

The county court held that Leo "assumed some responsibility for the support of Mary Ann," and the evidence in the record supports this finding. Mary Ann testified that as she grew up, "the expenses for [her] clothing, food, utilities and shelter [were] a shared expense between" Leo, Gertrude, and Bill. There was also evidence that after she was an adult, Mary Ann received financial assistance from Leo. However, the court found that "the amount of support . . . is [not] of such a great extent that the Court is convinced that [Mary Ann] stood in the relation of a daughter" to Leo. We cannot say that this factual finding is clearly wrong, as it does appear that the expenses for raising Mary Ann were shared between a number of family members, including Gertrude, Bill, and Leo.

Mary Ann testified that Leo would discipline her, that he did not ask Gertrude before he disciplined Mary Ann, and that Mary Ann "always had great respect for anything that [Leo] said." The record also reveals that Gertrude would often defer to Leo's opinion when Mary Ann asked to do something. The county court concluded that Leo "may have exercised some parental authority and discipline over [Mary Ann]." However, the court further noted that "[i]t does not appear to the Court that the amount of . . . parental authority is of such a great extent that

the Court is convinced that [Mary Ann] stood in the relation of a daughter." Again, there is evidence in the record to support the court's factual finding, and we cannot say that the finding is clearly wrong.

The next two factors are certainly in favor of a finding that Leo stood "in loco parentis" to Mary Ann. There is nothing in the record to suggest that Leo was not related by blood to Mary Ann, and there is ample evidence in the record indicating that Leo provided advice and guidance to Mary Ann throughout her experience with him. When Mary Ann was a child, Leo taught her to do chores and farmwork, and when Mary Ann was an adult, Leo gave her financial advice and guidance, as well as general life lessons.

There can similarly be little disagreement over whether Mary Ann shared a great deal of time with Leo. The record indicates that Mary Ann, as a child, spent her time working with Leo on the farm and that Leo took her on vacations. After Mary Ann married and moved to Lincoln, the time spent with Leo diminished, although she did see him once a month and on holidays. In 1983, Mary Ann moved back to Atkinson, and from that time until the end of Leo's life, it appears that Mary Ann saw Leo on almost a daily basis. There was little evidence presented at trial regarding affection between Leo and Mary Ann, although the evidence presented did tend to indicate that Leo was not particularly physically or verbally affectionate toward anyone. However, it is reasonable to infer from the evidence presented that Leo and Mary Ann had affection for one another.

Finally, the county court noted the following: "While not the only factor [Leo] apparently never acknowledged in writing or even orally that [Mary Ann] stood in the relationship of a daughter to [him]." This finding by the trial court is not clearly wrong. None of the witnesses testified that they heard Leo refer to Mary Ann as his daughter, and none of the documents entered into evidence contained such a written acknowledgment. Mary Ann did not say that Leo referred to her as his daughter, and she did not refer to him as her father, although she said that she "consider[ed] Leo . . . to be like a father" to her and that it was her "perception that Leo . . . considered [her] to be like a daughter to him." Further, it appears from the record that Mary Ann

had many "father figures," as she indicated to Father Steffes that "having several men playing the father figure was normal to her," and that she had viewed more than one of her uncles as a father figure. Additionally, Mary Ann conceded that had Leo passed away before Bill, she would have claimed that she had a father-daughter relationship with Bill.

The fact that Leo never acknowledged in writing or even orally that Mary Ann stood in the relationship of a daughter to him differentiates the instant case from the factual scenarios seen in both *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996), and *In re Estate of Kite*, 260 Neb. 135, 615 N.W.2d 481 (2000). In each of those cases, the Nebraska Supreme Court found that the petitioner had sustained his or her burden of proof under § 77-2004, and in each case, most of the factors listed in *In re Estate of Ackerman* were present. However, in each case, the testator had acknowledged, in writing or verbally, a parent-child relationship with the petitioner. Such an acknowledgment is absent here.

In no way do we wish to diminish the relationship between Mary Ann and Leo. The record certainly proves that they loved and cared for one another. However, given the preceding factors, and giving weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another, we cannot say that the trial court was clearly wrong when it concluded that Mary Ann did not qualify for the inheritance tax exemption provided in § 77-2004. This assignment of error is without merit.

CONCLUSION

We conclude that the county court was not clearly wrong when it found that Mary Ann had failed to carry her burden of showing that she was a person to whom Leo for not less than 10 years prior to his death stood in the acknowledged relation of a parent, and we accordingly affirm the judgment of the county court.

AFFIRMED.

ARL CREDIT SERVICES, INC., A NEBRASKA CORPORATION, APPELLEE, V. ASHLEY PIPER, ALSO KNOWN AS ASHLEY PACE, APPELLANT.

736 N.W.2d 771

Filed July 24, 2007. No. A-06-090.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Garnishment.** Garnishment in aid of execution is a legal remedy unknown at common law and strictly governed by statute.
4. **Statutes: Intent.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **Garnishment.** Neb. Rev. Stat. § 25-1056 (Cum. Supp. 2006) authorizes garnishments in aid of execution and, by incorporating other statutes, expressly authorizes assertion in garnishment proceedings of exemptions applicable to executions.
6. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.
7. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
8. **Statutes: Legislature: Intent: Appeal and Error.** In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
9. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
10. **Statutes: Appeal and Error.** If possible, an appellate court will try to avoid a statutory construction which would lead to an absurd result.

Appeal from the District Court for Nance County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Nance County, GERALD E. ROUSE, Judge. Judgment of District Court reversed and remanded for further proceedings.

Glenn A. Rodehorst for appellant.

Melanie A. Knoepfle, of Knoepfle Law Office, P.C., and Mark Quandahl for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In this appeal, we consider whether a judgment debtor may assert the in-lieu-of-homestead exemption, provided by Neb. Rev. Stat. § 25-1552 (Cum. Supp. 2006), in response to a garnishment summons against the judgment debtor's bank account. Because such exemption is authorized by statute and supported in case law and long-established practice, we reverse the judgments of the courts below and remand the cause for further proceedings in conformity with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 1997, in the county court for Platte County, ARL Credit Services, Inc. (ARL), obtained a judgment of $5,687.99 plus interest against Ashley Piper, also known as Ashley Pace (Piper).

On or about April 8, 2005, ARL prepared an "Affidavit and Praecipe for Summons in Garnishment (in Aid of Execution)" in the county court for Nance County, naming a bank as the garnishee. The affidavit alleged that Piper owed $5,913.37, that the sum owed was based upon a judgment which was not for the support of a person, and that the judgment debtor was not the head of the family. On April 15, the county court issued a "Summons and Order of Garnishment and Interrogatories" to the bank and Piper, setting forth the sum of $5,913.37, the amount owed by Piper.

On April 20, 2005, ARL sent to the garnishee bank and to Piper as the judgment debtor copies of the "Summons and Order of Garnishment, Interrogatories, and Notice to Judgment Debtor" via certified mail. ARL requested a return receipt on the certified mail service to the bank. The notice to judgment debtor stated that the enclosed summons and order of garnishment had been issued by the court at the request of the person who had a judgment against Piper and that if Piper believed the court should not allow a garnishment, then Piper needed to complete the request for hearing form and file it with the court within 3 business days of receiving the notice. ARL did not request,

nor does the record contain, any return receipt for the mailing directed to Piper. Thus, the record does not show that Piper actually received the copies mailed to her. Piper did not file any response until May 5, which filing we describe below.

On April 21, 2005, the bank signed the certified mail receipt. The bank answered the interrogatories, indicating that it had property belonging to the judgment debtor, Piper, in the form of a checking account in the amount of $1,210.76. Upon receipt of the answers to the interrogatories, ARL filed an "Application and Order to Deliver Non-Exempt Funds" to be served upon the bank. On May 3, the county court ordered that the nonexempt funds withheld by the bank in the amount of $1,210.76 be transferred to the court for payment to ARL.

On May 5, 2005, Piper filed an affidavit and election of exemption as well as a motion to quash the summons and revoke the order to the bank. Piper stated that she was the parent of two children, that she was the head of the household as defined in Neb. Rev. Stat. § 25-1558 (Cum. Supp. 2006), and that she was claiming the exemptions provided in § 25-1552 and Neb. Rev. Stat. § 25-1553 (Cum. Supp. 2006).

On May 17, 2005, a hearing was held addressing Piper's motion to quash the summons and revoke the order to the bank. The county court took the matter under advisement. On June 21, the county court filed its order overruling the motion. The county court found: "The garnishment was properly issued with regards to the non-exempt funds withheld by the [bank] in the amount of $1,210.76 on behalf of [Piper], and the garnishment shall proceed in accordance with the Order to Deliver which was previously signed by this Court on May 3, 2005."

Piper appealed to the district court for Nance County and subsequently filed her statement of errors, alleging that the county court for Nance County failed to allow her the right to the exemption as provided by Neb. Rev. Stat. § 25-1556 (Cum. Supp. 2006) and "did not utilize such exemption to prohibit the 'garnishment' of [Piper's] funds that were in the [bank] and failed to order the return of such funds to [Piper]." Piper also filed a brief with the district court, which brief sets forth both her assertion that she was entitled to the exemption provided by § 25-1552 and her supporting argument. At oral argument

on the appeal to the district court, ARL's counsel responded to Piper's argument concerning § 25-1552, arguing that a bank garnishment is not a forced sale or an execution and that the exemption provided by § 25-1552 does not apply to a bank garnishment.

On December 22, 2005, the district court affirmed the county court's order. The district court found that Piper "was not entitled to the exemptions claimed by her in this garnishment action." The district court further found that "[s]uch exemptions are available in other types of actions, but not in third-party garnishment proceedings." Piper now appeals to this court.

ASSIGNMENTS OF ERROR

Piper asserts, restated, that both courts erred in failing to allow Piper the right to claim an exemption of $2,500 as head of the family, provided by § 25-1552, and in failing to utilize such exemption to prohibit the garnishment of Piper's funds in the bank.

STANDARD OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

[3] Garnishment in aid of execution is a legal remedy unknown at common law and strictly governed by statute. *Id.* Generally, in cases where a court enters judgment in favor of a creditor, the judgment creditor may, as garnishor, request that the court issue a summons of garnishment against any person or business owing money to the judgment debtor. *Id.* See, also, Neb. Rev. Stat. §§ 25-1011 (Reissue 1995) and 25-1056 (Cum. Supp. 2006).

Piper has not alleged that the courts below were incorrect in determining that she is indebted to ARL. The only issue before

this court is whether, in this garnishment proceeding, Piper is entitled to claim the exemption provided under § 25-1552 to debtors.

Section 25-1552 provides for the civil procedure for exemptions in execution proceedings, as follows:

> Each natural person residing in this state shall have exempt from forced sale on execution the sum of two thousand five hundred dollars in personal property, except wages. The provisions of this section do not apply to the exemption of wages, that subject being fully provided for by section 25-1558. In proceedings involving a writ of execution, the exemption from execution under this section shall be claimed in the manner provided by section 25-1516. The debtor desiring to claim an exemption from execution under this section shall, at the time the request for hearing is filed, file a list of the whole of the property owned by the debtor and an indication of the items of property which he or she claims to be exempt from execution pursuant to this section and section 25-1556, along with a value for each item listed. The debtor or his or her authorized agent may select from the list an amount of property not exceeding the value exempt from execution under this section according to the debtor's valuation or the court's valuation if the debtor's valuation is challenged by a creditor.

ARL argues that the personal property exemption under § 25-1552 applies only to a "forced sale on execution" and cannot be claimed in response to a garnishment in aid of execution. We disagree. ARL's argument is not supported by the plain language of the applicable statutes, the case law, and the common understanding of the statutes over many years.

[4] The language of § 25-1552, even viewed in isolation, suggests that ARL's interpretation is too narrow. Its interpretation would render wholly superfluous the first clause of the third sentence of § 25-1552—"*In proceedings involving a writ of execution*, the exemption from execution under this section shall be claimed in the manner provided by section 25-1516." (Emphasis supplied.) If the exemption applies only to a "forced sale on execution," there could never be a proceeding in which

an exemption could be claimed other than one "involving a writ of execution." In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). This clause instead suggests, as we explain below, that there are other proceedings in which the exemption may be asserted. But we do not confine our analysis to § 25-1552, and we now turn to the other applicable statutes.

[5] Section 25-1056 authorizes garnishments in aid of execution and, by incorporating other statutes, expressly authorizes assertion in garnishment proceedings of exemptions applicable to executions. Section 25-1056(1) states in part: "Thereafter, the service of the summons and interrogatories and *all further proceedings shall be in all respects the same as is provided for in sections 25-1011 and 25-1026 to 25-1031.01* unless inconsistent with this section." (Emphasis supplied.)

Among the statutes thereby incorporated into the procedures governing garnishments in aid of execution is Neb. Rev. Stat. § 25-1030.03 (Reissue 1995), which states in pertinent part:

> *The defendant in the original action may by a suitable pleading filed in the garnishment proceedings set up facts showing that the debt or the property with which it is sought to charge the garnishee is (1) exempt from execution*, or (2) for any other reason is not liable for plaintiff's claim. If issue . . . on such pleading by the defendant in the original action is joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property or any part thereof . . . is found to be exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable.

(Emphasis supplied.) Thus, the plain language of the statute expressly contemplates that an exemption from execution may be asserted in a garnishment proceeding.

Longstanding Nebraska case law supports the interpretation that exemptions from executions also apply to garnishments. In *Mercer v. Armstrong*, 98 Neb. 645, 154 N.W. 219 (1915), the judgment debtor attempted to assert the exemption now codified in § 25-1552 in response to a garnishment of a bank account.

The trial court overruled the judgment debtor's jurisdictional objection to an evidentiary hearing, which the judgment debtor claimed could not be held in the absence of an appraisement. After the evidentiary hearing, the trial court made a factual finding that the judgment debtor was "'not entitled to hold as exempt all of the funds in the hands of the garnishee.'" 98 Neb. at 647, 154 N.W. at 219. The judgment debtor appealed, and the Nebraska Supreme Court affirmed, not because exemptions from execution do not apply in garnishment proceedings, but, rather, because the debtor failed to provide a bill of exceptions. Thus, as early as 1915, the Nebraska Supreme Court inferentially considered the exemption now codified at § 25-1552 as applicable in a garnishment of a bank account.

That interpretation is reinforced by the decision in *Scottsbluff Nat. Bank v. Pfeifer*, 126 Neb. 852, 254 N.W. 494 (1934), where once again a judgment debtor asserted the exemption now codified at § 25-1552 against a garnishment of a bank account. Although the Nebraska Supreme Court ultimately held that the judgment debtor asserted the exemption too late and that the application for exemption failed to state sufficient facts, the language of the opinion clearly contradicts ARL's interpretation. The court stated: "'Whether property in the hands of a garnishee is exempt or not is to be determined as of the date of the service of the garnishee summons.'" 126 Neb. at 854, 254 N.W. at 495, quoting *Wilcox & Co. v. Deines*, 119 Neb. 692, 230 N.W. 682 (1930). The court also explained:

> This action, so far as garnishment proceedings are concerned, is a proceeding in rem. From the date of the service of the garnishee summons the fund involved in the proceedings was placed in custodia legis. While the property stood in that condition a judgment was rendered adjudicating the ownership of the property and the disposition to be made of it. The [judgment debtor] was a party to the record. The claim made for exemptions after entry of that judgment might have been made before the judgment was rendered. After the judgment in rem against him, it is too late for a party to the record to assert a claim for exemptions which might have been made on the trial and determined by the judgment.

> While we have a statutory provision . . . providing that claim for exemptions may be made at any time before sale, that section can have no application in a garnishment proceeding where there is no sale of the property involved. It would seem that the rule in such case is that claim for exemption should be made within a reasonable time. The effect of the judgment entered was to put the parties in the same position they would have been had the sheriff made a sale of the attached property, paid the proceeds to the clerk of court, and the court had ordered them paid to the creditor. Where the [judgment debtor] has notice, as he had in this case, he should avail himself of the privilege of setting up every claim or demand he has to the property, to the end that the court may not enter an improvident judgment.

Id. at 854-55, 254 N.W. at 495 (emphasis omitted). Clearly, the court recognized that an exemption under the statutory provision now codified at § 25-1552 could properly be asserted against a garnishment of a bank account.

In another case involving a garnishment, *Live Stock Nat. Bank v. Jackson*, 137 Neb. 161, 288 N.W. 515 (1939), the Nebraska Supreme Court again implicitly recognized that garnishments in aid of execution, other than those involving wages, are subject to the exemption now codified at § 25-1552. The court observed that the Legislature had in mind two types of remedial process for enforcing collection of judgments. The court stated that the Legislature elected to "treat the subject of exemption of wages as separate and distinct from proceedings in aid of execution." 137 Neb. at 167, 288 N.W. at 518. The court also cited an earlier case in which the judgment debtor had attempted to assert the general exemption of personal property in a garnishment of wages. The reasoning shows that the exemption was denied because the statute then, as now, treated exemption of wages separately from the general exemptions applicable to other garnishments.

Not only does the case law support assertion of an exemption in a garnishment proceeding, the general understanding of the law by skilled practitioners comports with that interpretation. Referring to *Mercer v. Armstrong*, 98 Neb. 645, 154 N.W. 219

(1915), Louis Lightner's classic treatise noted that "in garnishment proceedings and in proceedings in aid of execution the defendant should claim his [or her] exemption . . . . A pleading should be filed in such proceedings setting up the debtor's claim to exemptions." 3 Louis Lightner, Nebraska Forms Annotated § 3491 at 221 (1951). Lightner's treatise prescribed a form for an "Answer of Defendant to Garnishee Summons Claiming Property Exempt." 1 Lightner, *supra*, § 1446 at 492. The specified form parenthetically referred to Neb. Rev. Stat. § 25-1553 (1943), which then specified the procedure for claiming the exemption now codified in § 25-1552. Later statutory amendments consolidated into § 25-1552 the procedure from the former § 25-1553. Lightner's form demonstrates a clear understanding that the exemption of § 25-1552 could properly be asserted in a garnishment proceeding.

The same understanding is demonstrated in the later classic work by Winsor C. Moore, then a professor of law at Creighton University, who initially undertook to provide supplements to the Lightner treatise and later published his own multivolume series. Moore asserts that "exemption laws should be construed liberally in favor of persons within their purview so as to effectuate their beneficient [sic] purposes." 5 Winsor C. Moore, Nebraska Practice § 3693c at 327 (1966). Moore provides a form for "Claim of Exemption in Lieu of Homestead" under § 25-1552. 5 Moore, *supra*, § 3695 at 329-30. Moore notes that under § 25-1030.03,

> [t]he defendant in the original action may by a suitable pleading filed in the garnishment proceedings set up facts showing that the debt or the property with which it is sought to charge the garnishee is (1) exempt from execution or (2) for any other reason is not liable for plaintiff's claim. . . . If the debt or property or any part thereof . . . is found to be exempt or not liable, the garnishee will be discharged as to that part which is exempt or not liable.

2 Winsor C. Moore, Nebraska Practice § 1509 at 395 (1964). Moore also prescribes adding the following language to the garnishee interrogatories: "'State whether . . . the judgment debtor is the head of a family, or if there is any other fact touching on his exemptions.'" *Id.*, § 1514 at 397. While the learned treatises are not binding

precedent, they elucidate the understanding of practitioners in the area of law regarding the applicability of exemptions in garnishment proceedings—particularly the exemption in lieu of homestead provided by § 25-1552, which exemption is at issue in the case before us.

[6,7] Several principles of statutory construction underlie our interpretation. First, in construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). Similarly, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006). Clearly, the purpose of § 25-1552 is to provide some reasonably equivalent personal property for judgment debtors having no lands or homestead and to allow such debtors to retain some minimal amount of property.

[8,9] Second, in determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006). Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. *Id.* In our opinion, these principles require us to conjunctively read the statutes on exemptions together with the sections governing executions, attachments, garnishments, and other proceedings in aid of execution.

[10] Finally, if possible, an appellate court will try to avoid a statutory construction which would lead to an absurd result. *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007). In our opinion, these principles lead to the construction that exemptions may be asserted in garnishment proceedings, while ARL's interpretation would defeat the statutory purpose and lead to absurd results.

Imagine our judgment debtor, without lands or tenements, clutching her $1,210.76 in currency as she approaches the

teller's window of her bank. The sheriff lies in wait, holding both a writ of execution and a summons in garnishment. As the debtor extends her arm with the cash, the sheriff levies execution and seizes it. Under ARL's interpretation, the exemption would clearly apply to defeat the levy. However, if before any levy is made, our debtor hands the money to the teller for deposit to the debtor's account and the sheriff immediately serves the summons in garnishment, under ARL's interpretation, no exemption would be available to our debtor in the garnishment proceeding. ARL's interpretation would thereby lead to an absurd result.

The county court's finding, quoted above, suggests that the county court accepted ARL's argument that the exemptions claimed by Piper cannot apply to a garnishment. The district court, acting as an intermediate appellate court, expressly relied on this concept, stating: "Such exemptions are available in other types of actions, but not in third-party garnishment proceedings." Both the county court and the district court erred in this regard.

CONCLUSION

Because it is not clear if Piper's claim of the exemptions was made before final judgment in the garnishment action, see *Scottsbluff Nat. Bank v. Pfeifer*, 126 Neb. 852, 254 N.W. 494 (1934), we reverse the judgment of the district court with instructions to reverse the judgment of the county court and remand the cause to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

REBECCA HIGGINBOTHAM, APPELLANT, V.
BENJAMIN SUKUP, APPELLEE.

737 N.W.2d 910

Filed July 24, 2007. No. A-06-624.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of

law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that the tendered instruction is the correct statement of law, that the tendered instruction is warranted by the evidence, and that the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. ____: ____: ____. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.
7. **Negligence: Damages.** The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease.
8. **Actions: Negligence: Damages: Proof.** The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence. The plaintiff is not, however, required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all.
9. **Negligence: Damages: Proximate Cause: Proof.** Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.
10. **Liability: Damages: Proximate Cause.** If a plaintiff has a preexisting condition and the defendant's conduct resulted in greater damages because of that preexisting condition, the defendant is nonetheless liable for all damages proximately caused by the defendant's conduct.
11. **Negligence: Damages: Jury Instructions.** The "suggested instruction" dealing with apportionment, as seen in part IIB of the comment to NJI2d Civ. 4.09, is appropriate only where the plaintiff has established injury and causation and there remains only a question of apportioning the damages between the preexisting injury and the defendant's negligence.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Reversed and remanded for a new trial.

Kathleen Koenig Rockey and Christopher C. Hilkemann, of Copple, Rockey & McKeever, P.C., L.L.O., for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Following a jury trial, Rebecca Higginbotham was awarded $6,464.58 in damages against Benjamin Sukup. The district court for Madison County, Nebraska, overruled Higginbotham's motion for new trial on the basis that the trial court erred in refusing to give one of her proposed jury instructions, and Higginbotham has appealed. For the reasons set forth herein, we reverse the judgment of the district court and remand the cause for a new trial.

STATEMENT OF FACTS

On August 5, 2004, Higginbotham filed a complaint in the district court, alleging that she had been injured in a car accident due to Sukup's negligence. Specifically, Higginbotham claimed:

> On or about the 30th day of August, 2000, [Higginbotham] was operating a 1995 Ford Taurus automobile in an easterly direction near the location of the 400 Block of East Norfolk Avenue [in Norfolk, Nebraska]. At the same time, [Sukup] was also operating a 1995 Ford Aerostar van in a[n] easterly direction along Norfolk Avenue. [Higginbotham] slowed to stop her vehicle to make a left turn utilizing her turn signal and signaling her intention to turn left to traffic to the front and rear of her automobile. Thereafter, [Sukup's] vehicle struck the rear of [Higginbotham's] vehicle as [she] was waiting to make a lawful left turn.

Higginbotham claimed that Sukup was negligent by failing to exercise proper control over his vehicle, by failing to operate the vehicle at a safe speed for the conditions, and for failing to stop in order to avoid colliding with Higginbotham's vehicle.

Higginbotham claimed that she suffered injuries to her neck, including severe and persistent neck and head pain, whiplash,

and cervical strain, and carpal tunnel syndrome. She alleged that she had sustained $16,059.55 in medical expenses and that she would continue to incur medical expenses in the future. She also alleged that she had incurred lost wages in the amount of $5,134.13. Thus, Higginbotham prayed for $21,193.68 in specific damages, as well as for general damages, costs, and any further relief the court deemed appropriate. On November 4, 2004, Sukup filed his answer, denying each and every allegation made by Higginbotham and asking the district court to dismiss the complaint. On May 31, 2005, Sukup filed an "Admission of Fault," in which he admitted fault in the case "but denie[d] the nature, extent, and amount of damages asserted by" Higginbotham. On August 31, Sukup filed an "Offer to Confess Judgment," in which he "offer[ed] to confess Judgment in open Court for the total sum of $40,000.00, inclusive of court costs."

A jury trial was held in the instant case beginning on March 15, 2006. Higginbotham testified with regard to the injuries she sustained, the pain she continued to suffer from at the time of trial, and the wages she lost as a result of the accident. She generally conceded she had suffered from previous neck stiffness and soreness since approximately 1990, but claimed that she would receive chiropractic adjustments for her neck pain and that her neck would feel fine after the adjustments. Higginbotham stated that she had been suffering from constant neck pain since the time of the August 30, 2000, accident and stated that she was still undergoing physical therapy for the neck injury. She stated that she had no neck pain or soreness immediately prior to the accident, but that she had suffered from soreness and stiffness in her neck and shoulder area ever since the accident.

Numerous depositions from doctors who had treated or examined Higginbotham were read into evidence at trial, and numerous exhibits were entered into evidence as well. Specific evidence relevant to our examination of the issues in this case will be discussed as necessary in the analysis section of this opinion.

On March 16, 2006, a jury instruction conference was held. The following colloquy was had between the trial court, Higginbotham's attorney, and Sukup's attorney:

THE COURT: Then that only leaves [NJI2d Civ.] 4.09 to discuss. So . . . you [Higginbotham's attorney] have included the paragraph, "If you cannot separate damages caused by the preexisting condition" [as the second paragraph of Higginbotham's proposed jury instruction No. 2]; is that right?

[Higginbotham's attorney]: I'm asking that that be included, Your Honor.

THE COURT: All right . . . why don't we start with your argument first.

[Higginbotham's attorney]: Well, Your Honor, the evidence in this case is that [Sukup] has spent a lot of time trying to emphasize the fact that [Higginbotham] has had a preexisting medical history, and has had a preexisting condition. And it seems that [Sukup] cannot have his cake and eat it too. If you want to complain about [Higginbotham's] having a preexisting condition, then I think you have to deal with the fact that you might have to deal with a 4.09 instruction that includes this second paragraph.

The fact that [Higginbotham] may have said she recovered from prior injuries, doesn't change the fact that there's evidence in the record, and it's actually been presented at times by [Sukup], that [Higginbotham] had a degenerative condition in her neck. It seems to me that this is precisely the type of case that we would look to in applying the second paragraph of 4.09 given the objective evidence of that, and the history of prior injury that [Higginbotham] has sustained to the neck has been documented in her medical history.

To the extent that the instruction — I think the instruction is designed for cases just like this one, where you might have a condition that flares up or waxes and wanes, use whatever phrase you like, from time to time, and you have a situation where you have a traumatic event that causes a condition that may have been relatively nonsymptomatic to become symptomatic. In the last deposition that we read today, that's the terminology used by Dr. [Michael H.] McGuire. This is symptomatic. It causes pain and it is

symptomatic. I think this is exactly the type of fact pattern where this type of instruction should be given.

I would strongly suggest that the court consider using the second paragraph of 4.09.

[Sukup's attorney]: Your Honor, I strongly disagree. I previously provided to the court a brief on this issue. I don't get this degenerative condition. [Higginbotham] brought it up so we had to address it. We established that Dr. [C. Robert] Adams is the only one saying that a possible disk was injured here.

We had to bring up the preexisting degenerative disk to show that he was wrong because he didn't know about the preexisting degenerative disk. I'm not here saying that her condition is going downhill because of her degenerative condition. The only reason that was brought up is to show Dr. Adams was wrong.

Now, getting to 4.09, the second [paragraph]. It's only appropriate when you have an injury to someone where they have a preexisting condition that is causing a downfall in their condition, and an injury to it that's — and they are so interwoven and intertwined that you can't separate them. The evidence is clear in this case, and if you instruct without that, the jury's finding is going to be the same. If they believe [Sukup's] evidence, then [Higginbotham] had a temporary cervical strain and everything is resolved and she's back to where she was.

If you instruct without it and they believe [Higginbotham], then everything that she has now isn't related to this accident. So you don't need the second [paragraph] in this case, because without it they are going to be appropriately instructed. I guess the instructions don't suggest or recommend it, and I don't think this is a case where it belongs.

. . . .

[Higginbotham's attorney]: Well, the instructions do suggest it because it is an optional provision in [the Nebraska Jury Instructions] that has been determined could be appropriate in certain circumstances. The notion, I guess, that — I guess what — the point I'm trying to get across here is as we so often hear, the defendant takes

the plaintiff as they find her. And in this case the defendant[, Sukup,] wants to present an argument to the jury, and will do so tomorrow, that at a certain point in time after the cervical strain healed at approximately a two-year period of time, [the plaintiff, Higginbotham,] was back to where she was before the accident occurred. And our position is that it is very difficult to make that definitive separation. And even Dr. McGuire, in his deposition, admitted it's difficult to make that separation. And if the jury thinks it can't make that separation, then I think the jury is properly instructed in this by utilizing this second [paragraph] in 4.09.

That is the defendant's theory, but nonetheless the damages that are — these conditions [Higginbotham] has are, I agree with [Sukup's attorney], interwoven with her other condition. And I think the jury needs to know that the defendant takes the plaintiff as they find her. And if [the jury] can't separate out those damages caused by the preexisting condition, then the defendant is liable for all of them. That's the law of the state.

[Sukup's attorney]: And I disagree with [Higginbotham's attorney]. The instructions specifically say that the second paragraph should not be routinely given. It should be rarely given. And this is not the case for it. This jury is going to be appropriately instructed in the law based upon the evidence before them, using the standard instruction without modifying it to add the damage apportion paragraph so you can get up there and argue to tag it all.

If they find — if their finding is this accident is the cause of [Higginbotham's] continued complaints and problems, then they'll be appropriately instructed even without the paragraph.

THE COURT: My ruling is going to be that I think that situation in [*Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997),] is probably the most applicable apportionment instruction appropriate where there is evidence of a preexisting condition, but if the degree to which the condition may have been aggravated could not be determined, an apportionment

> instruction in the absence of proof of aggravation. I think that's where we're at.
>
> Emotionally, I probably agree with [Higginbotham's attorney], because I don't think [Sukup's attorney] ought to be able to have his cake and eat it too, which he's trying to have here. But on the other hand, the situation as far as proof is concerned, I don't think it's clear here that there's a preexisting condition, and therefore I don't think it's appropriate to give the second paragraph. So I'm going to deny [Higginbotham's] motion and instruct as requested by [Sukup].
>
> However — well, that's what I'm going to do.

The case was submitted to the jury on March 17, 2006. After deliberations, the jury returned that same day with a verdict in favor of Higginbotham in the amount of $6,464.58. On March 27, Higginbotham filed a motion for new trial, alleging that the trial court improperly instructed the jury on the issue of damages. On May 10, following a hearing on the motion for new trial, the trial court overruled Higginbotham's motion. Higginbotham has timely appealed to this court.

ASSIGNMENTS OF ERROR

Higginbotham alleges that the trial court committed reversible error in refusing to give one of her proposed jury instructions and in overruling her motion for a new trial.

STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[2] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Id.*

[3] 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. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006); *Kant v. Altayar*, 270 Neb. 501, 704 N.W.2d 537 (2005).

ANALYSIS

Improper Jury Instructions.

Higginbotham first contends that the district court committed reversible error when it refused to give one of her proposed jury instructions. Higginbotham's proposed jury instruction No. 2 provided as follows:

> There is evidence [Higginbotham] had a neck condition prior to the date of the collision. [Sukup] is liable only for any damages that you find proximately caused by the collision.
>
> If you cannot separate damages caused by the preexisting condition from those caused by the collision, then [Sukup] is liable for all of those damages.

This instruction is essentially identical to that seen in NJI2d Civ. 4.09. The second paragraph of Higginbotham's proposed instruction is essentially identical to the "Suggested Instruction," dealing with apportionment, as seen in part IIB of the comment to NJI2d Civ. 4.09.

Instead of instructing the jury with Higginbotham's proposed jury instruction No. 2, the trial court instructed the jury as requested by Sukup, which was substantially similar to Higginbotham's proposed instruction except for the omission of the second paragraph of the proposed instruction.

[4-6] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that the tendered instruction is the correct statement of law, that the tendered instruction is warranted by the evidence, and that the appellant was prejudiced by the court's refusal to

give the tendered instruction. *Id.* A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Id.*

[7-9] The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for an aggravation of the preexisting disease. *Id.* The plaintiff has the burden of proving duty, breach, causation, and resultant harm to recover in a suit in negligence. *Id.* The plaintiff is not, however, required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all. *Id.* Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant. *Id.*

[10,11] If a plaintiff has a preexisting condition and the defendant's conduct resulted in greater damages because of that preexisting condition, the defendant is nonetheless liable for all damages proximately caused by the defendant's conduct. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006). The comment to NJI2d Civ. 4.09 states that the "Suggested Instruction" dealing with apportionment "should not be given routinely, but rarely." Further, this sentence is appropriate only where the plaintiff has established injury and causation and there remains only a question of apportioning the damages between the preexisting injury and the defendant's negligence. *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994).

It is undisputed that Higginbotham suffered from a preexisting neck condition. In fact, both parties put on evidence to suggest that she suffered from such an affliction. It is also true that more than one of the doctors who testified by deposition indicated that any damages that Higginbotham suffered to her neck as a result of the accident caused by Sukup had cleared up by the time of trial and that any neck problems she continued to have were not the result of the accident.

However, Higginbotham did in fact present evidence that her preexisting condition had been exacerbated by the accident and

that she continued to suffer from this exacerbation. The deposition of Dr. George Greene, taken on December 12, 2005, was read into evidence at the trial. Dr. Greene stated that he examined Higginbotham on two occasions, on December 8, 2000, and on September 20, 2001. Dr. Greene indicated that he took a medical history from Higginbotham. Dr. Greene noted that Higginbotham had been referred to him for neck pain arising out of her August 30, 2000, car accident and that "[i]t was [his] impression that she had had a strain of her neck that was causing her neck and shoulder pain." Dr. Greene testified that it was his "impression that [Higginbotham's cervical strain] was as a result of her motor vehicle accident."

Dr. Greene stated that Higginbotham had suffered a "severe cervical strain," which he characterized as "a strain of the muscles, joints, and ligaments in the neck region." He further stated that in his experience, surgery would not be an option to reduce Higginbotham's pain. Dr. Greene stated that he "suggested [to Higginbotham,] since her neck pain had been ongoing and had not been relieved with other nonoperative methods, that she consider evaluation at a comprehensive pain management clinic."

Dr. Greene stated in his deposition that he had assigned Higginbotham an impairment rating of 4 percent of the whole person, per the "AMA Guidelines to the Evaluation of Permanent Impairment." He stated that the impairment rating was "related to the unoperated soft tissue lesion and cervical spine with none to minimal degenerative changes on the structural test." Dr. Greene also interviewed Higginbotham on July 7, 2003, and he stated that Higginbotham was still suffering from neck pain at that time. Dr. Greene reiterated that he was of the opinion that Higginbotham had "experienced a cervical strain as a result of her motor vehicle accident." He stated that he did not have an opinion regarding whether Higginbotham's injury was permanent, and that the neck condition was not degenerative, but that he "still [thought] that she may derive some benefit from evaluation in a comprehensive pain management program."

On cross-examination, Dr. Greene stated that Higginbotham had not informed him that she had a preexisting neck condition and that he did not recall Higginbotham's telling him that

she had constant neck pain and stiffness. He stated that he had given Higginbotham a permanent impairment rating as a result of the cervical strain. He also explained that he did not have an opinion regarding whether Higginbotham's injury was permanent or not, due to his "understanding she has not completed a course of treatment for her cervical strain," and that he was "reluctant to assign her permanency until she has completed a course of treatment."

Dr. Greene again reiterated that as a result of the accident, Higginbotham suffered a cervical strain "which[,] in view of the other information available, may have exacerbated a pre-existing condition." Dr. Greene conceded that Higginbotham had not told him about her prior neck pain, but stated that he still believed her current neck pain was an aggravation of her previous condition: "Based on the history that she gave me that her neck pain — she had neck pain following her motor vehicle accident, so I must rely on what she told me that suggested that is more neck pain than she had previously." Dr. Greene reiterated that he believed Higginbotham's current neck pain was causally related to the accident, but conceded that "[b]ased on the additional information [he learned on the day his deposition was taken, concerning Higginbotham's] pre-existing neck pain, all of her current neck pain may not be related to her motor vehicle accident."

Additionally, the deposition of Dr. Curtis Meyer, taken on December 15, 2005, was read into evidence at trial. Dr. Meyer stated that he had been Higginbotham's treating chiropractor since February 2003. Dr. Meyer stated that Higginbotham had primarily received care for her neck. Dr. Meyer stated that his opinion regarding Higginbotham's neck was as follows:

> The care that I'm offering, based on the history that I read, and the examinations that I read of, and the medical opinions that I read of, and my objective findings say that [Higginbotham's] neck was hurt and that she has sought care from a variety of doctors for that and that that stems from an incident in 2000.
>
> . . . .
>
> . . . I have a variety of diagnoses as you can see through this regimen of care, all of which come into the same

> cervical and thoracic area that she was originally complaining of. My care at this point was less acute than that which I read about in the earlier days. So the strain/sprain incident and diagnoses that I read of, I scaled down to sometimes myalgias which was just muscle pain, sometimes dysfunctions, it didn't work well. And so my — my diagnoses are maybe less, not as heavy; not as heavy, and the court — for the court to understand, she wasn't in as bad of shape when I got to her or when she got to me as she was when she was first seen.

Dr. Meyer continued to state that Higginbotham "was hurt in the incident of 2000 and that some of the — the complaints, subjective complaints even yesterday stem from that."

Dr. Meyer stated that he had reviewed the records of Dr. James Thor, Higginbotham's chiropractor at the time of the accident. Dr. Meyer stated that he "looked at [Higginbotham's] records prior to [the 2000 accident], but did not delve" into them, and that he had examined the records after the accident as well. Dr. Meyer stated that his treatment of Higginbotham, with the exception of a few visits, had been "necessarily incurred as a result of the automobile accident she was involved in in August of 2000." Dr. Meyer gave his opinion regarding Higginbotham's future care needs:

> Based on the patient's needs over the last nearly three years, we're not that far from February now, the patient has required periodic care as we've discussed in short small blocks, sometimes based on incidents, sometimes not based on an incident. It would then be reasonable for me to think that with what had occurred or has occurred that she may continue to seek that form of care in small segmental blocks. It does look good for her, though, that her care requirements for this year were much less than they had been in the previous two. So I think that is very positive for her in her trying to achieve some quality of life.

He stated that Higginbotham would probably continue to require periodic treatment, but would not be on a scheduled regimen of chiropractic treatment.

On cross-examination, Dr. Meyer stated that Higginbotham did not have any future scheduled appointments with him, as

they were "on an as-needed basis." Dr. Meyer stated that he did not have an opinion on the care of Higginbotham's neck prior to the 2000 accident and that he did not know if Higginbotham "had flare-ups in her neck that subsided and then flared-up and subsided before this motor vehicle accident." Dr. Meyer also conceded that he did not know "if during the care and treatment . . . before the motor vehicle accident of August 30, 2000, [Higginbotham] ever had pain" in her cervical spine or at the thoracic level. He also did not know if Higginbotham reported to Dr. Thor that she suffered from "constant neck pain and stiffness" or if Higginbotham had been diagnosed with a chronic condition of her neck. However, we note that Dr. Meyer never changed his opinion that Higginbotham's neck problems that he had treated were at least partly the result of the 2000 accident.

As noted earlier, once a plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by a tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant. It is apparent from Dr. Greene's testimony, as well as that of Dr. Meyer, that Higginbotham presented evidence from which a jury could reasonably find that damages were proximately caused by a tortious act. Therefore, the burden of apportioning damages was squarely on Sukup.

The apportionment paragraph included in Higginbotham's proposed instruction is appropriate to include only where the plaintiff has established injury and causation and there remains only a question of apportioning the damages between the preexisting injury and the defendant's negligence. Although more than one of the doctors' opinions entered into evidence suggested that any damages suffered by Higginbotham due to the accident had cleared up prior to trial, Dr. Greene's opinion was that Higginbotham continued to suffer damages to her neck as a result of the accident; Dr. Meyer opined similarly. Dr. Meyer never changed his opinion, and while Dr. Greene's opinion changed slightly after he learned of Higginbotham's preexisting neck condition, he maintained his position that Higginbotham suffered a cervical strain as a result of the accident. Dr. Greene specifically stated that "all of her current neck pain may not be related to her motor vehicle accident," indicating that at least

part of Higginbotham's suffering at the time of trial was still due to the cervical strain she suffered in the accident.

Thus, at least some of the evidence presented at trial indicates that apportionment is not clear and that Higginbotham continues to suffer due to the accident. While Dr. Greene and Dr. Meyer may be in the minority, whether their testimony was credible or not is not for us, or the district court, to decide; rather, it is a question for the jury. Therefore, it is apparent from the record before us that Higginbotham's proposed instruction was warranted by the evidence presented at trial.

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). Higginbotham's proposed instruction was a correct statement of the law and, as previously stated, was warranted by the evidence. It is also apparent that Higginbotham was prejudiced by the court's failure to give her proposed instruction. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). The jury should have been instructed that if it was unable to separate the damages caused by the preexisting condition from those caused by the collision, then Sukup was liable for all Higginbotham's damages. Higginbotham was clearly prejudiced by the trial court's failure to properly instruct the jury. Accordingly, we find that the trial court's failure to give Higginbotham's proposed instruction was reversible error.

Denial of Motion for New Trial.

Higginbotham has also assigned that the trial court erred in overruling her motion for a new trial, on the basis that the court erred in failing to give her proposed jury instruction. Since we have found that the trial court committed reversible error in failing to give Higginbotham's proposed jury instruction, it follows that the court likewise abused its discretion in failing to grant her a new trial on that basis.

CONCLUSION

We find that the district court committed reversible error when it refused to give Higginbotham's proposed jury instruction, and accordingly, we reverse the judgment of the district court and remand the cause back to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
DOUGLAS J. CRAIG, APPELLANT.

739 N.W.2d 206

Filed July 31, 2007. No. A-06-504.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Speedy Trial: Pretrial Procedure.** A motion to discharge on speedy trial grounds is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion.
5. **Judgments.** A judgment's meaning is determined, as a matter of law, by the contents of the judgment in question.
6. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
7. **Public Officers and Employees: Records.** Neb. Rev. Stat. § 25-2206 (Reissue 1995) requires that the clerk of the court shall endorse upon every paper filed with him or her the day of filing it.
8. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
9. **Speedy Trial: Good Cause: Proof.** It is the State's burden to establish that facts showing good cause under Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995) exist to delay a defendant's trial beyond the 6-month time period.
10. **Speedy Trial.** An accused cannot generally take advantage of a delay in being brought to trial where the accused is responsible for the delay by either action or inaction.

11. **Trial: Records.** It is the duty of the court reporter to make a verbatim record of judicial proceedings, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.
12. **Speedy Trial: Time: Appeal and Error.** The period of time from the day of the defendant's filing a notice of his or her interlocutory appeal of the trial court's denial of the motion to discharge until the time at which the appellate court mandate is spread on the record is excludable, for speedy trial purposes, as a period of delay resulting from other proceedings concerning the defendant under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995).

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

Douglas J. Craig filed in the county court for Lancaster County a motion for discharge based on his right to a speedy trial. The county court excluded 37 days under the catchall "good cause" provision of Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995). On appeal, the district court affirmed the county court's decision. Craig now appeals to this court. We agree that the delay is properly considered under the catchall category rather than as a continuance under § 29-1207(4)(b), because the record does not show that the postponement was granted at Craig's request or with his consent. We further agree with the district court that a later 40-day delay was a continuance granted at the request of Craig's counsel and that the time in which to bring Craig to trial had not expired when he filed for discharge. We therefore affirm.

II. BACKGROUND

On April 18, 2005, the State filed a complaint in the county court charging Craig with third-offense driving under

the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 60-6,196(1)(c) (Reissue 2004). On April 20, Craig was arraigned, pled not guilty, and advised the county court that he planned to hire an attorney. The court stated that a docket call would be held on May 24 and that Craig's lawyer needed to be with him at that time.

On May 24, 2005, Craig appeared in court without counsel and explained that he had been unable to hire a lawyer due to not having work. The court appointed the public defender's office to represent Craig and told him, "you'll have to go over and see them as soon as you possibly can and come back for docket call on June 30th." A notation on the court's "Case Action Summary"—the county court equivalent to a district court's trial docket sheet—appears to state "P.D. apptmt Cont for Doc/call 6-30-at 1[30]." A later notation on the "Case Action Summary" states that on the court's motion, the case was continued until September 1 for docket call.

On September 1, 2005, Craig's counsel stated, "Judge, we don't know how to proceed at this point. . . . Craig and I have talked (indiscernible) continue this to (indiscernible)." Craig's counsel later repeated, "We don't know how to proceed, so I'd like to maybe place it on that October 11th jury docket call." The court stated that it would place the case on the jury list to be tried in the October jury term which would begin on October 24.

On October 24, 2005, Craig filed a motion to discharge, alleging that he had been denied both his statutory and his constitutional rights to a speedy trial. On December 5, the county court entered an order finding that the time between the May 24 docket call and the June 30 docket call was for "good cause" and should not be attributed to the State. The court reasoned that the delay occurred because Craig intended to hire an attorney but was unable to do so and because the matter was continued for the appointment of a public defender. The county court concluded that 37 days should not be taxed to the State and that the State had until November 21 to bring Craig to trial. Although the court did not expressly overrule Craig's motion for discharge, the court set the matter for a jury trial beginning December 12.

On December 6, 2005, Craig filed an appeal to the district court. On March 31, 2006, the district court affirmed the decision of the county court. The district court similarly found that the time between May 24 and June 30, 2005, was properly excluded under § 29-1207(4)(f), stating that "this delay occurred as a result of the failure of [Craig] to hire an attorney contrary to what he had told the court. The court finds that this delay was 'for good cause.'" The district court added 37 days to the October 18 trial deadline. The district court further excluded the time between September 1 and October 11 under § 29-1207(4)(b), finding that Craig's counsel made an oral motion to move the docket call to October. After excluding those 40 days, the court concluded that January 2, 2006, was the last day to bring Craig to trial.

On April 28, 2006, Craig timely appealed to this court. On May 30, we dismissed the appeal for lack of jurisdiction, citing Neb. Ct. R. of Prac. 7A(2) (rev. 2001). Craig filed a motion for rehearing, and on September 5, we reinstated the appeal.

III. ASSIGNMENT OF ERROR

Craig alleges that the district court erred in affirming the county court's decision to deny his motion to discharge on speedy trial grounds.

Although Craig's motion to discharge alleged violation of both his statutory and his constitutional rights to a speedy trial, and although his assignments of error to the district court and this court are broad enough to encompass a challenge based on constitutional grounds, Craig makes no argument in his brief regarding his constitutional right to a speedy trial, and we therefore do not consider whether Craig was deprived of such right. See *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007) (alleged error must be both specifically assigned and specifically argued in brief of party asserting error to be considered by appellate court).

IV. STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless

clearly erroneous. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005).

V. ANALYSIS

1. Jurisdiction in This Court

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Loyd, supra.* The potential jurisdictional problem in this case is caused by the county court's failure to expressly rule on Craig's motion to discharge, raising the issues of whether the county court overruled the motion and, if so, when that order became final and appealable.

[4] One line of cases holds that a motion to discharge on speedy trial grounds is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion and that at that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal. See, *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006) (where court orally overruled motion and matter then proceeded to trial); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002) (where court did not rule on motion until after conclusion of trial). If we applied this rule literally, we would find that because the court had not yet proceeded to trial, the December 5, 2005, order was not appealable. However, we find these cases inapposite, inasmuch as the rule has been applied only in the absence of a written order determining the merits of the motion for discharge. Here, we have a written order addressing the merits; the uncertainty arises from the contents of the order.

[5] A judgment's meaning is determined, as a matter of law, by the contents of the judgment in question. *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995). The contents of the county court's order—both setting the matter

for trial and making findings on the merits of the motion for discharge consistent only with an order overruling the motion—lead us to conclude that the effect of the court's order was to deny Craig's motion to discharge. We urge trial courts to expressly state that a motion is denied, overruled, granted, or sustained so that appellate courts can avoid such intellectual exercises to deduce a court's intended ruling.

We conclude that the county court overruled Craig's motion on December 5, 2005, and that at that time, it became a final, appealable order. The district court properly acquired jurisdiction upon Craig's timely filed notice of appeal, and jurisdiction vested in this court upon Craig's timely appeal from the district court's order.

2. Statutory Right to Speedy Trial

[6] Section 29-1207 requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006). To calculate the time for speedy trial purposes, we exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[7] Craig incorrectly claims in his brief and in his motion to discharge that the complaint was filed on April 15, 2005. He thus contends that he should have been brought to trial by October 14. Although the complaint contains an April 15 date on the first page, the second page contains the signature of the county court clerk, a seal, and an April 18, 2005, date stamp. Neb. Rev. Stat. § 25-2206 (Reissue 1995) requires that "[t]he clerk of the court shall endorse upon every paper filed with him [or her] the day of filing it . . . ." We conclude that the complaint was filed on April 18. If no time was excludable, Craig's trial would have had to commence by October 18.

[8] The focus of Craig's appeal is that the courts below erred in excluding the 37-day period of delay from the speedy trial calculation. Perhaps recognizing that the additional 40-day

period found to be excludable by the district court will prevent him from ultimately prevailing on appeal, his brief makes nary a reference to that finding. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). Although we could resolve this appeal by limiting our analysis to the 40-day delay, we will consider both periods of delay to aid the court and counsel in determining how many days remain on the speedy trial clock.

(a) Days Excluded Under § 29-1207(4)(f)

[9] Section 29-1207(4) lists the periods of delay that are excluded in computing the time for trial. The excludable periods of delay listed in § 29-1207(4) which are particularly relevant to this appeal are as follows:

> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

It is the State's burden to establish that facts showing good cause under § 29-1207(4)(f) exist to delay a defendant's trial beyond the 6-month time period. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

Craig argues that the period between May 24 and June 30, 2005, was a continuance and that the catchall section of § 29-1207(4)(f) is not available to exclude the time, because a continuance is specifically enumerated in § 29-1207(4)(b). We disagree because the record does not demonstrate that Craig requested or consented to a continuance.

In *State v. Droz*, 14 Neb. App. 32, 703 N.W.2d 637 (2005), this court considered a period of delay resulting from the court's December 11, 2003, granting of Dorothy A. Droz' counsel's motion to withdraw and the appointment of a public

defender. The State argued that the time between December 11 and Droz' filing of a motion to discharge on January 29, 2004, was excludable under § 29-1207(4)(a) or (b) either as time from filing of a pretrial motion until final disposition of the motion or as delay resulting from a continuance granted at the request or with the consent of Droz or her counsel. We stated that § 29-1207(4)(a) did not apply because Droz' motion for court-appointed counsel and the court's final disposition sustaining that motion were almost simultaneous. In concluding that the delay did not fall under § 29-1207(4)(b), we stated that the record did not contain any evidence of an oral or written motion for continuance made by Droz or her counsel. We rejected the State's argument that "Droz' consent to a continuance under these circumstances is 'self-evident' because 'no one would expect a newly appointed attorney to be prepared for a felony trial on such short notice.'" 14 Neb. App. at 38-39, 703 N.W.2d at 643. Although we agreed that some delay would be expected under the circumstances, we concluded: "[A]bsent evidence that a continuance was sought by either Droz or her counsel, this period of time is not properly excludable under § 29-1207(4)(b)." 14 Neb. App. at 39, 703 N.W.2d at 643. In dicta, we then stated: "Although it could be argued that there was 'good cause' for delay following the appointment of new counsel, the district court did not make a specific finding to that effect as required by § 29-1207(4)(f)." 14 Neb. App. at 39, 703 N.W.2d at 643.

In the case at hand, during the May 24, 2005, hearing, the following colloquy occurred:

> THE COURT: You were arraigned in court (indiscernible) charged with DWI third offense. You indicated then that you were going to hire your own lawyer.
>
> [Craig]: Right. I was unable to hire a lawyer as of yet. I'm self-employed during the summer. I just do like remodeling job — jobs. And the job I was scheduled to do, she couldn't pay and she's not going to be able to do it 'til the first of June. So I thought the one that was going to start in May, she couldn't do it until June. So I — I have basically no work, and so I'm not able to — I wasn't able —

> THE COURT: (indiscernible)
>
> [Craig]: I beg your pardon?
>
> THE COURT: Do you want me to appoint a lawyer for you?
>
> [Craig]: I — I would rather still like to hire my own. I mean I don't know if —
>
> THE COURT: (indiscernible)
>
> [Craig]: Well, in that case I would need a public defender.
>
> THE COURT: Well, you could hire one yourself.
>
> [Craig]: I'd rather not. I'd rather not, Your Honor.
>
> THE COURT: (indiscernible)
>
> COURT STENOGRAPHER: Oh, why don't we use that June 30th at 1:30.
>
> THE COURT: Okay. (indiscernible) I'll appoint the public defender to represent you and you'll have to go over and see them as soon as you possibly can and come back for docket call on June 30th (indiscernible). Okay. Go over here now and —

Like the situation in *Droz*, the record in the instant case does not support a determination that Craig requested or consented to a continuance. We do not read *Droz* to limit the application of § 29-1207(4)(b) to an express request for continuance initiated solely by the defendant or his or her counsel. In some circumstances, a continuance initiated by the trial court may fall within the ambit of § 29-1207(4)(b). But there must be more involvement by the defendant in the discussion of a continuance than was present in the case before us. To be sure, Craig did not object when the court suddenly announced that a docket call would be held on June 30, 2005. But until the trial court ordered its continuance, the topic of a possible continuance had not been raised. Up to that point, nothing Craig said can be read as impliedly requesting a continuance. Because § 29-1207(4)(b) does not apply, the county court and district court did not err in considering the delay under the catchall "good cause" provision of § 29-1207(4)(f).

[10] The county court found that the delay between the May 24, 2005, docket call and the June 30 docket call was for "good cause," that it should not be attributed to the State, and

that it occurred because Craig was unable to hire an attorney as he had intended and because the matter was continued for the appointment of a public defender. The district court similarly found that the time between May 24 and June 30 was properly excluded under § 29-1207(4)(f), that the delay occurred as a result of Craig's failure to hire an attorney contrary to what he had told the court, and that the delay was "'for good cause.'" These findings by the county and district courts are supported by the record and are not clearly erroneous. Further, an accused cannot generally take advantage of a delay in being brought to trial where the accused is responsible for the delay by either action or inaction. See, e.g., *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). The delay in this case is solely attributable to Craig.

The Nebraska Supreme Court's recent decision in *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007), does not call for a different result in this case. In *Sommer*, the district court excluded for good cause the delay resulting from a court-initiated continuance to allow a previously scheduled trial in another case to proceed. Because the record showed that the defendant in the other case entered guilty pleas 5 days before the originally scheduled trial date, the *Sommer* court found that the evidence did not show that the defendant therein could not have been tried prior to the final trial date for speedy trial purposes. In the instant case, there is no evidence in the record showing that a date earlier than June 30, 2005, was available for the continued arraignment. Thus, the record supports the lower courts' findings of good cause for the continuance.

Adding 37 days to the October 18, 2005, trial deadline, the new trial deadline would be November 24, which happened to fall on Thanksgiving, a court holiday. Trial could therefore commence on Monday, November 28, without violating Craig's right to a speedy trial. See Neb. Rev. Stat. § 25-2221 (Cum. Supp. 2006). Because Craig filed his motion for discharge on October 24, it was clearly premature.

[11] We note, as is established in the colloquy reproduced above, that several of the county court's statements during the May 24, 2005, hearing appear in the record as "(indiscernible)."

It is the duty of the court reporter to make a verbatim record of judicial proceedings, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty. *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995); *In re Guardianship of Breeahana C.*, 14 Neb. App. 182, 706 N.W.2d 66 (2005). A record in which numerous statements are indiscernible fails to present a verbatim record.

(b) Days Excluded Under § 29-1207(4)(b)

Neither Craig in his brief nor the county court addressed the excludability of the time from September 1 to October 11, 2005. The district court, however, determined that those 40 days were excludable under § 29-1207(4)(b). We agree.

On September 1, 2005, Craig appeared in court with counsel, and his counsel informed the court that he and Craig did not know how to proceed, that they had "talked (indiscernible) continue this to (indiscernible)," and that he would "like to maybe place it on that October 11th jury docket call." The "indiscernibles" in the record again hamper our review, but the context sufficiently demonstrates that Craig's counsel orally requested a continuance, making the time excludable under § 29-1207(4)(b).

Adding 40 days to the November 24, 2005, trial deadline, the new trial deadline would be January 3, 2006. (The district court incorrectly stated that January 2 was the last day that Craig could be brought to trial.)

(c) Excluded Time While Appeal Is Pending

[12] Craig argues that any time between this court's dismissal of his appeal and the motion for rehearing is not attributable to him and should be counted against the State. The period of time from the day of the defendant's filing a notice of his or her interlocutory appeal of the trial court's denial of the motion to discharge until the time at which the appellate court mandate is spread on the record is excludable, for speedy trial purposes, as a period of delay resulting from other proceedings concerning the defendant under § 29-1207(4)(a). See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). We therefore conclude that the entire time from Craig's filing his notice of appeal to the district court on December 6, 2005, to the time of

spreading of the district court's mandate on the record of the county court (pursuant to our mandate to the district court) is excluded from the speedy trial calculation.

In calculating the time remaining to bring Craig to trial, we do not count the day on which Craig filed his motion to discharge. See *id.* As discussed above, adding the 37-day and 40-day excludable periods to the initial speedy trial deadline results in a deadline of January 3, 2006. Upon entry of the mandate on remand to the county court, the State has 71 days in which to bring Craig to trial.

VI. CONCLUSION

We conclude that the county and district courts did not err in finding that the period of time between May 24 and June 30, 2005, should be excluded under the good cause provision of § 29-1207(4)(f). We further conclude that the district court's finding that a period of 40 days should be excluded under § 29-1207(4)(b) as a continuance granted at the request of Craig's counsel was not clearly erroneous. Because Craig had not suffered a denial of his statutory right to a speedy trial when he filed his motion to discharge, we affirm the decision of the district court affirming the decision of the county court.

AFFIRMED.

IN RE INTEREST OF EMILY C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

738 N.W.2d 858

Filed July 31, 2007. No. A-06-1408.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction.** A juvenile court is not required to terminate its jurisdiction over a minor child even when the sole basis for the court's acquiring jurisdiction over the child no longer exists, if termination of such jurisdiction is not in the child's best interests.

Appeal from the Juvenile Review Panel, PHILIP M. MARTIN, JR., WADIE THOMAS, JR., and ROBERT A. IDE, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, TONI G. THORSON, Judge. Judgment of Juvenile Review Panel affirmed.

Jon Bruning, Attorney General, and B. Gail Steen, Special Assistant Attorney General, for appellant.

Gary Lacey, Lancaster County Attorney, Alicia B. Henderson, and Henry L. Wiedrich, Senior Certified Law Student, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

The Nebraska Department of Health and Human Services (DHHS) appeals the decision of the Juvenile Review Panel affirming the decision of the separate juvenile court of Lancaster County continuing its jurisdiction over Emily C. after the juvenile court found that she is at risk to become truant if released from the Youth Rehabilitation and Treatment Center-Geneva (YRTC). DHHS contends that the juvenile court erred in not terminating its jurisdiction. We disagree and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 23, 2005, the juvenile court entered an order adjudicating Emily as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2004)—habitually truant from home or school—after she pled no contest to the allegations of the petition. Although, such petition is not in our record. The juvenile court found that the allegations of the petition were true beyond a reasonable doubt and that Emily was a child less than 16 years of age who was habitually truant from school, having been truant from school on all or parts of the following dates in 2005: September 1; October 5, 6, 10, 11, 12, 13, 14, and 17; and November 4 and 7.

After a disposition hearing, which does not appear in our record, the juvenile court entered an order on February 16, 2006, which disapproved the DHHS plan to terminate the

court's jurisdiction, finding such plan to be contrary to Emily's best interests. The juvenile court placed temporary legal custody of Emily with DHHS for placement, treatment, and care at Girls and Boys Town. The juvenile court's plan ordered that Emily shall cooperate with her placement at Girls and Boys Town; that Emily shall attend school on a regular basis; that DHHS, school personnel, and all other service providers working with the family shall exchange information related to the development or evaluation of a plan to correct the conditions resulting in the adjudication; that Emily shall have no tardies or truancies; and that Emily shall cooperate with counseling.

A review hearing was held on April 5, 2006, although the content of such hearing does not appear in our record. The juvenile court disapproved the DHHS plan to terminate the court's jurisdiction and found that the prior plan, as ordered by the juvenile court, was in Emily's best interests. The juvenile court ordered that temporary legal custody of Emily be placed with DHHS, subject to the plan as ordered by the court. The juvenile court's plan ordered that Emily shall cooperate with her placement; that Emily shall attend school on a regular basis; that DHHS, school personnel, and all other service providers working with the family shall exchange information related to the development or evaluation of a plan to correct the conditions resulting in the adjudication; that Emily shall have no tardies or truancies; and that Emily shall cooperate with counseling.

A review hearing was held on August 4, 2006. At the hearing, DHHS called Richard Wehland, the YRTC principal, to testify because Emily was committed to YRTC in mid-April 2006. Wehland testified that over the summer, Emily was enrolled in three classes—an art class, a food class, and a music class. Emily fully attended all classes, passed such classes, and received 9 credit hours. The summer session was the first schooling she participated in at YRTC. Wehland testified that Emily was enrolled for seven classes in the fall. Wehland also testified as to the school's policy regarding attendance for students at YRTC. He stated that they are required to attend and that if, for whatever reason, they are not attending, they are expected to make up their work. He further stated that if they are in separation status, the teacher will go to them every day,

take assignments to them, and pick up completed assignments. Wehland said it would be "[p]retty difficult" for Emily to be truant while she is at YRTC.

Sara Goscha, a supervisor with DHHS, testified that she supervises Emily's caseworker and has also reviewed the file and signed off on the court report. Goscha testified that when Emily was originally found to be truant, she had missed approximately 9 days of school, and that Emily had indicated she missed those days because she "had run." Goscha later stated that Emily had been truant on all or parts of 11 days from September to November 2005. Goscha testified that Emily was committed to YRTC on April 5, 2006. Goscha stated that Emily has been compliant with the YRTC program and is making progress on her objectives, although Emily's goals at YRTC are not meant to deal with her truancies. Goscha stated that Emily has not had any truancies while at YRTC, so that has not been identified as something she needs to work on. Goscha said that two of Emily's goals are working on her anger and listening to authority. Goscha believes that the conditions that led to the juvenile court's taking jurisdiction have been remedied, because Emily has not been truant from school. Goscha also said that once the juvenile court "closes" the truancy case, Emily will still be under an Office of Juvenile Services commitment, and that part of her "Conditions of Liberty" to be in a community-based setting is going to be a full-time school program. The record reflects that Emily is committed to the Office of Juvenile Services under a separate docket and is placed at the YRTC under that case, but our record is not clear as to what the other case is about other than it is due to "her behaviors." According to Goscha, if Emily violates her "Conditions of Liberty," her parole would be revoked and she could go back to YRTC. Goscha also stated that even though Emily is 16 years old, there are no plans to disenroll her from an educational program. Goscha testified that she is asking the juvenile court to terminate its jurisdiction of Emily under the truancy case docket because such would be in Emily's best interests, since she has shown that she can go to school and that she can do that without truancies.

On cross-examination by the State, Goscha gave the following testimony:

> Q Now at this point in time, has [DHHS], in its capacity as the custodian, legal custodian of [Emily], done anything to correct [Emily's] truancy problem in a nonstructured setting?
>
> A No. She's been in a structured setting.
>
> Q So we have no experience, at this point in time, with how Emily . . . will perform as it relates to truancies once she is discharged from the structured setting that is [YRTC], is that right?
>
> A We don't have that information at this time, no.

Goscha also stated that when children are not compliant with their "Conditions of Liberty," their parole is not always revoked.

Goscha testified that Emily is refusing to see her parents, even though she has been encouraged to talk to her parents and go through family mediation with her counselor. Goscha stated that Emily has indicated that she feels like she needs to work on herself and that she does not believe she is in a position to work on her family issues. Though no discharge date has been set, once Emily is discharged from YRTC, DHHS hopes to place her with her parents. But, if Emily refuses contact with them, DHHS will have to find an alternative placement.

At the time of closing arguments to the court, Emily's father volunteered that after the court had ordered Emily to be placed at Girls and Boys Town in February 2006, she attended only 1 day of school there and then was on the run for 5 weeks from that facility until she was found. That situation brought her back into court in early April 2006. When Emily's mother and father were asked by the juvenile court if they agreed or disagreed with DHHS' recommendation to close the truancy case, they said they would disagree with the proposal.

The juvenile court disapproved DHHS' recommendation to terminate the court's jurisdiction, finding that "Emily . . . has not successfully attended school in an open setting and there is insufficient evidence to demonstrate Emily has corrected the truancy issue. The plan to terminate jurisdiction is contrary to

Emily's best interest by [a] preponderance of the evidence." The juvenile court ordered that temporary legal custody of Emily remain with DHHS, subject to the plan as ordered by the court. The juvenile court's plan was the same as set forth in April 2006.

On August 28, 2006, DHHS filed a request for review by the juvenile review panel, see Neb. Rev. Stat. § 43-287.03 (Reissue 2004), alleging that the August 2006 order "directed an implementation of a plan different from the plan prepared by [DHHS] concerning the care, placement, or services to be provided to the minor child, Emily . . . , and [DHHS] believes that the Court's order is not in her best interest."

In its order filed November 6, 2006, the juvenile review panel stated that (1) it has not been shown by a preponderance of the evidence that the disposition of the separate juvenile court of Lancaster County was not in Emily's best interests; (2) the truancy situation is solved so long as the juvenile remains placed at the YRTC in Geneva, but the record is clear that such placement will not be indefinite; (3) the state of the relationship between any juvenile and the juvenile's parents has a direct and important connection relative to the likelihood of the juvenile being truant; and (4) the juvenile review panel was mindful of the importance of the benefits to Emily of the juvenile court maintaining involvement and supervision over her, which would not likely occur if Emily were simply in the custody of the Office of Juvenile Services under a parole situation. The juvenile review panel affirmed the August 2006 order of the separate juvenile court, because neither DHHS nor the guardian ad litem was able to show by a preponderance of the evidence that the disposition was not in Emily's best interests. DHHS now appeals.

ASSIGNMENT OF ERROR

DHHS alleges that the juvenile court erred in continuing its jurisdiction of Emily under the truancy case docket.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent

of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

ANALYSIS

[2] In *In re Interest of Kevin K., ante* p. 641, 735 N.W.2d 812 (2007), a truancy case where the mother had signed Kevin out of school pursuant to Neb. Rev. Stat. § 79-201 (Cum. Supp. 2006) after he reached age 16 and after his adjudication, this court held that a juvenile court is not required to terminate its jurisdiction over a minor child even when the sole basis for the court's acquiring jurisdiction over the child—truancy—no longer exists, if termination of such jurisdiction is not in the child's best interests. In the instant case, the court acquired jurisdiction over Emily because of her truancy. The simple fact that Emily has not been truant at YRTC is not enough to terminate the court's jurisdiction, because the situation at YRTC makes it nearly impossible for her to be truant—attendance is mandatory, and if she fails to attend, her assignments are brought to her. Emily has not yet demonstrated that she can and will successfully attend school in an unstructured setting. Furthermore, Emily's therapy goals do not directly align with her past truancy, but we cannot conclude that her family problems, authority problems, and anger issues being addressed in her therapy are unrelated to her past truancy. It is clearly not in Emily's best interests that the juvenile court terminate its jurisdiction under the truancy case docket. Therefore, the juvenile court did not err in continuing its jurisdiction of Emily under § 43-247(3)(b).

DHHS argues that "the Court [should] not maintain two separate dockets for a juvenile when one of the jurisdictional bases can be managed under the other docket's services." Brief for appellant at 8. Given that the Office of Juvenile Services is part of DHHS, see Neb. Rev. Stat. § 43-404 (Reissue 2004), DHHS is essentially asking this court to render an advisory opinion as to how DHHS should internally manage Emily, which has nothing to do with the specific assignment of error

before this court—whether the juvenile court erred in continuing its jurisdiction of Emily. Therefore, we discuss this argument no further.

CONCLUSION

For the reasons stated above, we find that the juvenile court did not err in continuing its jurisdiction of Emily under § 43-247(3)(b).

AFFIRMED.

SARA M. GODSEY, APPELLEE, V. CASEY'S GENERAL STORES, INC., AND CANNON COCHRAN MANAGEMENT SERVICES, INC., APPELLANTS.

738 N.W.2d 863

Filed August 7, 2007. No. A-06-1223.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation: Words and Phrases.** Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
5. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
6. ____. An employee's return to work does not in every case terminate an employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability continues notwithstanding the return to work.
7. ____. The determination as to the length of temporary total disability is one of fact.
8. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Reissue 2004) precludes an appellate court's substitution of its view of the facts for that

of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.

9. **Workers' Compensation.** If the payment of wages was intended to be in lieu of compensation, credit for the wages is allowed.
10. ____. If an employee is paid his regular wage although he does no work at all, it is a reasonable inference that the allowance is in lieu of compensation. However, the employer can claim no credit if it denied its workers' compensation liability while paying the wages.
11. **Workers' Compensation: Employer and Employee: Intent.** When determining whether an employer's payment to an employee should be credited against the employee's workers' compensation claim, the focus is on the intent of the employer and the circumstances surrounding the payment.
12. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
13. ____: ____. Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
14. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
15. **Workers' Compensation: Expert Witnesses.** It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Paul F. Prentiss and Megan E. Richey, of Timmermier, Gross & Prentiss, for appellants.

Terry L. Rogers, of Terry L. Rogers Law Firm, for appellee.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Sara M. Godsey sought benefits, alleging that she had sustained injuries while employed by Casey's General Stores, Inc. A trial judge of the Nebraska Workers' Compensation Court awarded Godsey temporary total disability (TTD) and future medical payments, among other things. Godsey appealed;

Casey's General Stores and its workers' compensation carrier, Cannon Cochran Management Services, Inc. (collectively Casey's), cross-appealed. The review panel affirmed the trial court's findings with regard to TTD and future medical payments, and it is from this affirmance by the review panel that Casey's appeals to this court. Because we agree with the review panel's decision on these issues, we affirm.

BACKGROUND

Godsey was born September 27, 1975, and graduated from high school in 1994. After graduation, Godsey worked at a gas station in York, Nebraska, about 6 months before starting work at Casey's General Stores in Exeter, Nebraska. At Casey's General Stores, Godsey worked her way up from making pizza and doughnuts to being an area supervisor, that is, a liaison between various store managers and the district manager. At the time of her accident and injury, Godsey was supervising stores in the western part of Nebraska, including stores in Ord, Broken Bow, Kearney, Lexington, and North Platte, and she was living in North Platte. In addition to traveling to meetings and to Casey's General Stores in the towns in her area, Godsey's duties included routinely moving cases of pop and beer, loading and unloading a heavy floor-stripping machine from her vehicle and bringing it into a store, performing inspections of store conditions, and transporting heavy boxes of records. Godsey was often on her feet for 9 hours or more per day.

Godsey suffered injuries to her lower back on November 18, 2002, as the result of an accident arising out of and in the course of her employment with Casey's General Stores. Godsey was traveling east on Interstate 80 to attend a supervisor's meeting in Columbus, Nebraska. Godsey was somewhere near Aurora, Nebraska, when a deer "came out of the median." Godsey struck the deer, totaling her car. Godsey was transported to the hospital in Aurora, where she was diagnosed with thoracic and lumbar back strain from the motor vehicle accident. Godsey was released from the hospital on November 18, was given various medications, and was given instructions to contact her physician if her pain did not improve or got worse. Godsey returned to work a couple of days after the accident, because she "got

a phone call saying that [her] stores were not good and [she] needed to come back to work." The first 3 weeks after returning to work were difficult for Godsey because she was "on a lot of pain medication" and "in a significant amount of pain." Godsey was not able to perform all of her work duties "the way [she] was supposed to." Godsey was subsequently terminated from her position at Casey's General Stores on June 10, 2003, for "[f]ailure to perform."

On November 21, 2002, Godsey sought further treatment from her family physician, who prescribed physical therapy. Godsey testified that the physical therapy did not work and left her "hurting worse than before." Godsey experienced pain in her lower back that radiated into her buttock and down her leg. Her family physician's records show that the physician did refer Godsey to physical therapy before the accident for "pelvic instability" and also reveal that Godsey had complaints of back pain prior to the accident. Godsey testified that she had not previously experienced pain that radiated into her buttock and leg.

Godsey next sought treatment from Dr. Steven Brestin at an orthopedic clinic in April 2003. Following the initial examination, Brestin's impression was low-back and left lower extremity pain as a result of the motor vehicle accident. Brestin scheduled an MRI scan and recommended that Godsey continue the chiropractic treatment she had previously started. The MRI, performed on April 29, revealed desiccation of the lower three lumbar disks, most significant at L5, and small disk herniations at L3 through L5. After the MRI, Brestin's impression was low-back and left lower extremity pain as a result of the accident and lumbar degenerative disk disease which preexisted the accident. Brestin recommended a series of epidural injections, advised Godsey regarding avoidance of recurrent disk herniations, advised Godsey not to lift over 40 pounds, and told Godsey that she could "exceed the 3.2 mph limit on the treadmill if it is a good quality treadmill that absorbs heel strike[s]." Brestin later also restricted Godsey to driving no more than an hour daily.

In May 2003, Godsey received three epidural injections, each a week apart, which improved her leg pain only transiently. In

June, Godsey underwent a myelogram and CT imaging, which revealed signs of disk herniation at L3-4, L4-5, and L5-S1. Brestin concluded that the "herniated 3rd lumbar disc" was a result of the motor vehicle accident. In his office notes for June 3, Brestin also recorded his impression of mild lumbar spinal stenosis at L4-5 and stated that the stenosis was probably aggravated by the accident.

On September 25, 2003, Godsey saw Dr. David Benevides, a neurosurgeon, at the request of Brestin. After his examination of Godsey, Benevides' impressions were of lumbar degenerative disk disease at L3-4, L4-5, and L5-S1 and lumbar disk herniation at L3-4 greater than L4-5 and L5-S1. In his office notes, Benevides stated that back surgery was an alternative, but that he would make it "the very last resort." Benevides stated that Godsey needed to work intensely on a weight loss program, needed to work on an exercise program to strengthen her lumbar muscles and stretch her hamstrings, and needed to avoid narcotics as much as possible. Benevides gave a prescription for 6 weeks of aquatic therapy. In May 2004, Benevides recommended that Godsey see a plastic surgeon about breast reduction, in an attempt to avoid back surgery. Following Benevides' recommendation, Godsey saw Dr. John Heieck, a physician with a cosmetic surgery clinic, who also recommended breast reduction surgery. Heieck stated that the procedure was medically necessary because of Godsey's increased back pain following the accident. Heieck observed that "[Godsey's] neurosurgeons [were] reluctant to operate and perform a back fusion at such an early age" and had consequently recommended reduction mammoplasty.

Godsey saw Dr. Eric Pierson for a neurosurgical evaluation in November 2004. Pierson stated that by history, Godsey's pain was clearly related to the motor vehicle accident, but that he was unable to anatomically localize the cause of the pain. In later correspondence with Godsey's attorney, Pierson explained that he meant that he was unable to pinpoint a specific disk or nerve which could be operated on to offer Godsey a chance of pain relief. Pierson referred Godsey to his partner Dr. David Diamant, who performed a series of nerve blocks at "left L4, L5, S1 facet," which provided Godsey with some pain relief.

In 2005, Diamant performed two radiofrequency neurotomy procedures, which did not provide the expected relief. Diamant subsequently referred Godsey to a doctor in Denver, Colorado, for help with pain management.

Dr. Brian Reiss conducted an independent medical examination of Godsey on February 16, 2005. Reiss opined that Godsey's pain was related to the accident, and he confirmed that she was not a candidate for back surgery. Reiss did not believe that breast reduction would be useful, but he suggested a continued exercise conditioning program.

Subsequent to the accident and loss of her job, Godsey also developed severe depression and sought counseling from Sue Huebner, a mental health counselor, at Lutheran Family Services. Although Godsey's counseling "focused on underlying issues," which included childhood sexual abuse and an incident of nonconsensual sex in approximately the summer of 2003, Huebner did not feel that Godsey would have "shown for counseling" absent the accident and its results.

Godsey was evaluated by Dr. Bruce Gutnik in August 2005 for depressive symptoms. Gutnik concluded that Godsey suffered from a recurrent major depressive disorder, and he could not rule out the possibility of posttraumatic stress disorder. Gutnik opined that Godsey's ongoing psychotherapy was not the result of the motor vehicle accident and injury, but, rather, the result of "a recent sexual assault which may well have caused childhood sexual abuse issues to resurface." Gutnik noted the records he reviewed showed that Godsey had "'unconsensual sex on a date'" a couple months prior to mid-September 2003, that Godsey was assaulted again in late September or early October 2004, and that Godsey received an e-mail from her assailant in April 2005.

Trial was held before a single judge of the compensation court on September 28, 2005, and the judge entered an award on February 8, 2006. We set forth only those findings of the trial judge that are relevant to our decision on appeal. The trial judge found that Godsey had suffered injuries to her lower back on November 18, 2002, and was entitled to benefits as provided under the Nebraska Workers' Compensation Act. The judge awarded TTD benefits as described below. The trial judge

concluded that Godsey sustained a 15-percent loss in earning capacity, and the judge also awarded benefits for the loss in earning capacity. The trial judge rejected the argument advanced by Casey's that any permanent disability suffered by Godsey was a progression of her preexisting degenerative disk disease.

The trial judge found that Godsey was temporarily totally disabled for 18 hours on November 19, 2002, 9 hours on January 1, 2003, 9 hours on January 24, 18 hours from March 20 to 21, 7 hours on March 26, 9 hours on April 22, 41.5 hours from April 28 to May 2, and 18 hours from May 8 to 9. The judge awarded TTD benefits of $424.96 per week for 3.24 weeks. In making this award, the judge relied upon trial exhibit 21, Godsey's summary of hours she missed to obtain medical treatment. The judge noted that attached to Godsey's summary were leave slips signed by Godsey's supervisor. The judge was persuaded by this evidence that the TTD awarded was correct.

The judge ordered Casey's to pay certain outstanding medical bills and to reimburse Godsey for payments she had made to Lutheran Family Services in the amount of $2,150. The judge gave Casey's credit for medical payments made as set forth in the evidence at trial. The trial judge found that Godsey was entitled to future medical care and that Casey's should continue to provide and pay for such reasonable and necessary medical care as may be required as a result of the accident and injury at issue. The judge found that medical care should include, but was not limited to, the breast reduction surgery suggested by Benavides and confirmed by Heieck, treatment at Lutheran Family Services for ongoing depression related to the pain Godsey experiences as a result of the motor vehicle accident, and a referral by Diamant to a pain management doctor in Denver.

The trial judge noted the dispute over whether Godsey suffered depression as a result of the accident and injury, and the judge observed that she had been provided with conflicting evidence. The judge noted the report of Godsey's counselor at Lutheran Family Services, Huebner, a licensed mental health professional. The judge also noted that Casey's had presented the opinion of Gutnik. The judge observed that while Gutnik diagnosed Godsey with a major depressive disorder in agreement with Huebner, he related it to sexual abuse Godsey suffered as

a child and a more recent sexual assault, not Godsey's accident and injury. The judge noted that Huebner had presented a contrary opinion, and the judge stated that she found Huebner's opinion to be the more persuasive. The judge found that Godsey had not been in any way psychiatrically or psychologically disabled from continuing to work. However, the judge found that Godsey was entitled to be reimbursed for the counseling for which she had already paid and that Casey's should continue to provide and pay for any ongoing counseling causally related to the accident and injury at issue.

Godsey appealed to the review panel, and Casey's cross-appealed. On September 22, 2006, the review panel entered an order of affirmance in part and reversal in part with remand. The review panel affirmed the decision of the trial court in all respects, except for an issue not relevant to our analysis which it reversed and remanded for further disposition. In ruling on the cross-appeal of Casey's, the review panel disagreed with the assertion of Casey's that the award of TTD was erroneous. The review panel noted that Godsey had offered evidence to indicate that she missed various hours of work to attend medical appointments and receive treatment. The panel also noted that Casey's acknowledged in its brief the fact that Godsey did miss some work for medical treatment while she remained employed with Casey's General Stores. The panel observed that the trial judge awarded TTD only for the periods referenced in exhibit 21. Accordingly, the panel found the assignment of error presented by Casey's to be without merit. The review panel also discussed the assertion by Casey's that the award of future medical benefits was erroneous, specifically Godsey's continued counseling for depression as well as the recommended breast reduction surgery. The panel noted the specific evidence in the record relied upon by the trial court to support its decision. The panel stated that the issue was not whether it might have decided the issue differently had it been sitting as trier of fact, but, rather, whether any evidence existed to support the conclusion reached by the trial court. Because such evidence existed in the record, the review panel found the allegation of error presented by Casey's as to future medical benefits to be unfounded. It is from the affirmance by the review panel of the trial court's

decision with respect to TTD and future medical benefits that Casey's now appeals to this court.

ASSIGNMENT OF ERROR

Casey's asserts that the review panel erred in affirming the trial court's awards of TTD and future medical benefits.

STANDARD OF REVIEW

[1-3] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

Award of TTD.

[4-8] Casey's asserts that the review panel erred in affirming the trial court's award of TTD. Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Id.* An employee's return to work does not in every case terminate an employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability

continues notwithstanding the return to work. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). The determination as to the length of temporary total disability is one of fact. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). Section 48-185 precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

The trial judge in this case awarded TTD benefits for the days that Godsey missed work to receive or convalesce from medical treatment. Godsey was paid for the time that she missed from work on these occasions. Specifically, the record shows that Godsey used and was paid for accumulated hours of either medical leave or vacation leave on the dates that she missed work. Casey's argues that because Godsey received her "full wage compensation" on those dates, she was not disabled and thus not entitled to TTD benefits. Brief for appellants at 17. Casey's also argues that to award Godsey TTD benefits for these occasions permits Godsey to "'double-dip.'" *Id.* In its answer, Casey's alleged that all benefits had been paid to or on behalf of Godsey, including medical benefits, for which Casey's claimed "full credit." In the award, the trial judge gave Casey's credit for medical payments made but did not give any credit toward the award of indemnity benefits. Although Casey's has not specifically assigned this failure to give credit toward the award of indemnity benefits as error, we consider the following case law because it has some bearing on the assigned error of Casey's regarding the award of TTD.

[9-11] In *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954), the employee was off work for a period of time following his accident and injury and then returned to work part time. Eventually the employee began working full time but with restrictions. Following the accident and injury, at all times, the employee continued to draw his regular paycheck. On appeal, the Nebraska Supreme Court considered whether the employer should be given credit against the award of indemnity benefits for the regular wages it had continued to pay the employee. The

court, citing favorably to "Volume 2 of Prof. Arthur Larson's The Law of Workmen's Compensation," held that "'[i]f the payment of wages was intended to be in lieu of compensation, [i.e., indemnity benefits,] credit for the wages is allowed.'" *Anderson v. Cowger*, 158 Neb. at 784, 65 N.W.2d at 60. The court further held that if an employee is paid his regular wage although he does no work at all, it is a reasonable inference that the allowance is in lieu of compensation. *Id.* However, the employer can claim no credit if it denied its workers' compensation liability while paying the wages. *Id.* More recently, this court considered whether the employer's payment of a severance package to the employee should affect the amount of TTD benefits to which the employee might be entitled in *Brummer v. Vickers, Inc.*, 11 Neb. App. 691, 659 N.W.2d 838 (2003). This court clarified that when determining whether an employer's payment to an employee should be credited against the employee's workers' compensation claim, the focus is on the intent of the employer and the circumstances surrounding the payment. *Id.* In *Brummer*, the severance package was given to all employees regardless of whether they had work injuries. We concluded that there was no evidence to show that the employer intended for the severance package to be in lieu of workers' compensation benefits.

In the present case, the money paid by Casey's to Godsey on the dates that Godsey missed work was not technically wages, but, rather, was pay for medical leave and vacation time, benefits already earned by Godsey and not connected with her ability to earn on the dates in question. With regard to sick and vacation pay, "[a] second type of payment for which credit is usually disallowed is any kind of sick pay or vacation pay of which it can be said that the claimant's entitlement to the payment is based on past service rather than on the injury as such." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 82.06[3] at 82-9 (2007). We conclude that the payment of vacation and medical leave to Godsey for the dates which Godsey missed work did not preclude an award of TTD in this case.

The trial judge limited the award of TTD to the dates Godsey missed work to obtain medical treatment as summarized by

Godsey in exhibit 21. Godsey's summary is supported by leave slips in the record signed by Godsey's supervisor. Godsey also testified about the side effects she suffered from the various treatments she underwent, her use of pain medication following the accident, and the degree and nature of pain she experienced after the accident compared to the pain from the back and hip problems she had before the accident.

[12,13] If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

In determining the extent of Godsey's disability in this case, the trial judge was entitled to rely on Godsey's testimony and her evidence concerning the days she received medical treatment. Given our standard of review, the evidence in the record, and the acknowledged authority of the compensation court to make its own determinations of disability, we cannot say that the review panel erred in affirming the trial judge's award of TTD benefits.

Award of Future Medical Benefits.

[14,15] Casey's asserts that the review panel erred in affirming the trial court's award of future medical benefits, specifically with regard to breast reduction surgery and further counseling. There was conflicting evidence in the record regarding the necessity for these treatments and their connection to Godsey's work-related accident and injury. When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Id.*

With regard to counseling, Huebner admitted that her counseling of Godsey dealt with other "underlying issues," but felt that Godsey would not have "shown for counseling" but for "the accident and [its] results." A review of Huebner's records confirms that Huebner addressed issues relating to Godsey's ongoing pain and loss of her job, as well as issues of sexual abuse as a child and recent sexual assaults. On the other hand, Gutnik diagnosed Godsey with a major depressive disorder but related her disorder more closely with the sexual abuse Godsey suffered as a child and the more recent sexual assaults, as opposed to her accident and injury. The trial judge found Huebner's opinion to be more persuasive and ordered Casey's to provide and pay for any ongoing counseling causally related to the accident and injury sustained by Godsey. This ruling contemplates that at some point, the counseling obtained by Godsey may no longer relate to her accident and injury and that Casey's will not be responsible for any unrelated counseling. We will not substitute our judgment for that of the trial court in this regard, and we conclude that the review panel did not err in affirming the trial court's award of future medical care for counseling causally related to Godsey's accident and injury.

The evidence regarding the usefulness or need for breast reduction surgery to reduce the pain suffered by Godsey from her work-related accident was also conflicting. The trial judge relied on the opinions of Benevides and Heieck to support this award. The record indicates that Godsey's neurosurgeons were reluctant to perform back fusion surgery due to Godsey's young age and that reduction mammoplasty was recommended as an alternative to back fusion surgery. Because there is evidence in the record to support the trial judge's decision, we will not substitute our judgment for that of the trial court. The review panel did not err in affirming the trial court's decision to award future medical care in the form of breast reduction surgery.

Attorney Fees on Appeal.

Godsey has filed a motion for the allowance of attorney fees incurred in connection with the defense of this appeal. Pursuant to Neb. Rev. Stat. § 48-125(1) (Cum. Supp. 2006), the motion is granted and Godsey is awarded attorney fees in the sum of $4,800 to be taxed as costs against Casey's.

CONCLUSION

The review panel did not err in affirming the trial court's award of TTD and its award of future medical care.

AFFIRMED.

BRUCE MCINTOSH, APPELLANT AND CROSS-APPELLEE,
v. NEBRASKA STATE PATROL, APPELLEE
AND CROSS-APPELLANT.

738 N.W.2d 873

Filed August 21, 2007. No. A-05-818.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. **Foreign Judgments: Jurisdiction.** The general rule is that a judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

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

Susan M. Ugai for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

HANNON, Judge, Retired.

I. INTRODUCTION

Bruce McIntosh appeals the order of the Lancaster County District Court affirming the decision of the Nebraska State Patrol (NSP) classifying him as a Level 3 sex offender under the Sex Offender Registration Act, see Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2006). McIntosh also contends that the district court erred when it found the Nebraska sex offender risk assessment instrument conforms to the Nebraska statutes and is not arbitrary and capricious and that the court erred in affirming the assessment of points against him on three items. The NSP has cross-appealed, contending that the district court erred in reducing McIntosh's sex offender assessment score under item No. 8 by 15 points. We affirm the district court's decision on McIntosh's appeal and conclude that determination of the NSP's appeal is unnecessary because a modification would not result in a change in McIntosh's sex offender classification.

II. STATEMENT OF FACTS

In 1994, McIntosh was convicted in Nebraska of attempted first degree sexual assault of a child (the victim was his stepdaughter) and was sentenced to 3 to 5 years' imprisonment. On October 31, 2000, a sex offender risk assessment (SORA) instrument was completed for McIntosh on which he scored 200 points, putting him into the Level 3 sex offender classification, which is the highest classification.

McIntosh's SORA score was very seriously influenced by a 1990 California conviction for lewd or lascivious acts with a child under the age of 14 (the victim was the same stepdaughter that he later victimized in 1994 in Nebraska) for which McIntosh was placed on 36 months' probation. In California, in May 1992, he had filed a "Petition for Change of Plea and Dismissal Under Penal Code Section 1203.4 and Early Termination of Probation." In connection with that petition, McIntosh filed a "declaration" in which, "under penalty of perjury," he declared, "I understand that the requested dismissal will not relieve me of the obligation to disclose the conviction in response to a direct question in any questionnaire or application for public office or for licensure by any state or local agency." On May 20, the California court

ordered that "the verdict of guilty . . . be set aside, a plea of not guilty be entered, and the information is dismissed."

In order for the reader to understand the overall approach under the SORA and the related issues in this case, we summarize the items listed on the SORA and, after each item, list the point value assessed against McIntosh in these proceedings. Also, where such information is helpful, the reason for the points assessed as given on McIntosh's SORA instrument is also noted:

(1) Number of convictions for sex or sex-related offenses (including current offenses). Forty points assessed. (Two convictions.)

(2) Number of convictions for other offenses, besides traffic infractions. No points assessed.

(3) Other sex or sex-related charges not resulting in conviction. No points assessed.

(4) Age at arrest for first sex or sex-related conviction. Twenty points assessed. (Age 26 or over.)

(5) Relationship of offender to victim. Five points assessed. (Family or stepfamily.)

(6) Prior sex offense convictions in jurisdictions other than the State of Nebraska. Twenty points assessed.

(7) Victim's gender. Fifteen points assessed. (Female.)

(8) Age of sex crime victim. Thirty points assessed: 15 points for the 11-and-under age classification and 15 points for the 12-to-17 age classification. (One victim.)

(9) Use of force (includes current and previous sexual assaults). Five points assessed for "Fondling/Manipulate/Seduce/Coerce/Authority." Twenty-five points assessed for "Physical Force or Violence/Restrained Victim/Threatened [victim] with Weapon or Dangerous Object."

(10) Release environment. Ten points assessed. (No supervision.)

(11) Disciplinary history while incarcerated. Ten points assessed. (Disciplined for nonviolent activity.)

(12) Treatment participation (considers incarceration, court-ordered, or postrelease). No points assessed.

(13) Mental and cognitive functioning. No points assessed.

(14) Calculation of time elapsed from previous release from court-ordered confinement or supervision to arrest for felony or Class I or Class II misdemeanors for which the offender was convicted or while under court-ordered conditions. Twenty points assessed. (Twenty-four months or less.)

The SORA instrument also provides for an automatic override to a Level 3 classification for certain conduct, such as victim torture, victim abduction, or articulation to authorities of unwillingness to control future sexually assaultive behavior, and also upon a professional assessment of dangerousness. It also lists mitigation factors, such as illness and age. Since the override and mitigation factors are not relevant to McIntosh's sex offender classification, they are not summarized here in full. The total points assessed as shown above were 200, which placed McIntosh into the Level 3 sex offender classification.

McIntosh requested a review of the Level 3 classification, with the contested issues identified as items Nos. 6, 8, and 9 as shown in the summary above and the validity of the SORA instrument. An administrative hearing was held on February 11, 2003. The NSP conceded that McIntosh's score should be reduced by 10 points for an error in scoring item No. 11. Thus, McIntosh's total score was reduced to a 190, which still fell above the 130-point cutoff for classification as a Level 3 sex offender.

At the hearing, Dr. Shannon Black, clinical director for the NSP Sex Offender Registry, testified on the validity and significances of some of the questions used in the SORA instrument and to their statistical significance in evaluating the recidivism of sex offenders. A police report which set forth pertinent facts of the force that McIntosh used in the crime in Nebraska was introduced. McIntosh also testified. To the extent pertinent, this evidence will be stated when the issues to which the evidence is relevant are considered. McIntosh's Level 3 classification was upheld.

McIntosh appealed his classification to the Lancaster County District Court, pursuant to the Administrative Procedure Act, see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Cum. Supp. 2006). The district court reversed the decision of the NSP with regard to items Nos. 5 and 6 and lowered the point assessment from 30 points to 15 points on item No. 8, resulting

in a total decrease of 40 points in McIntosh's score, bringing his final total point assessment to 150 points. The district court found that since the adjustment to McIntosh's score still resulted in a total score exceeding 130 points, McIntosh's Level 3 sex offender classification should be affirmed as modified. McIntosh timely appealed to this court, and the NSP has filed a cross-appeal.

III. ASSIGNMENTS OF ERROR

McIntosh contends that the district court erred (1) in finding that the Nebraska SORA instrument conforms to the Nebraska statutes and is not arbitrary and capricious and (2) in affirming the decision of the NSP classifying him as a Level 3 sex offender. On cross-appeal, the NSP contends that the district court erred in reducing McIntosh's SORA score under item No. 8 by 15 points.

IV. STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006); *Lein v. Nesbitt*, 269 Neb. 109, 690 N.W.2d 799 (2005); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *McCray v. Nebraska State Patrol, supra*; *Lein v. Nesbitt, supra*; *Slansky v. Nebraska State Patrol, supra.*

[3,4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *McCray v. Nebraska State Patrol, supra*; *Lein v. Nesbitt, supra*; *Slansky v. Nebraska State Patrol, supra.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports

those findings. *Lein v. Nesbitt, supra*; *Slansky v. Nebraska State Patrol, supra.*

V. ANALYSIS

1. McIntosh's Appeal

(a) Validity of SORA Instrument

(i) Failure to Include All Statutorily Required Factors

First, McIntosh contends that the SORA instrument does not consider all the factors required by § 29-4013(2)(b) (Cum. Supp. 2000). Specifically, he claims that the SORA instrument fails to consider § 29-4013(2)(b)(iii)(A), "[w]hether the conduct of the sex offender was found to be characterized by repetitive and compulsive behavior," and § 29-4013(2)(b)(iii)(G), "[a]ny recent threats by the sex offender against a person or expressions of intent to commit additional crimes."

We have already summarized the SORA items in the statement of facts section of this opinion. We do not think it would be helpful to relist them here. We agree that some of the items in the cited statute are not directly reflected in the SORA items. Although the factors found in § 29-4013(2)(b)(iii)(A) and (G) are not set forth verbatim in the SORA instrument, each is accounted for by the instrument. For example, whether a sex offender's conduct was characterized by repetitive or compulsive behavior can be ascertained from items Nos. 1 and 2, which score a sex offender based upon prior convicted offenses, and item No. 3, which scores an offender on other sex or sex-related charges not resulting in conviction. Similarly, whether the sex offender has expressed any recent threats against a person or expressed an intent to commit additional crimes is accounted for under the third override factor, which considers whether the perpetrator has articulated to officials or treatment professionals an unwillingness to control future sexually assaultive behavior or plans to reoffend violently or sexually. Consequently, this assignment of error is without merit.

(ii) Item No. 3

McIntosh also contends that the fact that item No. 3 considers the number of sex and sex-related offenses charged rather

than actual convictions is prejudicial and should invalidate the SORA instrument. McIntosh did not raise this argument to the district court. Accordingly, we need not address it. See, *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004); *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003) (appellate court will not consider issue on appeal that was not passed upon by trial court).

(iii) Inclusion of Statistically Insignificant Questions in SORA Instrument

McIntosh also contends that the SORA instrument includes factors which were found not to be statistically significant in a Nebraska validation study. The items that McIntosh claims are not statistically significant are item No. 4 (age at arrest for first sex or sex-related conviction), item No. 8 (age of sex crime victim), and item No. 12 (treatment participation). McIntosh further argues that item No. 5 (relationship of offender to victim) is statistically significant only for multiple victims.

Dr. Black, clinical director for the NSP Sex Offender Registry, testified that some of the questions used in the SORA instrument, including items Nos. 4, 8, and 12, were not statistically significant in evaluating the recidivism of sex offenders. However, Dr. Black then testified that items Nos. 4 and 12 were included in the SORA instrument based upon statutory considerations and the findings and other research of the representative support literature considered in the creation of the SORA instrument, even though the items did not reach statistical significance in the validation study. Item No. 8 was included in the SORA instrument based upon the representative supporting literature. Further, Dr. Black testified that item No. 5 (relationship of offender to victim) was statistically significant only for "multiple victim types."

In *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 374, 685 N.W.2d 335, 348 (2004), the Nebraska Supreme Court recognized that "no instrument will perfectly predict future conduct." Furthermore, the Nebraska Supreme Court has held that the SORA instrument is a rationally based risk assessment tool even though the instrument as a whole has a statistical error

rate of 12 percent. See *Slansky v. Nebraska State Patrol, supra.* Thus, this assignment of error is without merit.

(b) District Court Erred in Affirming Sex Offender Classification

(i) Use of California Conviction

McIntosh claims that his 1990 California conviction for lewd or lascivious acts with a child under 14 should not be considered for purposes of the SORA because it has been set aside by the California court. He argues, "This appears to be more than a simple expungement of the record. The order actually set aside the verdict of guilty, allowed a not guilty plea to be entered, and dismissed the information. It is an outright dismissal of the original charges." Brief for appellant at 12.

In May 1992, McIntosh filed a "Petition for Change of Plea and Dismissal Under Penal Code Section 1203.4 and Early Termination of Probation." When McIntosh filed the petition for change of plea and dismissal, he submitted an accompanying "declaration" in which, "under penalty of perjury," he stated, "I understand that the requested dismissal will not relieve me of the obligation to disclose the conviction in response to a direct question in any questionnaire or application for public office or for licensure by any state or local agency." On May 20, the California court ordered that "the verdict of guilty . . . be set aside, a plea of not guilty be entered, and the information is dismissed."

The Lancaster County District Court held that McIntosh's California conviction could be used in the SORA notwithstanding the set-aside of that conviction. It did so based upon its reading of Cal. Penal Code Ann. § 1203.4 (West Cum. Supp. 2005) and an interpretation of that statute by a California appeals court in *Adams v. County of Sacramento*, 235 Cal. App. 3d 872, 1 Cal. Rptr. 2d 138 (1991). In *Adams*, the plaintiff had been denied employment as a deputy sheriff in California under a California statute which prohibits a person from being a deputy sheriff when the person had been convicted of a felony. The plaintiff had been convicted of burglary in Kansas, but that conviction had been set aside by a Kansas court. The California Court of Appeal stated and held that the set-aside of a conviction under

California law was never intended to obliterate the fact that the defendant had been convicted, but merely freed the defendant from the penalties and disabilities of the conviction, and that the applicable Kansas law was in accord. In deciding similarly, the district court in the instant case concluded that the effect of the conviction for a sexual offense and its set-aside in California is determined by California law, not Nebraska law.

At the time the district court in this case rendered its decision, neither the opinion in *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d 349 (2005) (*McCray I*), nor the opinion in *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006) (*McCray II*), had been issued. In *McCray I*, the Nebraska Supreme Court did not get to the issue of the effect of a set-aside under Nebraska law, but in *McCray II*, the court withdrew its opinion in *McCray I* and considered the issue of whether the setting aside and nullification of a conviction for previous sexual conduct pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2002) precluded the consideration of the conviction for purposes of the SORA. The court concluded that such convictions could not be used for the purpose of assessing a sex offender's risk of recidivism under the SORA. It is clear that if McIntosh's conviction had been set aside under Nebraska law, the previous conviction could not be used. But the set-aside upon which McIntosh relies was of a California conviction and was issued by a California court under California law.

The basis of the *McCray II* decision was stated to be that the statute under which the set-aside was issued, § 29-2264, provided that it would nullify the conviction and remove all civil disabilities and disqualifications imposed as a result of the conviction except those listed in § 29-2264(5)(a) through (g) and that none of those subdivisions could properly be interpreted to permit use of a set-aside conviction under § 29-2264 for purposes of assessing recidivism under a SORA. The trial court's order setting aside the defendant's conviction provided:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that defendant's conviction in the above-referenced matter is nullified and all civil disabilities and disqualifications imposed as a result of the conviction are removed, except for those matter [sic]

> specifically identified in Neb. Rev. Stat. § 29-2264(5)(a-g) (Reissue 1995)."

McCray II, 271 Neb. at 9, 710 N.W.2d at 307.

The *McCray II* court concluded that the trial court's order did not allow the set-aside conviction's use for purposes of assessing the defendant's risk of recidivism for purposes of the SORA. While the appeal was pending, the Legislature expanded the list of exceptions under § 29-2264(5) to include two subdivisions, (5)(h) and (i), which would have made the defendant's conviction usable notwithstanding the set-aside. The *McCray II* court held that the set-aside order was a judgment under which the defendant's rights had vested. Thus, the Nebraska Supreme Court has clearly held that a conviction set aside under § 29-2264 (Cum. Supp. 2002) could not be used for the purpose of assessing an offender's risk of recidivism by means of the SORA. However, McIntosh's conviction under California law was set aside under a California statute by a California court.

In considering the purpose of the California statute under which McIntosh's conviction was set aside, the district court noted that § 1203.4(a), after providing for the set-aside of convictions, stated that with some exceptions, a defendant whose conviction is set aside is released "from all penalties and disabilities resulting from the offense of which he or she has been convicted." The section further provided:

> However, in any subsequent prosecution of the defendant for any other offense, the conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.

See § 1203.4(a).

Furthermore, beginning in 1981, a related California statute provided: "Notwithstanding Section 1203.4 and except as provided in Section 290.5, a person convicted of a felony sex

offense shall not be relieved from the duty to register under Section 290." See Cal. Penal Code Ann. § 290.1 (West 1988). The statute was amended in 1994 to provide, "Notwithstanding Section 1203.04 and except as provided in Section 290.5, a person who is convicted of a sex offense for which registration is required under Section 290 shall not be relieved from the duty to register under that section." See § 290.1 (West 1999). The statute was repealed in 2005.

McIntosh does not contest that he is required to register as a sex offender under California law; rather, he argues that his conviction which has been set aside "should not be allowed to be used" for purposes of determining his sex offender classification because "[t]he only exception to §1203.4 listed under §290.1 is the requirement to register. It does not list any further exceptions nor any specific uses which can be made of the [conviction set aside under] § 1203.4 . . . . Any use beyond the specific statutory language would be unreasonable." Brief for appellant at 13. This position ignores the fact that the Nebraska Sex Offender Registration Act, as well as the California statutes which provide for the registration of sex offenders, see Cal. Penal Code § 290 et seq. (West 1999 & Cum. Supp. 2007), provides not only for the registration of sex offenders but also for a system for the determination of their level of classification.

The most meaningful California case on the issues of this case that we have located is *People v. Vasquez*, 25 Cal. 4th 1225, 25 P.3d 1090, 108 Cal. Rptr. 2d 610 (2001). In that case, the Los Angeles County District Attorney petitioned to have the defendant committed under the Sexually Violent Predators Act (SVPA) on the basis of a 1980 conviction in Texas for sexual abuse of a child and a 1983 California conviction for another sexual offense. The Texas conviction had been set aside by a Texas court, and the issue was whether that conviction could be the basis for finding that the defendant was a sexually violent predator within the meaning of California statutes on the subject. The opinion states that in 1980, the defendant had received 5 years' probation for the Texas conviction. The opinion states:

> In 1986, however, the Texas prosecutor, citing defendant's subsequent conviction and 13-year state prison sentence in California, moved the District Court of Bell County, Texas,

> to terminate probation and vacate the conviction, on the grounds that "justice will no longer be served by retaining the Defendant on the roles [*sic*] of the Adult Probation Office of Bell County, Texas." The Texas court granted the motion to dismiss probation, ordering that defendant's conviction be "set aside, the probation terminated, a new trial granted, and the indictment dismissed."

25 Cal. 4th at 1227, 25 P.3d at 1091, 108 Cal. Rptr. 2d at 611.

The California trial court had allowed use of that conviction for purposes of confining the defendant, but the appeals court had reversed that holding, and on further appeal, the California Supreme Court held that the conviction could be used. The relevant provision of Texas' code of criminal procedure was quoted as follows:

> [A]fter a defendant has satisfactorily served a specified portion of a term of supervised release, the trial court may shorten and end the term and discharge the defendant. Under this procedure, the court "may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss" the accusatory pleading. [Citation omitted.] The defendant "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted," except that the conviction shall be "made known to the judge" if the defendant is later convicted of another criminal offense, and the state may consider the conviction in issuing, denying, renewing or revoking child care facility licenses.

25 Cal. 4th at 1228, 25 P.3d at 1091-92, 108 Cal. Rptr. 2d at 612. The court noted that the Texas statute was analogous to the applicable version of § 1203.4(a) of the California penal code, which provided in significant part that the defendant "'shall [after his or her conviction is set aside and the accusation against him or her is dismissed] be released from all penalties and disabilities resulting from the offense of which he or she has been convicted." *People v. Vasquez*, 25 Cal. 4th at 1228, 25 P.3d at 1092, 108 Cal. Rptr. 2d at 612.

The court stated that the question presented was whether a person "has been convicted" of an offense where the conviction has been set aside under the cited Texas statutes. *Id.* at 1229,

25 P.3d at 1092, 108 Cal. Rptr. 2d at 612. It concluded that that question could be analyzed under two parts: First, what effect does the change in status have on the conviction under Texas law; and second, does that change qualify under California's SVPA, i.e., under California law? The court recognized that the applicable version of § 1203.4, and the case law interpreting it, was relevant only indirectly in determining the meaning and effect of the Texas counterpart.

The California court reviewed the few Texas cases which considered the meaning of Texas law on the subject and concluded that the set-aside and charges dismissed under the cited Texas statute

> [do] not negate the existence of the conviction as a legally cognizable fact. "[Their] effect is merely to restore the *civil rights* of a convicted defendant, rather than to remove all evidence of the conviction . . . . [W]e do not believe that a convicted defendant's release from all penalties and disabilities . . . means that he no longer has a 'final conviction.'"

People v. Vasquez, 25 Cal. 4th 1225, 1229-30, 25 P.3d 1090, 1092-93, 108 Cal. Rptr. 2d 610, 613 (2001). It went on to state:

> In this regard, Texas law is in accord with that of California. "[Penal Code] section 1203.4 does not, properly speaking, 'expunge' the prior conviction. The statute does not purport to render the conviction a legal nullity. Instead, it provides that, except as elsewhere stated, the defendant is 'released from all penalties and disabilities resulting from the offense.' The limitations on this relief are numerous and substantial . . . ."

25 Cal. 4th at 1230, 25 P.3d at 1093, 108 Cal. Rptr. 2d at 613.

The court goes on to list other legal actions which appear to be to the serious disadvantage of the convicted person in which the set-aside conviction may nevertheless be used, such as disbarment proceedings, licenses for alcoholic beverages, qualification as a police officer, and participation in pari-mutuel wagering. It stated that California courts "have drawn a distinction between penalties imposed on a felon as further punishment for the crime, as to which vacation under Penal

Code section 1203.04 generally affords relief, and nonpenal restrictions adopted for protection of public safety and welfare." 25 Cal. 4th at 1230, 25 P.3d at 1093, 108 Cal. Rptr. 2d at 613. The court stated:

> [W]e explained that "action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law." (*In re Phillips*[, 17 Cal. 2d 55, 61, 109 P.2d 344, 348 (1941)].) "That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, either by the order of probation or by the later order dismissing the action after judgment." (*Ibid.*)
>
> . . . .
>
> . . . "As used in section 1203.4 of the Penal Code the words 'penalties and disabilities' have reference to criminal penalties and disabilities or to matters of a kindred nature. . . ."

25 Cal. 4th at 1230-31, 25 P.3d at 1093, 108 Cal. Rptr. 2d at 613-14. The court concluded that the SVPA statute was protective of the public. It concluded that Texas law on this point was in accord with California law, although the Texas courts have not addressed this distinction.

The defendant in *People v. Vasquez* argued the Texas set-aside was similar to a pardon and cited *People v. Terry*, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964), *overruled, People v. Laino*, 32 Cal. 4th 878, 87 P.3d 27, 11 Cal. Rptr. 3d 723 (2004), to support the propositions that a pardon must be given full faith and credit in accord with article IV, § 1, of the U.S. Constitution and that the Texas set-aside should have the same effect in his case as an Oklahoma pardon which was held in *Terry* to prevent the use of the pardoned conviction in the *Terry* defendant's case. *Terry* was overruled by *Laino* in a holding that California did not have to ignore a pardon by another state for purposes of enhancing a penalty for a California crime. The *Vasquez* court stated, "As shown above, vacation pursuant to [the Texas set-aside statute] has no comparable effect under Texas law. An order under that provision restores civil rights to the defendant, but does not negate the legal cognizability of his or her conviction." 25 Cal. 4th at 1234, 25 P.3d at 1095, 108 Cal. Rptr. 2d at 616.

We conclude from *People v. Vasquez* that the California Supreme Court has determined that the statute under which McIntosh's California conviction was set aside does not prevent the use of that set-aside conviction in California proceedings under that state's SVPA, or any other proceedings wherein that conviction would be used as a basis to protect the public, even if McIntosh's rights and privileges are curtailed when, without that conviction, they would not be. In Nebraska, the *McCray II* decision clearly reaches a different result after interpreting a similar, but different, statutory scheme on the same subject. The question is which law prevails.

The conviction the NSP relies upon is a California conviction under California law. In *McCray II*, the Nebraska Supreme Court clearly held that an order setting aside a conviction is a judgment. The set-aside of McIntosh's California conviction is therefore also a California judgment. In accordance with article IV, § 1, of the U.S. Constitution, Congress has provided in significant part:

> [The] Acts [of any state legislature, and the] records and judicial proceedings [of any court of any state,] or copies thereof, [properly] authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of [the] State . . . from which they are taken.

28 U.S.C. § 1738 (2000).

[5] The Nebraska Supreme Court has interpreted that provision as follows: "The general rule is that a judgment of a state court which had jurisdiction has the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced." *Miller v. Kingsley*, 194 Neb. 123, 125, 230 N.W.2d 472, 474 (1975). It is clear that in California, the set-aside upon which McIntosh relies would not prevent his California conviction's use in a proceeding such as those in this case. We therefore conclude that this assignment of error is without merit.

(ii) Scoring of Item No. 9

McIntosh further argues that he should not have been assessed 25 points under item No. 9 (the level of force used during

current and previous sexual offenses). McIntosh testified that "[t]here was no violence, no physical violence, threatening, weapons, anything of that sort at all."

However, the police report in evidence set forth that McIntosh would "force" his stepdaughter to "'suck'" on his penis. Further, according to the report, the stepdaughter stated to the investigating officer that McIntosh would "grab her by the waist and pull her towards him, in a face to face manner, and 'rubs [sic] [his penis] against [her].'" The report also stated that McIntosh "made" his stepdaughter either rub his penis or perform fellatio at least once every day from Thanksgiving until mid-December 1993, when the police report was taken. Clearly, competent evidence supported the district court's finding and decision that the NSP properly assessed McIntosh 25 points under item No. 9.

(iii) Scoring of Item No. 10

McIntosh also contends that the SORA instrument is flawed because "[i]n fact, an individual who is released from supervision because [he or she has] been found not to require supervision is actually penalized by this item." Brief for appellant at 15. He then argues that he has received treatment, therapy, and training and that his doctor has found his condition to be "'stable.'" *Id.* at 16. McIntosh also states that he has "changed his lifestyle to ensure that he does not reoffend." *Id.* Thus, McIntosh contends that his points should be reduced under item No. 10.

A similar argument was made in *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004), wherein the defendant argued that the SORA instrument was invalid because item No. 10 did not account for the fact that he had not reoffended in the 4 years since his release from supervision. The Nebraska Supreme Court disagreed, noting:

> [I]tem 10 assigns 10 points for offenders who are no longer under supervision because they remain at a high risk to reoffend. Therefore, although [the defendant's] behavior during the 4 years after his release from supervision is commendable, it does not provide a basis from which a downward departure in score must be made.

Id. at 372-73, 685 N.W.2d at 347.

In the present case, McIntosh testified that he has resided in the same residence since November 1996 and that he has maintained the same job for nearly 4 years. McIntosh further testified that he makes efforts not to reoffend such as recognizing the stressors and "red flags" that led to his offenses and dealing with the issues surrounding the offenses. He further stated that he stays out of situations that might lead him to offend and that he is aware that therapy is available if he sees "red flags" occurring. McIntosh's behavior in recent years is commendable but does not provide a basis from which a downward departure in score must be made. Thus, this assignment of error is without merit.

2. NSP's Cross-Appeal

[6] On cross-appeal, the NSP contends that the district court erred in reducing McIntosh's sex offender assessment score under item No. 8 by 15 points. The district court found that "the fact that [McIntosh's] last sexual assault of his sole victim occurred three weeks into a second category does not support an assessment of an additional 15 points for crossing into that second identified age category" and, thus, reduced the points assessed under item No. 8 by 15 points. However, regardless of whether the 15-point credit is given or not, McIntosh's sex offender classification level remains at Level 3, and whether the credit is upheld has no effect on the outcome of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994). Since a determination of this issue has no effect on the outcome of this appeal, we decline to consider it.

VI. CONCLUSION

In sum, the decision of the district court affirming the NSP's classification of McIntosh as a Level 3 sex offender conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. Therefore, the order of the district court is affirmed.

Affirmed.

DOROTHY RENTER, APPELLANT AND CROSS-APPELLEE, V. VANCE SIEDENBURG, APPELLEE AND CROSS-APPELLANT, AND ITT HARTFORD, A CORPORATION, APPELLEE.

739 N.W.2d 216

Filed August 21, 2007. No. A-05-1546.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes.** The meaning of a statute is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
7. **Contracts: Words and Phrases.** Annuities have been defined as contracts under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary.
8. ____: ____. In a variable annuity, the purchaser's money is invested in a designated way and payments to the purchaser vary with investment performance.
9. **Contracts.** The construction of a contract is a matter of law.
10. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Dave B. Eubanks, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for appellant.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee Vance Siedenburg.

Brian M. Mumaugh and Kerri J. Atencio, of Holland & Hart, L.L.P., for appellee ITT Hartford.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Dorothy Renter filed a declaratory judgment action in the district court for Scotts Bluff County to determine her and Vance Siedenburg's respective rights regarding an annuity contract issued by ITT Hartford. The trial court granted Siedenburg's motion for summary judgment. Renter appeals, and Siedenburg cross-appeals. Based on the analysis that follows, we affirm.

BACKGROUND

Siedenburg is the oldest of Renter's five children. In February 1997, Renter's critically ill brother gifted her four certificates of deposit totaling over $400,000. On February 26, a bank account in the name of Renter, Siedenburg, and Renter's husband was opened at Platte Valley National Bank in Scottsbluff, Nebraska. On February 27 and 28, the proceeds of the four certificates of deposit were deposited into the Platte Valley National Bank account.

On March 12, 1997, Renter, Siedenburg, and Renter's husband met with an investment representative regarding an appropriate investment of the money previously deposited into the Platte Valley National Bank account. At that meeting, a decision was made to purchase a variable annuity contract from ITT Hartford, also known as ITT Hartford Life and Annuity Insurance Company, which contract is the subject of the case before us. An application for a variable annuity contract was prepared, and it was signed by Renter as "Contract Owner" and by Siedenburg as "Joint Contract Owner." Renter testified that when she signed the application, she understood Siedenburg was going to be a joint contract owner, and that she was okay with that at the time. Thereafter, consistent with the parties' application, ITT Hartford issued an "Individual

Flexible Premium Variable Annuity Contract" which reflected an initial premium payment of $400,000 and listed both Renter and Siedenburg as contract owners.

Subsequently, the relationship between Renter and Siedenburg deteriorated and Renter decided she did not want Siedenburg to be co-owner of the annuity contract. Beginning sometime in 1998, Renter asked Siedenburg on several occasions to remove his name from the annuity, but Siedenburg refused. In 2004, Renter made an attempt to unilaterally terminate the annuity contract by forging Siedenburg's signature on a document she sent to ITT Hartford requesting that the annuity be cashed out and also forging Siedenburg's signature on the check she subsequently received from ITT Hartford. However, after Renter deposited the check into a bank, she was notified that payment on the check had been stopped. The money went back to ITT Hartford and was deposited in the same funds from which it was taken. Renter was also informed that any further action in regard to the annuity would require signature guaranteed requests by each of the joint owners.

On September 22, 2004, Renter filed an amended complaint for declaratory judgment to determine her and Siedenburg's respective rights regarding the ITT Hartford annuity. In her amended complaint, Renter alleged that ITT Hartford issued a variable annuity contract to her in which Siedenburg was listed as a co-owner, that she contributed the entire $400,000 premium to purchase the annuity contract, that Siedenburg contributed no part of the premium, that he should be removed as a joint owner of the annuity contract because he has made no contribution to the fund and has no claim to any of the proceeds, and that the court should determine that Renter is the sole owner of the annuity contract and may redeem the contract in her own name and have the proceeds distributed solely to her. In Siedenburg's answer and counterclaim, he asserted that the rights of the parties are defined in the annuity contract, that neither party may redeem the contract without the consent of the other, and that Renter's cause of action is frivolous.

On May 31, 2005, Siedenburg filed a motion for summary judgment. On June 28, a hearing was held on the motion. On December 20, 2005, the trial court entered a final, appealable

order in which it granted Siedenburg's motion for summary judgment. The trial court found that the net contribution rule set forth in Neb. Rev. Stat. § 30-2722 (Reissue 1995) is not applicable to the annuity contract, as Renter had claimed, and that the parties' rights and obligations are governed by the provisions contained in the annuity contract.

ASSIGNMENTS OF ERROR

Renter assigns that the trial court erred in granting Siedenburg's motion for summary judgment.

On cross-appeal, Siedenburg assigns that the trial court erred in (1) failing to base its decision on the fact that Renter's construction of § 30-2722 violates the principle of freedom of contract and (2) failing to base its decision in part on the fact that even if § 30-2722 applies as Renter contends, the parties contracted for different ownership provisions.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Pogge v. American Family Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (2006); *Sjuts v. Granville Cemetery Assn.*, 272 Neb. 103, 719 N.W.2d 236 (2006). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Pogge v. American Family Mut. Ins. Co., supra*; *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

ANALYSIS

Renter assigns that the trial court erred in granting Siedenburg's motion for summary judgment, because there is a genuine issue of fact whether the net contribution rule found in § 30-2722 applies to the annuity contract at issue. The trial court found that the statute was inapplicable to the annuity contract. Section 30-2722 is part of the "Nonprobate Transfers" article of the Nebraska Probate Code. Section 30-2722(b)

provides in part: "During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." Renter contends that § 30-2722(b) applies to the annuity at issue and that thus, she is entitled to terminate the annuity on her own and receive all of the proceeds, because she contributed 100 percent of the funds used to purchase the annuity.

[3,4] The meaning of a statute is a question of law. *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007); *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

The application of § 30-2722(b) to the annuity contract depends on whether the annuity constitutes an "account." Neb. Rev. Stat. § 30-2716(1) (Reissue 1995) defines "account" as "a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account." For the annuity to be an "account," it must be a "contract of deposit" and ITT Hartford must be a "financial institution."

[5,6] We first address whether the annuity is a contract of deposit. The definition of "account" specifically states that a contract of deposit includes a checking account, savings account, certificate of deposit, and share account. A share account is a member's balance held by a credit union and established by a member. Neb. Rev. Stat. § 21-1722 (Reissue 1997). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004). Furthermore, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Rauscher v. City of Lincoln, supra*; *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003).

Based on the plain, direct, and unambiguous words used in the statute to describe the types of arrangements that are contracts of deposit, it is clear to us that the annuity contract is not a checking account, a savings account, a certificate of deposit, or a share account. Further, the way the statute is worded does not allow for an interpretation that other types of arrangements besides those listed in the definition may be included in the definition. The "account" definition specifically states what types of arrangements are considered contracts of deposit. To conclude that the list is not exhaustive and that other arrangements such as annuities may fall within the definition would require us to read a meaning into a statute that is not there.

We further conclude that even if § 30-2716(1) could be interpreted to include arrangements other than those listed in the statute, an annuity does not fit within the term "contract of deposit" as it is commonly defined. A "deposit" is "[t]he act of giving money or other property to another who promises to preserve it or use it and return it in kind; esp., the act of placing money in a bank for safety and convenience." Black's Law Dictionary 471 (8th ed. 2004). A "deposit contract" is "[a]n agreement between a financial institution and its customer governing the treatment of deposited funds and the payment of checks and other demands against the customer's account." *Id.* at 344.

[7,8] Annuities have been defined as "contracts under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary." *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995). In a variable annuity, which is what we have in the present case, "the purchaser's money is invested in a designated way and payments to the purchaser vary with investment performance." 513 U.S. at 254. The annuity contract at issue gives the option to allocate the assets among various subaccounts, i.e., mutual funds, and the payments vary based on the performance of the investments Renter and Siedenburg chose. Thus, the annuity contract is much different from a contract of deposit, because ITT Hartford made no promise to preserve the premium money or to use it and return it in kind. The

annuity is similar to an investment, not a deposit. Accordingly, the annuity contract is not a "contract of deposit" and, thus, not an "account" as defined in § 30-2716(1). Therefore, the net contribution rule set forth in § 30-2722 does not apply.

Our analysis regarding the application of § 30-2722 could end here. However, for the sake of completeness, we further discuss whether ITT Hartford is a "financial institution" as used in the definition of "account." As previously stated, an "account" is defined in § 30-2716(1) as "a contract of deposit between a depositor and a financial institution." Under § 30-2716(4), "[f]inancial institution means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union."

It is easily apparent that ITT Hartford is not a bank, trust company, savings bank, building and loan association, savings and loan company or association, or a credit union. ITT Hartford describes itself in the annuity contract as a stock life insurance company. Further, Renter's amended complaint alleges that ITT Hartford is a corporation organized under the laws of the State of Connecticut and is "authorized to engage in the business of issuing policies of insurance including variable annuity contracts in . . . Nebraska."

ITT Hartford does not fit within the entities listed in the definition of financial institution, and the language used in the definition cannot be interpreted in such a way as to conclude that other entities may be included in the definition. As previously set forth, 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. See, *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004). Giving the language its plain and ordinary meaning, the list of entities is a complete listing of what entities are included. A different conclusion would result if the definition contained open ended language, such as "or other similar entities."

In addition, as the trial court found, insurance companies are authorized to do business in this state pursuant to laws relating to insurance—Neb. Rev. Stat. § 44-101 et seq. (Reissue 2004 & Cum. Supp. 2006)—rather than "laws relating to financial institutions" as required by § 30-2716(4). We conclude that ITT Hartford is not a financial institution as defined in § 30-2716(4) and, thus, that the annuity at issue is not an account for this additional reason. Accordingly, we conclude as a matter of law that the net contribution rule set forth in § 30-2722 does not apply to the annuity contract at issue. Thus, the trial court did not err in so concluding.

[9,10] In granting Siedenburg's motion for summary judgment, the trial court also concluded that the parties' rights and obligations are governed by the provisions in the annuity contract. We agree. The annuity in question is a contract and should be construed as such. The construction of a contract is a matter of law. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004); *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002). When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Misle v. HJA, Inc., supra*; *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

The annuity contract clearly identifies Renter and Siedenburg as contract owners. The "Contract Control Provisions" section of the contract provides:

> The Contract Owner has the sole power to exercise all the rights, options and privileges granted by this contract or permitted by the Company and to agree with the Company to any change in or amendment to the contract. . . . In the case of joint Contract Owners, each Contract Owner alone may exercise all rights, options and privileges, *except with respect to the Termination and Partial Surrender/Annual Withdrawal Amount Provisions and change of ownership.*

(Emphasis supplied.)

The "Full Surrender" provision included in the "Termination Provisions" of the contract states that at any time prior to the annuity commencement date, the contract owner has the right to terminate the contract by making a written request. When such request is made, the termination value of the contract may be taken in the form of a cash settlement.

Based on the clear, unambiguous terms of the annuity contract, Renter and Siedenburg are both owners and when there are joint owners, any change of ownership or termination must be agreed to by all owners. Thus, Renter cannot unilaterally remove Siedenburg as an owner, nor can she terminate the contract without Siedenburg's consent. Under the terms of the contract, the fact that Renter contributed 100 percent of the premium amount to purchase the annuity contract does not give her any greater rights than those of Siedenburg as co-owner.

Accordingly, we conclude that the trial court did not err in granting Siedenburg's motion for summary judgment. Renter's assignment of error is without merit.

[11] Having concluded that the trial court did not err in granting Siedenburg's motion for summary judgment, we need not address Siedenburg's assignments of error on cross-appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006); *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

CONCLUSION

We conclude as a matter of law that the net contribution rule set forth in § 30-2722 is not applicable to the annuity contract at issue and that Renter's and Siedenburg's rights are governed by the provisions contained within the annuity contract. Therefore, Siedenburg is co-owner of the annuity and the ownership of the annuity cannot be changed without his approval, nor can the annuity be terminated without his approval. Accordingly, we affirm the judgment of the trial court granting Siedenburg's motion for summary judgment.

AFFIRMED.

DUANE S. HOLMSTEDT, APPELLANT, V. YORK COUNTY JAIL SUPERVISOR (NAME UNKNOWN) ET AL., APPELLEES.

739 N.W.2d 449

Filed August 28, 2007. No. A-05-906.

1. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a case for lack of personal jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003), an appellate court examines the question whether the nonmoving party has established personal jurisdiction de novo.
2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** An appellate court will review a district court's grant of a motion to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. The appellate court is, however, free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations.
3. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
5. **Statutes: Service of Process.** Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued.
6. **Rules of the Supreme Court: Judges.** Pursuant to Neb. Ct. R. of Dist. Cts. 5B (rev. 2000), briefs of parties in the district court are presented to the judge and not filed with the clerk.
7. **Judgments: Final Orders: Records.** All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action.
8. **Motions to Dismiss: Rules of the Supreme Court.** When a court is confronted with motions to dismiss under both Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003), it ordinarily ought to decide the former before broaching the latter.
9. **Courts: Jurisdiction.** A federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject matter jurisdiction) and the parties (personal jurisdiction).
10. **Rules of the Supreme Court: Pleadings: Jurisdiction.** The dismissal of a case on an issue relating to the merits of the dispute, such as the issues raised by a motion filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), is improper without resolving threshold issues of jurisdiction, including personal jurisdiction.

11. ____: ____: ____. A disposition of a motion filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is a decision on the merits and, therefore, an exercise of jurisdiction.
12. **Service of Process.** The defense of insufficiency of process differs from insufficiency of service of process: the former challenges the content of a summons; the latter challenges the manner or method of service.
13. **Service of Process: Jurisdiction.** Valid service of process is a prerequisite to the court's exercise of personal jurisdiction.
14. **Civil Rights: Actions.** Federal law is controlling in the determination of civil rights claims.
15. **Civil Rights: Public Officers and Employees.** Public servants may be sued under 42 U.S.C. § 1983 (2000) in their official capacity, their individual capacity, or both.
16. **Public Officers and Employees: Liability.** Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent.
17. ____: ____. In determining whether suit has been brought against a public official as an official or as an individual, a court may follow the "course of proceedings" test, which considers such factors as the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. The test also considers whether subsequent pleadings put the defendant on notice of the capacity in which he or she is sued.
18. **Courts: States.** Regarding interpretations of federal law, while Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority.
19. **Civil Rights: Governmental Subdivisions: Liability.** A governmental entity is liable under 42 U.S.C. § 1983 (2000) only for actions taken pursuant to a policy, ordinance, regulation, or decision officially adopted, or under a permanent and well-settled practice constituting a custom or usage with the force of law.
20. **Pleadings: Parties: Names.** Neb. Rev. Stat. § 25-321 (Cum. Supp. 2006) authorizes a plaintiff to designate a defendant by any name and description, followed by the words "real name unknown."
21. **Counties: Actions.** A county must be sued in the name designated by statute.
22. **Administrative Law.** Exhaustion of administrative remedies is properly categorized as an affirmative defense.
23. **Administrative Law: Motions to Dismiss.** A complaint alleging exhaustion of administrative remedies is ordinarily not vulnerable to a motion to dismiss based on a failure to plead such exhaustion.
24. **Civil Rights: Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (2000), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States.
25. **Civil Rights: Pleadings.** A civil rights complaint is adequate where it states the conduct, time, place, and persons responsible.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed.

Duane S. Holmstedt, pro se.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellees.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

PER CURIAM.

INTRODUCTION

Duane S. Holmstedt appeals the decision of the York County District Court dismissing his action filed pursuant to 42 U.S.C. § 1983 (2000) against the York County jail supervisor, the York County Sheriff's Department, Sheriff Dale Radcliff, Lt. Paul Vrbka, and Deputy Ray Silverstrand under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2), (4), (5), and (6) (rev. 2003). We conclude that the district court properly dismissed the complaint against the York County Sheriff's Department for lack of personal jurisdiction, but that the court erred in dismissing the complaint as to the remaining defendants.

STATEMENT OF FACTS

On May 20, 2005, Holmstedt filed a pro se complaint in the York County District Court against the defendants, which he designated in the caption as follows: "York County Jail Supervisor, (name unknown) York County Sheriff's Department, Sheriff Dale Radcliff, Lt. Paul Vrbka, Deputy Ray Silverstrand, Defendants." In the complaint, which he entitled "Petition," the allegations which appear to be relevant to a possible claim against the defendants are that he was arrested and interrogated by Radcliff and Vrbka on August 13, 2003. He alleges with some particularity that he was abused by them on that day and on later occasions while incarcerated in the York County jail (apparently awaiting the disposition of a criminal charge against him). Holmstedt alleges he was struck, yelled at, deprived of an attorney, and told that he "had to tell [them] everything." He also alleges that Radcliff deprived him of medical care and medication. He alleges other abuse by Radcliff,

Vrbka, and Silverstrand during subsequent intermittent times he was in the jail. For purposes of this opinion, we think it is unnecessary to set forth all of the details of his pro se handwritten complaint. Holmstedt prays that the defendants be charged and prosecuted for the alleged crimes, that the York County Sheriff's Department be ordered to pay him the sum of $250,000, and that the remaining defendants be ordered to pay him $25,000 each.

The transcript shows that the defendants were served on May 23, 2005, by delivery of a copy of the summons and complaint for each of the named defendants as follows: on Radcliff, to "Dale E. Radcliff"; on the York County Sheriff's Department, to "Dale E. Radcliff, Sheriff of York County, Nebraska"; on the York County jail supervisor, to "John Prusia, York County Jail Supervisor"; on Vrbka, to "Paul M. Vrbka"; and on Silverstrand, to "Ray Silverstrand a/k/a Gene R. Silverstrand."

Separate motions to dismiss were filed by counsel for each of the defendants in the name used in the complaint. Each motion raised the same grounds for dismissal, that is, pursuant to rule 12(b)(2), (4), (5), and (6), and all but the motion of the York County Sheriff's Department alleged the complaint was deficient in that it (1) purports to sue the respective defendant in his official capacity but the defendant was not served in his official capacity, (2) fails to state a claim for relief because it fails to allege that Holmstedt exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a) (2000), and (3) fails to state a claim for relief against the defendant acting in his official capacity pursuant to § 1983. The motion of the defendant York County Sheriff's Department differs in that the first reason stated in its motion to dismiss was that there is no individual or political subdivision which may be sued known as the "'York County Sheriff's Department,'" rather than the first reason stated by the other defendants, as shown above.

The transcript shows a letter from Holmstedt to the trial judge dated June 4, 2005, and file stamped June 7, wherein Holmstedt "object[s]" to the motions to dismiss and then goes on to briefly argue each of the points raised in the motions. The motions were heard by the district court on June 24, with Holmstedt appearing by telephone and the defendants' attorney

appearing in person. At that hearing, the defendants' attorney stated the bases for the motions to dismiss. Then Holmstedt stated that his brief had been mailed "yesterday," and requested a continuance. The continuance was denied, but the judge stated that he would not rule until he had received Holmstedt's brief. Holmstedt started to read the brief over the telephone; the judge asked Holmstedt whether he had anything to say that was not in the brief, and he said no. The judge then stated that he would rather not listen to Holmstedt read the brief because he was going to read the brief several times himself before he ruled on the motion. Holmstedt stated, "That works." The hearing was concluded shortly thereafter.

Holmstedt's brief in opposition to the motions to dismiss was dated June 23, 2005. The brief was received by the district court clerk on June 29, but was not filed because the brief was considered Holmstedt's written argument to the court. On July 12, the district court entered an order which stated, in its entirety, "Motion to dismiss sustained in all bases. Complaint dismissed." Holmstedt has timely appealed to this court.

ASSIGNMENTS OF ERROR

Holmstedt's assignments of error, restated, are that the district court erred (1) in dismissing his complaint "without showing cause or producing an order to support the dismissal" and (2) in failing to consider his written arguments. Holmstedt also contends that because he was acting pro se, the district court should have held him to less stringent standards than an attorney and should have construed his pleadings liberally.

STANDARD OF REVIEW

[1] When reviewing an order dismissing a case for lack of personal jurisdiction under rule 12(b)(2), an appellate court examines the question whether the nonmoving party has established personal jurisdiction de novo. See *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

[2,3] An appellate court reviews a district court's grant of a motion to dismiss under rule 12(b)(6) de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. See *Kellogg v.*

Nebraska Dept. of Corr. Servs., 269 Neb. 40, 690 N.W.2d 574 (2005). The appellate court is, however, free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations. *Id.* Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*

[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

ANALYSIS

Less Stringent Standards for Pro Se Litigants.

Holmstedt contends that because he was acting pro se, the district court should have held him to less stringent standards than an attorney under his § 1983 claim and should have construed his pleadings liberally. We recognize that the U.S. Supreme Court has so stated in the context of a § 1983 action. See *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (pro se litigant's complaint is to be held "to less stringent standards than formal pleadings drafted by lawyers").

[5] To the extent that our decision involves construction of Holmstedt's complaint, we have followed the requisite approach. However, to the extent that the question before us concerns whether Holmstedt has complied with the statutory requirements for service of process, the dictates of *Haines* do not apply. Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued. *Erdman v. National Indemnity Co.*, 180 Neb. 133, 141 N.W.2d 753 (1966). There is no merit to this assignment of error.

Alleged Error by District Court in Failing to Consider Written Arguments and Not Setting Forth Reasoning.

Holmstedt claims that the district court erred in dismissing his complaint "without showing cause or producing an order to support the dismissal." Holmstedt also claims that the district

court erred in failing to consider his written arguments and in failing to set forth the court's reasoning. He bases this claim on the fact that although the court's decision dismissing his complaint was filed on July 12, 2005, Holmstedt's brief was not file stamped until July 28 and the trial court did not set forth its reasoning in the order.

[6,7] Briefs of parties in the district court are "presented to the judge and not filed with the clerk." Neb. Ct. R. of Dist. Cts. 5B (rev. 2000). Such briefs are not part of the complete record of a case. See Neb. Rev. Stat. § 25-1321 (Cum. Supp. 2006). "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." Neb. Rev. Stat. § 25-1318 (Reissue 1995).

The trial judge's signed order provided, "Motion to dismiss sustained in all bases. Complaint dismissed." The trial court complied with § 25-1318. At the oral hearing, the trial judge stated he would not rule on the case until he received Holmstedt's brief. The delay between the hearing on June 24, 2005, and the decision on July 12 shows that the judge waited for Holmstedt's brief. Because rule 5B states that briefs are not to be filed with the clerk, the clerk's subsequent filing of the brief in contravention of the district court rules provides no logical support for Holmstedt's inference that the judge did not consider the brief. There is no merit to these assignments of error.

Order for Consideration of Multiple Rule 12(b) Motion.

The defendants moved to dismiss upon multiple grounds, and the trial court sustained the motions on all these grounds. Therefore, the court sustained the defendants' motions to dismiss pursuant to rule 12(b)(2), (4), (5), and (6).

Rule 12(b) provides in significant part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . . .

> (2) lack of jurisdiction over the person;
>
> . . . .
>
> (4) insufficiency of process;
>
> (5) insufficiency of service of process;
>
> (6) that the pleading fails to state a claim upon which relief can be granted[.]

[8] In *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 600, 694 N.W.2d 625, 630 (2005), the Nebraska Supreme Court held: "'[W]hen a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter. . . . After all, if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest.'" (Quoting *Deniz v. Municipality of Guaynabo*, 285 F.3d 142 (1st Cir. 2002).)

[9-11] Other case law dictates that a comparable rule applies concerning personal jurisdiction. A federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject matter jurisdiction) and the parties (personal jurisdiction). *Sinochem Int'l v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007). Without jurisdiction, the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case. *Id.* The dismissal of a case on an issue relating to the merits of the dispute, such as the issues raised by a rule 12(b)(6) failure to state a claim, is improper without resolving threshold issues of jurisdiction, including personal jurisdiction. *Sucampo Pharmaceuticals v. Astellas Pharma*, 471 F.3d 544 (4th Cir. 2006). "[A] disposition of a Rule 12(b)(6) motion is a decision on the merits and, therefore, an exercise of jurisdiction." *Magee v. Nassau County Medical Center*, 27 F. Supp. 2d 154, 158 (E.D.N.Y. 1998). See, also, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990). Thus, pursuant to the above authority, we proceed to consider the personal jurisdictional issues raised in the motions to dismiss before considering the failure to state a claim for relief raised by rule 12(b)(6).

Error in Dismissing Complaint for Lack of Personal Jurisdiction.

[12,13] The defense of insufficiency of process differs from insufficiency of service of process: the former challenges the content of a summons; the latter challenges the manner or method of service. *Heise v. Olympus Optical Co., Ltd.*, 111 F.R.D. 1 (N.D. Ind. 1986). Valid service of process is a prerequisite to the court's exercise of personal jurisdiction. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987). We think it necessarily follows that if a valid summons has not been served properly on the designated defendant or if that process is insufficient or if that service was insufficient, then the court does not have jurisdiction over the person of that particular defendant. We therefore treat rule 12(b)(2), (4), and (5) together.

[14-16] Federal law is controlling in the determination of civil rights claims. See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). Public servants may be sued under § 1983 in their official capacity, their individual capacity, or both. *Johnson v. Outboard Marine Corp.*, 172 F.3d 531 (8th Cir. 1999).

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. . . . Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 690, n. 55[, 98 S. Ct. 2018, 56 L. Ed. 2d 611] (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (emphasis in original) (citations omitted). The U.S. Supreme Court also noted that there is no longer a need to bring official-capacity actions against local government officials, for under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), local government units can be sued directly for damages and injunctive or declaratory relief. *Kentucky v. Graham, supra.* The federal circuit courts do not agree, however, on the proper means of determining whether an action is pleaded as an official-capacity suit or as one seeking individual liability.

[17] In *Moore v. City of Harriman*, 272 F.3d 769, 773 (6th Cir. 2001), the court explained that the majority of circuits follow the "'course of proceedings'" test to determine whether suit has been brought against a public official as an official or as an individual. The "course of proceedings" test considers such factors as the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. The test also considers whether subsequent pleadings put the defendant on notice of the capacity in which he or she is sued. The court in *Moore* stated that only two circuits deviate from the "course of proceedings" test, identifying the Eighth and Ninth Circuits.

In *Johnson v. Outboard Marine Corp.*, 172 F.3d at 535, the court explained:

> [I]n order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the pleadings, otherwise, it will be assumed that the defendant is sued only in his or her official capacity. . . . Because section 1983 liability exposes public servants to civil liability and damages, we have held that only an express statement that they are being sued in their individual capacity will suffice to give proper notice to the defendants. . . . Absent such an express statement, the suit is construed as being against the defendants in their official capacity. A suit against a public employee

> in his or her official capacity is merely a suit against the public employer.

(Citations omitted.)

The Ninth Circuit's jurisprudence presumes that a suit seeks to impose individual liability where the complaint seeks money damages from state officials. See *Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho*, 42 F.3d 1278 (9th Cir. 1994).

[18] In *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), regarding interpretations of federal law, the Nebraska Supreme Court explained that while Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority. Because the Nebraska Supreme Court has not declared which rule should be followed, we attempt to determine how that court would decide the issue when presented.

While the approach of the Eighth Circuit displays the virtues of simplicity and certainty, we believe the Nebraska Supreme Court would follow the majority of federal courts that have recognized the "course of proceedings" test.

[19] In the case before us, Holmstedt concedes in his brief to this court that he "did not specify" whether the individual defendants were being sued in their individual or official capacities. Brief for appellant at 9. Because of the early stage of these proceedings, we lack information regarding some of the factors of the "course of proceedings" test. Because none of the defendants had filed an answer, they have not yet had the opportunity to plead defenses, such as claims of qualified immunity. We have no subsequent pleadings from Holmstedt. Of the factors identified in *Moore v. City of Harriman*, 272 F.3d 769 (6th Cir. 2001), only the nature of the plaintiff's claims and the plaintiff's requests for damages are available to us. We recall that under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), a governmental entity is liable under § 1983 only for actions taken pursuant to a policy, ordinance, regulation, or decision officially adopted, or under a permanent and well-settled practice constituting a custom or usage with the force of law.

In the case at hand, the allegations in the complaint make no reference to any policy or custom which might suggest that

Holmstedt was making a claim that the individual defendants were acting in their official capacities. Rather, the complaint alleges actions by a number of identified individuals. In his complaint, Holmstedt put a title in front of the names of such defendants almost every time he refers to them, but this is not significant. We conclude that the action is one against those defendants in their individual capacities, notwithstanding that their names and titles appear in the complaint. As to defendants Radcliff, Vrbka, and Silverstrand, the record shows issuance of summons having proper content. The returns appearing in the record show proper service of that process. The defendants make no arguments to the contrary.

[20] As to the defendant "York County Jail Supervisor," we observe that Neb. Rev. Stat. § 25-321 (Cum. Supp. 2006) authorizes a plaintiff to designate a defendant by "any name and description, followed by the words, 'real name unknown.'" Holmstedt designated the defendant by the person's title, followed by the words "name unknown." The summons was duly issued to the "York County Jail Supervisor" and was served upon "John Prusia, York County Jail Supervisor." The defendants advance no argument that the content of the process, the manner of service, or the content of the return is insufficient.

The issues raised by the motion to dismiss filed by the York County Sheriff's Department are somewhat similar. In its motion to dismiss, the York County Sheriff's Department alleged that there is no individual or political subdivision or other legal entity which may be sued in that name. The complaint contains no allegation which would tend to support a finding that the York County Sheriff's Department is an entity which may be sued.

Neb. Rev. Stat. § 23-101 (Reissue 1997) provides:

> Each county, established in this state according to the laws thereof, shall be a body politic and corporate, by the name and style of The county of ....., and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction of the subject matter, either in law or equity, or other place where justice shall be administered.

In *Jameson v. Plischke*, 184 Neb. 97, 165 N.W.2d 373 (1969), the Nebraska Supreme Court upheld the dismissal of Buffalo

County as a defendant where an action was brought against the Buffalo County board of supervisors, not against Buffalo County. The Nebraska Supreme Court noted that § 23-101 "provides how the county may sue and be sued, and an action against the board of supervisors does not make the action one against the county within the ambit of that statute." *Jameson v. Plischke*, 184 Neb. at 99, 165 N.W.2d at 375.

[21] In the instant case, Holmstedt filed his action against the York County Sheriff's Department rather than the county of York. "A county must be sued in the name designated by statute." *Id.* If Holmstedt intended to sue the alleged department of the York County government, the above-referenced statute requires suit to be brought in the proper name of the county.

We therefore conclude that the district court properly sustained the motions to dismiss under rule 12(b)(2), (4), and (5) for lack of jurisdiction over the person of the defendant York County Sheriff's Department, for insufficiency of process, and for insufficiency of service of process, but that the court erred in sustaining the motion to dismiss under those subsections as to the remaining defendants.

Motion to Dismiss Under Rule 12(b)(6).

The defendants' motions to dismiss also allege as a basis for dismissal that the complaint fails to state a claim for relief both because Holmstedt failed to allege he has exhausted all available administrative remedies as required under 42 U.S.C. § 1997e(a) and, for the individual defendants, because Holmstedt did not allege that the defendants acted in their official capacities.

[22,23] In *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005), the Nebraska Supreme Court extensively discussed the exhaustion requirement of the Prison Litigation Reform Act. The court determined that exhaustion of administrative remedies is properly categorized as an affirmative defense. The court recognized that a complaint alleging exhaustion is ordinarily not vulnerable to a motion to dismiss based on a failure to plead exhaustion and that exhaustion can be explored by other procedural devices. The court declined to impose a heightened pleading requirement on a prisoner. In the instant case, while we recognize that Holmstedt did not

make a general allegation of procedural exhaustion, we believe such defect could easily be cured by amendment and that dismissal at this stage is not appropriate. If Holmstedt has failed to exhaust administrative remedies, other procedural devices exist to address that defect.

Turning to the defendants' other argument regarding the sufficiency of the complaint, we observe that each individual defendant specifically asserted that the complaint failed to state a claim against him in his official capacity. We have rejected their argument that the complaint was made against the individual defendants solely in their official capacities. We therefore consider whether the allegations were sufficient to state a claim against those defendants in their official capacities.

[24] In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States. *State ex rel. Jacob v. Bohn*, 271 Neb. 424, 711 N.W.2d 884 (2006). We have already stated the applicable standard of review. We are aware that in the recent decision in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the U.S. Supreme Court addressed the controversial language in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In the *Bell Atlantic Corp.* decision, which abrogated *Conley*, the U.S. Supreme Court explained that the phrase "'no set of facts'" is "best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." 127 S. Ct. at 1969. The *Bell Atlantic Corp.* decision explained that "*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." 127 S. Ct. at 1969.

[25] A civil rights complaint is adequate where it states the conduct, time, place, and persons responsible. *Boykins*

v. Ambridge Area School Dist., 621 F.2d 75 (3d Cir. 1980). Holmstedt's complaint meets this requirement. This fulfills Holmstedt's responsibility to allege facts establishing conduct by a person acting under color of state law, which conduct deprived Holmstedt of rights, privileges, or immunities secured by the Constitution and laws of the United States.

CONCLUSION

In sum, the district court's order granting the motion to dismiss as to the defendant York County Sheriff's Department under rule 12(b)(2), (4), and (5) is affirmed, and as to that defendant, the case is dismissed without prejudice. As to the remaining defendants, we reverse the trial court's order to dismiss under rule 12(b)(2), (4), (5), and (6).

AFFIRMED IN PART, AND IN PART REVERSED.

MICHAEL M. KERR, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

739 N.W.2d 224

Filed August 28, 2007. No. A-05-953.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
3. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Pleadings.** The character of a pleading is determined by its content, not by its caption.
6. **Administrative Law: Final Orders.** According to Neb. Rev. Stat. § 84-917(1) (Reissue 1999), any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act.
7. **Administrative Law: Words and Phrases.** According to Neb. Rev. Stat. § 84-901(3) (Reissue 1999), for purposes of the Administrative Procedure Act, a

"contested case" is defined as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

8. ____: ____. According to Neb. Rev. Stat. § 84-901(1) (Reissue 1999), an "agency" is each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations.
9. **Administrative Law: Colleges and Universities.** The University of Nebraska College of Law Student-Faculty Honor Committee and the College of Law dean are not agencies under Neb. Rev. Stat. § 84-901(1) (Reissue 1999).

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

Joy Shiffermiller, of Shiffermiller Law Office, for appellant.

John C. Wiltse, Senior Associate General Counsel for the University of Nebraska, and Amber Shenk, Senior Certified Law Student, for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

The University of Nebraska College of Law Student-Faculty Honor Committee (Honor Committee) found that Michael M. Kerr should be dismissed from the College of Law for engaging in four "exceedingly flagrant" instances of plagiarism. After an appeal, College of Law Dean Steven L. Willborn affirmed the decision of the Honor Committee. Kerr filed a petition in the district court for Lancaster County under the Administrative Procedure Act (APA). Kerr now appeals from the order of the district court that dismissed his petition for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

A hearing was held before the Honor Committee on September 10, 2004, regarding alleged violations of the University of Nebraska College of Law Honor Code (Honor Code) by Kerr. The Honor Committee consisted of three College of Law professors and two students. Kerr attended the hearing and was represented by counsel. As stated in the Honor Committee's opinion, Kerr was charged with "four instances of behavior that

violated sections 1.020(B)(ii) and 1.020(1)(A)" of the Honor Code as follows:

> (1) By submitting a plagiarized paper titled "International Human Rights Law on Health Care" to Professor Brian Lepard in the course in International Human Rights Law in the fall 2003 semester . . . .
>
> (2) By submitting a plagiarized paper titled "International Labor Rights and the Alien Tort Claims Act" to Professor Brian Lepard as a draft of the final paper for independent research in the spring 2004 semester . . . .
>
> (3) By submitting a plagiarized paper titled "The Implementation of a Universal Coverage to all Americans is the Best Way to Achieve Moral Fairness and Cost-Effectiveness in the U.S. Health Care Delivery System" to Professor Craig Lawson in the course in Law and Medicine in the fall 2003 semester . . . .
>
> (4) By submitting the paper referred to in Allegation (3), of which sections I-III and V-VII substantially duplicated sections I-III and VI-VIII of the paper described in Allegation (1), without receiving permission from Professors Lawson and Lepard to submit the same material in two different courses.

The Honor Committee found the evidence was clear that almost none of the substance of the papers described in charges 1 through 3 was Kerr's original work. The Honor Committee also found that major sections of the papers described in charges 1 and 3 were identical and that Professors Brian Lepard and Craig Lawson had not given Kerr permission to submit the same paper for credit in each of their classes. The Honor Committee noted that Kerr did not dispute the evidence, and also noted Kerr testified that he engaged in the conduct outlined in charges 1 through 3, but that he did not have any "culpable intention," because he did not understand what plagiarism really was. Kerr also admitted through counsel that he did submit materially the same paper for credit in two classes as alleged in charge 4. The Honor Committee found that "[a]lthough the evidence of what . . . Kerr actually 'knew' about plagiarism was in dispute, there was overwhelming evidence of what . . . Kerr 'should have known' about plagiarism," because (1) Kerr

had received a syllabus, distributed by Professor Lawson at the beginning of the fall 2003 "Law and Medicine" course, with a section entitled "Plagiarism: What it is, and how to avoid it"; (2) Kerr had received a July 1, 2003, e-mail from a Professor Shavers regarding plagiarism; and (3) in Kerr's first-year legal writing class, he was assigned to read specific passages about plagiarism. The Honor Committee unanimously found by clear and convincing evidence that Kerr violated the Honor Code as outlined in charges 1 through 4. By a vote of four to one, the Honor Committee determined that Kerr should be dismissed from the College of Law. The Honor Committee also determined that Kerr's dismissal should appear on his official University of Nebraska-Lincoln transcript and on his unofficial College of Law transcript. Kerr appealed the Honor Committee's decision to Dean Willborn.

In his decision, Dean Willborn stated that he had reviewed the record, that such provided clear support for the Honor Committee's factual findings, and that such findings of fact were not clearly erroneous. Dean Willborn found that the prosecutor for the Honor Committee hearing did follow "the time requirements of [s]ection 1.050(4) of the Honor Code." Dean Willborn also found that the record did not support Kerr's claim of disparate treatment based on his race or national origin. Dean Willborn affirmed the decision of the Honor Committee.

Kerr filed his "Amended Petition for Review" with the district court on December 10, 2004, alleging that the decisions of the Honor Committee and of the dean were erroneous for a number of reasons. Kerr requested that the district court reverse and vacate the decisions of the Honor Committee and Dean Willborn.

The Board of Regents of the University of Nebraska, the Honor Committee, and Dean Willborn filed an answer on January 6, 2005, which answer (1) objected to the subject matter jurisdiction of the district court, because the proceedings before the Honor Committee are not subject to the APA and such proceedings do not qualify as a "contested case" as defined by Neb. Rev. Stat. § 84-901(3) (Reissue 1999), and (2) alleged that the decisions of the Honor Committee and the dean are supported by substantial evidence, including Kerr's admission

to violating the Honor Code, and that such decisions should be affirmed.

In its order filed on June 30, 2005, the district court noted that Kerr brought the appeal under the APA, asserting that the Honor Committee and Dean Willborn are agencies for purposes of the APA. However, the district court found that "neither the Committee [n]or Dean [is] authorized *by law* to make rules and regulations and [they] are not 'agencies' for purposes of the APA." The district court also noted that Kerr's case did not involve a "contested case" as defined by § 84-901(3), and said:

> Not only are the Committee and Dean not agencies for purposes of the APA and the Committee hearing not an agency hearing, but there is also no identified constitutional or legal right regarding the Honor Code hearing and Kerr's dismissal from the College of Law. The source of Kerr's right to an Honor Code hearing stems from the Code itself, not from a statute or constitution.

The district court held that it did not have jurisdiction under the APA and therefore dismissed Kerr's appeal. Kerr timely appeals the district court's order.

ASSIGNMENTS OF ERROR

Kerr alleges that the district court erred in a number of ways, but we focus on his claim that the district court erred in finding that neither the Honor Committee nor the dean is an agency for purposes of the APA and that the Honor Committee hearing is not an agency hearing.

STANDARD OF REVIEW

[1-3] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005). When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995); *K N Energy, Inc.*

v. Cities of Broken Bow et al., 248 Neb. 112, 532 N.W.2d 32 (1995). Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

ANALYSIS

[4] Our duty respecting jurisdictional issues is well known, and we quote from *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 316, 589 N.W.2d 520, 521 (1999):

> Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Notwithstanding whether or not the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Schmidt v. State*[, 255 Neb. 551, 586 N.W.2d 148 (1998)]. When a lower court does not gain jurisdiction over the case before it, an appellate court also lacks the jurisdiction to review the merits of the claim. *Id.*

[5] Whether a University of Nebraska student's expulsion or dismissal is subject to judicial review under the APA is a matter of first impression. Initially, we note that while the caption on Kerr's operative petition names the "Board of Regents of the University of Nebraska," the operative allegation is found in paragraph 2. There, Kerr alleges: "Respondent, University of Nebraska, College of Law, and more particularly the . . . Honor Committee, and Dean . . . Willborn[,] is the agency whose action is at issue . . . ." Thus, Kerr has made no allegations of any action by the Board of Regents that is subject to judicial review in this case. The character of a pleading is determined by its content, not by its caption. *Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002). Kerr has alleged that the Honor Committee and the dean are the "agency," which ultimately is the key to our analysis of whether jurisdiction exists under the APA. And, it is an undisputed fact that the dismissal of Kerr from the College of Law was not done by the Board of Regents, even though Kerr has ostensibly

attempted to name the Board of Regents as "respondent." It is an undisputed fact that Kerr was dismissed from the College of Law by the Honor Committee, a decision affirmed on appeal by Dean Willborn.

[6] The core statutory provision providing for APA jurisdiction in the district court is as follows: "Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA]." Neb. Rev. Stat. § 84-917(1) (Reissue 1999).

[7] For purposes of the APA, a "contested case" is defined as "a proceeding before an *agency* in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an *agency* hearing." § 84-901(3) (emphasis supplied).

[8,9] An "agency" is each board, commission, department, officer, division, or other administrative office or unit of the state government "authorized by law to make rules and regulations." § 84-901(1). We have found no basis to conclude that the Honor Committee or Dean Willborn is "authorized by law to make rules and regulations," nor does Kerr cite such to us. Without such authorization by law, neither the Honor Committee nor the dean can be an agency for purposes of the APA—a predicate finding for APA jurisdiction in this case. As a result, if the Honor Committee and Dean Willborn are not "agencies," their decisions are not subject to judicial review under the APA.

We next turn to the question of whether this is a "contested case," meaning that Kerr's rights, duties, and privileges "are required by law or constitutional right to be determined after an agency hearing." This issue cuts against Kerr in two ways, because there is no law requiring that the question of whether Kerr remains a College of Law student be determined by an agency (as defined by § 84-901(1)) and, in any event, as said, the Honor Committee and the dean are not agencies under such statute. Therefore, the district court correctly determined that it did not have jurisdiction under the APA, and as a result, neither do we. See *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

APPEAL DISMISSED.

BARBARA MURPHY, APPELLANT, V. WILLIAM BROWN ET AL., APPELLEES.

738 N.W.2d 466

Filed August 28, 2007. No. A-06-243.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
3. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Jurisdiction: Final Orders: Appeal and Error.** If the trial court has abused its discretion in certifying an order as final under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), there is no final order before the appellate court and, thus, no jurisdiction of the appeal.
5. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Order vacated, and appeal dismissed.

Terrence J. Salerno for appellant.

Stephen G. Olson II and Karen Weinhold, of Engles, Ketcham, Olson & Keith, P.C., for appellee Jimmy's Place.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Barbara Murphy appeals from a summary judgment dismissing her complaint only as to Jimmy's Place, formerly known as Turf Lounge (Turf Lounge), whose employee allegedly parked a vehicle so as to obstruct the view of a driver exiting Turf Lounge's parking lot. Murphy's claim against William Brown, a bar patron whose vehicle struck Murphy's automobile, continues

to await disposition in the district court. Because the Nebraska Supreme Court's recent decision interpreting Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) compels the conclusion that in the instant case the district court abused its discretion in invoking § 25-1315(1), we lack jurisdiction and must dismiss the appeal.

BACKGROUND

As we describe in more detail below, this is the second appearance of this case in this court. On January 29, 2004, Murphy filed an amended complaint naming as defendants Brown, Turf Lounge, and "John Doe, exact name unknown, [an] employ[ee] of [Turf Lounge]." Murphy alleged that on August 27, 2000, at approximately 9:25 p.m., she was driving eastbound on Center Street in Omaha, Nebraska, approaching the intersection with 60th Street. Murphy's vehicle was traveling in the curb lane, traversing the area adjacent to the premises of Turf Lounge. At that time, a vehicle driven by Brown pulled into Center Street from the parking lot behind Turf Lounge, broadsiding Murphy's car. Murphy alleged that as Brown pulled out of Turf Lounge's parking lot, Brown's "vision was obscured due to the fact that the bartender was allowed to park his pick-up truck on the street side curb in front of the bar, obscuring vision of oncoming traffic." Murphy alleged that a cause of the crash was Brown's negligence in failing to keep a proper lookout, in failing to yield the right-of-way, and in operating his vehicle while he was in an impaired condition.

Murphy further alleged that Turf Lounge was negligent in allowing employees to park on the street-side curb in front of the building and in ignoring complaints of patrons that the employees' parking practice obstructed the view of patrons exiting the parking lot. Murphy claimed that the negligence of the bartender was a contributing cause of the collision and that because the bartender was acting within the course and scope of his employment in parking his vehicle at that location, the bartender's actions were imputed to Turf Lounge by the doctrine of respondeat superior. Turf Lounge filed an answer disputing Murphy's allegations.

On March 31, 2004, Turf Lounge filed a motion for summary judgment. On April 28, the district court conducted a hearing on Turf Lounge's motion. The parties produced evidence primarily consisting of two photographs, an affidavit, and Brown's deposition. The evidence focused on prior complaints regarding the location of the employee's parked vehicle and on the nature of the obstruction.

On June 22, 2004, the district court entered its order sustaining Turf Lounge's motion for summary judgment and dismissing Murphy's petition as against Turf Lounge. However, the court's six-page order, which discussed the court's analysis regarding the issues of negligence pertaining to Turf Lounge, did not make the "express determination that there [was] no just reason for delay" or the "express direction for the entry of judgment" authorized by § 25-1315(1). On July 9, Murphy attempted to appeal. This court noted the absence of the § 25-1315(1) determination and direction. On January 25, 2006, this court, without opinion, dismissed Murphy's first appeal for lack of jurisdiction.

After the matter returned to the district court, that court reaffirmed its earlier order granting summary judgment, incorporating the original order by reference. The new order, however, made the express determination and the express direction contemplated by § 25-1315(1). Murphy timely appealed to this court.

Three days after the parties presented their oral arguments in the instant appeal, the Nebraska Supreme Court released its opinion in *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). We sought, from the parties, supplemental briefs addressing the impact of the *Cerny* decision on the case before us, and we have considered the parties' responses.

ASSIGNMENTS OF ERROR

Murphy makes five assignments of error, which we consolidate for discussion to two. First, Murphy asserts that the district court erred in failing to allow the matter to proceed for discovery before granting summary judgment. Second, Murphy asserts that the court erred in granting Turf Lounge's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

[2] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Cerny v. Todco Barricade Co., supra.* Our discussion from this point forward assumes the reader's familiarity with both the text of § 25-1315 and the decision in *Cerny.*

[4] The *Cerny* decision teaches that where a trial court has invoked § 25-1315(1) to make appealable an otherwise interlocutory order, the appellate court's jurisdiction "depends on whether it was properly certified." *Cerny v. Todco Barricade Co.*, 273 Neb. at 808, 733 N.W.2d at 885. If the trial court has abused its discretion in certifying an order as final under § 25-1315(1), there is no final order before the appellate court and, thus, no jurisdiction of the appeal.

[5] There are three elements constituting a § 25-1315(1) certification. With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. *Cerny v. Todco Barricade Co., supra.* The case before us clearly involves multiple parties, satisfying the first element. Likewise, the second element has been met. The district court's order granting Turf Lounge's motion for summary judgment and dismissing

Murphy's claim represents a final judgment as to Turf Lounge. See *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). Ultimately, the third element controls our decision. Our jurisdiction depends upon whether the trial court abused its discretion in making the "express determination" and "express direction" required by § 25-1315(1).

In the instant case, as in *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), the trial court did not explain the reasoning behind the court's § 25-1315(1) determination. We are confident that from this point forward, trial court judges will follow the dictate in *Cerny* to make specific findings rather than merely reciting the statutory language. In the instant case, despite not having the benefit of such reasons, we examine the facts in light of the following factors summarized in *Cerny*:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

273 Neb. at 812, 733 N.W.2d at 888.

This case presents an issue regarding whether Turf Lounge could anticipate or contemplate that Brown would proceed to exit the parking lot despite the existence of the obstruction. The facts underlying Murphy's claims against Brown and Turf Lounge are intertwined. Like the Supreme Court in *Cerny*, "[t]he questions we are asked to decide now, on a summary judgment record, are in effect still pending for a trial that will, presumably, further illuminate the issues, both for the trial court and this court." 273 Neb. at 816, 733 N.W.2d at 890. Further, the parties in this appeal have not asserted that a delay in entering a final judgment as to all parties would cause a hardship.

Cerny instructs:

> [C]ertification of a final judgment must be reserved for the "unusual case" in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.

273 Neb. at 809, 733 N.W.2d at 886. Murphy argues in her supplemental brief that certification was proper because no further action or claim remained between Murphy and Turf Lounge. She cites to *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991), for the proposition that there is no just reason for delay of an appeal when the rights and liabilities between two parties are fully litigated and nothing remains to be done as to the action between those parties. However, the factors from *Cerny* mentioned above, as applied to the instant case, simply do not demonstrate that it is the "unusual case" for which certification would be appropriate. Further, we observe that the *Genty* court stated that "[t]he district court's discretionary decision to certify . . . must be accompanied by a statement of reasons explaining the court's conclusion." 937 F.2d at 905. We also observe that the *Genty* opinion shows that the trial court found no just reason for delay only after it set forth a number of findings to support such determination. Again, in the instant case, the district court gave no explanation for its certification.

As the Nebraska Supreme Court noted in *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007), it had not previously considered a trial court's determination under § 25-1315(1) that there was no just reason to delay the entry of a final judgment. Although we ultimately conclude that the district court in the instant case abused its discretion in certifying the judgment as final, we recognize that it did so without the guidance of the reasoning contained in the *Cerny* decision.

CONCLUSION

We conclude that the district court abused its discretion in certifying its summary judgment as final under § 25-1315(1). We therefore vacate the district court's order certifying a final

judgment, and because there is no final order, we dismiss the appeal for lack of jurisdiction.

ORDER VACATED, AND APPEAL DISMISSED.

DENNIS DAMROW, APPELLANT, V. MARLIN MURDOCH ET AL., APPELLEES.

739 N.W.2d 229

Filed September 4, 2007. No. A-05-1200.

1. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Arbitration and Award: Appeal and Error.** Appellate review of an arbitrator's award is necessarily limited because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Strong deference is due an arbitrative tribunal; when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process.
5. **Trial: Witnesses: Testimony.** The credibility of witness testimony and weight to be given the testimony are questions for the trier of fact.
6. **Trial: Evidence: Appeal and Error.** An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.
7. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
8. ____. A party cannot complain of error which that party has invited the court to commit.
9. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Michael J. Synek for appellant.

Jeanelle R. Lust and Carly J. Beusch, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellees.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Marlin Murdoch, Duane Murdoch, Clyde Lueking, Jerry Lueking, Robert Lueking, and Dr. Thomas Smith (the Appellees) filed a motion in the district court for Buffalo County, seeking confirmation of an arbitration award under Nebraska's Uniform Arbitration Act. The arbitration action was initiated by Dennis Damrow (Damrow) against the Appellees and Martin Damrow. Damrow opposed the Appellees' motion in the district court. The court granted the motion to confirm the arbitration award and entered judgment against Damrow. Damrow appeals. For the reasons set forth herein, we affirm.

II. BACKGROUND

Damrow served as manager for a cattle feedlot near Holdrege, Nebraska. Shareholders of the feedlot corporation (CFI) included Damrow, the Appellees, and Martin Damrow.

On October 11, 1999, the shareholders of CFI executed a shareholder repayment agreement. The agreement stated that the shareholders entered into the agreement to provide for a procedure to be used to determine what, if any, amounts were owed by the individual shareholders to CFI and to provide for repayment of such amounts to CFI. The agreement included the following provision regarding arbitration: "If no agreement can be reached by the parties concerning any individual shareholder's liability, such issue shall be submitted to binding arbitration subject to the Rules of the American Arbitration Association using up to three arbitrators." The agreement also provided:

> The Shareholders hereby promise and agree to not plead the statute of limitations as a defense to repayment to [CFI] of any amount determined due hereunder and hereby waive the statute of limitations, estoppel and laches, as to any and all claims for repayment to [CFI] determined

due hereunder for a period of two years from the date of this Agreement.

Because the shareholders did not reach an agreement concerning individual shareholder liability, Damrow, who was then represented by counsel, initiated an arbitration proceeding with the American Arbitration Association (AAA), naming the other shareholders as respondents. That demand for arbitration is dated July 21, 2000. Damrow sought a determination of amounts which might be owed to CFI by its shareholders and provision for the repayment of sums determined due. Damrow estimated for purposes of the demand that the amount in controversy was likely in excess of $900,000. Damrow requested that the arbitration hearing be held in Kearney, Nebraska.

Damrow retained new counsel in approximately May 2001, and in a letter dated May 4, 2001, Damrow's newly retained attorney notified the AAA and the Appellees' attorney of his retention by Damrow and requested that they send correspondence involving Damrow to his office. The letter also stated, "It is with great regret that . . . Damrow finds himself in the financial position not to be able to continue with the arbitration."

On June 4, 2001, attorneys for the Appellees and CFI met in Omaha, Nebraska, at the offices of the law firm representing the Appellees. The transcription from this proceeding includes opening remarks from the Appellees' attorney indicating that June 4 was the first day set for a scheduled arbitration hearing, that the AAA had asked the parties to notify it of a mutually agreeable location for the hearing, that the law firm had received no instructions from the AAA as to where the hearing was to convene, and that the firm had notified the AAA of the availability of its offices as a possible location. The attorney stated her presumption that absent an order from the AAA, the hearing was to proceed. Damrow was not present at this hearing or proceeding; nor were any arbitrators present. The participating attorneys proceeded to question witnesses under oath, and testimony was recorded by a court reporter. Exhibits referenced during the course of the proceeding, including an order scheduling the June 4 hearing, are not included in the record before us.

The AAA notified the parties, including Damrow, of a hearing to occur in Kansas City, Missouri, on February 1, 2002. The

notice of this hearing is not included in the record before us, but the parties agree that the statutory notice was given for the scheduled February 2002 hearing. On the date of the scheduled hearing, the Appellees' attorney called the AAA by telephone to indicate that she could not attend because of weather conditions. The hearing was rescheduled to March 8 in Kansas City. The record contains a letter dated March 6, 2002, from the AAA case manager to the parties. The body of the letter states, "This will serve as a reminder the hearing in the [arbitration] matter is scheduled to commence on March 8, 2002, per the enclosed Notice of Hearing." The upper and lower portions of the letter contain printed notations indicating that the letter was transmitted to Damrow and Martin Damrow via first class mail and United Parcel Service next day air delivery and to the Appellees' attorney and the arbitrators via telecopy only. The attached notice of hearing states the time, date, and location of the hearing; lists the names of the arbitrators; and also contains a notice stating in part, "The arbitrators have arranged their schedule and reserved the above date(s) based on the advice of the parties." Further information regarding the rescheduling of the hearing from February to March is set forth in the analysis section below.

Damrow did not attend the March 8, 2002, arbitration hearing. The Appellees participated in the March 8 hearing, were represented by counsel, and offered evidence in support of their positions, including the transcription of the testimony taken at the office of their attorney in June 2001.

Counsel for the Appellees sent a letter to the AAA dated March 29, 2002, which, among other things, included a demand that the arbitration panel's decision be released "no later than April 7, 2002, as previously ordered by you." The letter also stated that if the AAA failed to release the decision by that date, the Appellees would bring suit against the AAA "for its breach of its duty to administer this arbitration in accordance with its own rules and its representations to [the Appellees] that it would do so." The letter does not contain any notations indicating that a copy was sent to Damrow.

On April 3, 2002, the AAA received a letter from Damrow which described his efforts to obtain access to certain records

of CFI and stated, "With the total lack of access to any and all the records it has become impossible for me to proceed with the Arbitration." Damrow's letter also stated, "As I have informed you by phone[,] I do not have the financial resources to proceed in the Arbitration and the fact remains that the 'STOCKHOLDER REPAYMENT AGREEMENT' has expired as of October 11, 2001."

On May 7, 2002, the AAA sent a telecopy of the arbitration award, signed by the arbitrators on May 3, to Damrow and the Appellees' attorney; Martin Damrow was sent a copy by first class and certified mail. In the award, the arbitrators denied "the claim of . . . Damrow" and, on the Appellees' "counterclaim," awarded the Appellees as representatives of CFI the sum of $8,619,566.39 for the benefit of CFI. Subsequently, on July 8, the AAA mailed a letter by first class and certified mail to Damrow, the Appellees' attorney, and Martin Damrow with an enclosed copy of the award.

On May 28, 2002, the Appellees filed a motion in the district court under Neb. Rev. Stat. § 25-2612 (Reissue 1995), seeking to confirm the arbitration award. The Appellees sought confirmation of the May 3 arbitration award and an order directing entry of judgment against Damrow for the sum of $8,628,146.37.

On July 1, 2002, Damrow filed a responsive answer and resistance to the motion to confirm the arbitration award. Damrow admitted the execution of the shareholder repayment agreement attached to the Appellees' motion, but generally denied the substantive allegations of the motion to confirm. As an affirmative defense, Damrow alleged that the repayment agreement expired as of October 11, 2001, and was no longer in effect or valid at the time the arbitration award was entered. In objecting to the Appellees' motion, Damrow alleged certain defects in the arbitration proceedings, including lack of notice of the arbitration hearing and incorrect service of the arbitration award upon him. Damrow also alleged a statute of limitations defense to the arbitration proceedings. Damrow did not specifically ask the court to vacate the arbitration award, but he requested denial of the Appellees' motion.

The Appellees filed a motion for summary judgment, which was heard by the district court on November 7, 2002. The court

entered an order on January 2, 2003, denying the motion for summary judgment. After reciting the general history of the dispute between the parties, the court analyzed the issues raised by Damrow in response to the Appellees' motion to confirm the arbitration reward. The court stated in part:

> In his answer [Damrow] has raised an affirmative defense to the arbitration award, alleging that the shareholder repayment agreement under which the award was granted had expired as of October 11, 2001, and was no longer in effect or valid at the time of the entry of the arbitration award. The Court notes first, however, that it was [Damrow] himself who initiated the arbitration procedure and the procedure was initiated within the time frame set forth in the agreement. More importantly, the agreement does not actually set forth a time frame or limitation. Rather, the shareholder repayment agreement establishes a procedure to resolve disputes of shareholder obligations to [CFI]. The only time limiting clause contained in the agreement pertains to the period of time in which a party could utilize the statutes of limitations, or the defenses of estoppel and laches as affirmative defenses to obligations owed to [CFI]. As a matter of law the Court therefore must find that the shareholder repayment agreement and the utilization of arbitration were not time barred.

The district court went on to find that a factual dispute existed with respect to whether Damrow was notified in advance of the hearing rescheduled for March 8, 2002.

On January 2, 2003, the district court stayed its proceedings due to pending bankruptcy proceedings involving Damrow. The U.S. Bankruptcy Court discharged all but $3,550,471.19 of Damrow's obligation to CFI in an order dated August 17, 2004.

Damrow, although represented by counsel at earlier stages of the proceedings, appeared pro se at the March 2, 2005, trial on the Appellees' motion to confirm the arbitration award. The district court entered an order on March 7 denying Damrow's request that confirmation be withheld, confirming the arbitration award, and entering judgment against Damrow for $3,550,471.19. The district court's order contained a thorough discussion of the procedural history of the arbitration proceeding and a detailed

analysis of Damrow's various objections to the award. We include additional facts and district court findings in the analysis section below.

Damrow filed a pro se motion for new trial on March 14, 2005. At the time of the hearing before the district court on August 15, Damrow was represented by counsel. The court entered an order on September 1, 2005, denying Damrow's motion for new trial. Damrow subsequently perfected his appeal to this court.

III. ASSIGNMENTS OF ERROR

Damrow asserts, consolidated and restated, that the district court erred in (1) confirming the arbitration award, (2) limiting the issues at trial, and (3) denying his motion for new trial.

IV. STANDARD OF REVIEW

[1] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003). However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous. *Id.*

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

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

V. ANALYSIS

[4] We begin our analysis by recognizing that Nebraska case law provides that appellate review of an arbitrator's award is necessarily limited because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. *Hartman v. City of Grand Island, supra.* Strong deference is due an arbitrative tribunal;

when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process. *Id.*

1. FAILURE TO VACATE AWARD

Damrow asserts that the district court erred in confirming the arbitration award rather than vacating the award. Damrow argues that the award in this case was procured by undue means and that the hearing was conducted so as to substantially prejudice his rights.

Neb. Rev. Stat. § 25-2613(a) (Cum. Supp. 2006) provides, in relevant part, that the court shall vacate an award when

> (1) The award was procured by corruption, fraud, or other undue means;
>
> . . . .
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party.

There is no suggestion in this case that the award was procured by corruption or fraud, but Damrow argues that the award should be vacated because it was procured by other undue means. Other jurisdictions have interpreted "undue means" in the context of vacating an arbitration award as akin to corruption or fraud. See, *Spiska Engineering v. SPM Thermo-Shield*, 678 N.W.2d 804 (S.D. 2004); *Hawrelak v. Marine Bank, Springfield*, 316 Ill. App. 3d 175, 735 N.E.2d 1066, 249 Ill. Dec. 241 (2000); *Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346 (Colo. App. 2000); *Wojdak v. Greater Phila. Cablevision*, 550 Pa. 474, 707 A.2d 214 (1998); *Arkansas Dep't of Parks and Tourism v. Resort Managers, Inc.*, 294 Ark. 255, 743 S.W.2d 389 (1988); and *Firmin v. Garber*, 353 So. 2d 975 (La. 1977).

Damrow also argues that the award should be vacated because the hearing was conducted contrary to the provisions of Neb. Rev. Stat. § 25-2606 (Cum. Supp. 2006), so as to substantially prejudice his rights. Section 25-2606 provides:

> Unless otherwise provided by the agreement:
>
> (a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served

> personally or by registered or certified mail not less than ten days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy;
>
> (b) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing; and
>
> . . . .
>
> Arbitration proceedings shall take place in the county designated in section 25-403.01 unless the parties otherwise agree at a time subsequent to the arising of the controversy.

Damrow presents several specific arguments about the means used to procure the award and the manner in which the arbitration hearing was conducted, and we address each argument separately below.

(a) Notice

Damrow argues that the arbitrators failed to give him the required statutory notice of the March 2002 arbitration hearing. As noted above, § 25-2606(a) provides that "[t]he arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered or certified mail not less than ten days before the hearing." The parties agree that the statutory notice was given for the February 2002 hearing, which hearing was postponed until March 8. The only written notice contained in our record for the March 8 hearing is dated March 6, 2002, and states that it was sent to Damrow via first class mail and United Parcel Service next day air. The March 6 letter stated that it was to "serve as a reminder" that the hearing was scheduled for March 8. Damrow

presented evidence before the district court suggesting that he was not aware of the March 8 hearing until March 11, when he called the AAA case manager to find out if the hearing had been rescheduled.

One of the attorneys who represented the Appellees during the arbitration proceedings testified about the rescheduling of the hearing from February to March 2002. The attorney testified that when bad weather conditions arose, she called the AAA on the date of the previously scheduled hearing. The attorney testified, "I called somebody down in Kansas City, and we had a conference call, and I indicated I didn't feel safe driving down that day. I believe on the telephone that day we rescheduled it." The attorney was asked if Damrow was "contacted previously" about the rescheduling, and she testified, "I'm sure that he was. He may have been on that phone call with us. I don't recall." Damrow then made a hearsay objection, stating, "There [were] no telephone calls, and it's hearsay evidence." The court overruled Damrow's objection. The attorney also testified that prior to the Appellees' motion to confirm the arbitration award, she never received any communications from Damrow in which he stated he did not have notice of the arbitration hearing. The attorney testified further that prior to the actual hearing, she never heard from Damrow that he intended to be personally present at the hearing. Based on letters received from Damrow's counsel at the time, the attorney was under the impression that Damrow did not intend to participate further in the proceedings.

On cross-examination, Damrow questioned the attorney about her recollection of his involvement in any telephone calls with the AAA. When Damrow stated to her, "You . . . said that I was involved in a phone conversation with [the AAA]," the attorney responded, "No. I said you may have [been involved in the conference call on the original date of the hearing]. I didn't recall." Damrow asked the attorney if there were any notices other than the March 6, 2002, letter stating that there was a hearing on March 8. The attorney responded, "Well, that's why I think that you were on that phone call with us because I think that you did know about it." Damrow asked the attorney if she had proof that he was notified by telephone, and the

attorney stated, "My memory tells me that you were on that call with us. We never excluded you even though you asked to be excluded."

In addressing the notice issue, the district court noted that § 25-2613(a)(4) provides that one ground for vacating an arbitration award is evidence that the arbitrators conducted a hearing in violation of § 25-2606 to the prejudice of the claimant. The court determined that the evidence showed that the statutory requirements were followed with regard to the notice for the original February 2002 hearing. The court then stated:

> The statute does not require, however, that the same notice be given to the parties should the original hearing be adjourned or postponed. It appears adequate that the arbitrators provided the parties with actual notice of the new date and time of hearing which the evidence suggest[s] was done in these proceedings.

The court referred to the testimony by the Appellees' attorney that the parties had a discussion with the arbitrators at the time the February 2002 hearing was continued and that she believed Damrow participated in the conversation. The court stated:

> [Damrow] actually offered no evidence even through his own testimony which specifically denied his participation in that telephone conference. The evidence also reflects that he received a reminder notice, which is suggestive of an earlier notice. The evidence further reflects that he failed to raise objection or concerns about notice of the hearing until after he received the arbitrator's award.

The court stated that the evidence "strongly suggests that [Damrow] was in fact aware of the change in dates and would have received a reminder of the new hearing date and time." The court also observed that Damrow admitted knowing about the hearing by March 11, but that he took no action to request further opportunity to offer evidence or to resolve the issue of notification at that time. The court found Damrow's failure to appear at the arbitration hearing "more attuned to his prior statements to the arbitrators concerning his inability to financially afford to attend and participate." The court concluded that Damrow elected not to participate in the arbitration proceedings

and further found that Damrow's claims of irregularity were not sufficient to justify the vacation of the arbitration award.

It is clear that the March 6, 2002, notice letter with regard to the March 8 hearing did not comply with the notice requirements of § 25-2606(a). The district court suggested and the Appellees argue that the actual notice of the postponed hearing was sufficient. Other jurisdictions have found that lack of formal notice will not invalidate an arbitration award if the parties have actual knowledge of the hearing in advance. In *Lombardo v. Inv. Management and Research*, 885 S.W.2d 320 (Ky. App. 1994), the court held that although parties to an arbitration are generally entitled to reasonable notice of the time and place of arbitration hearings, lack of formal notice does not invalidate an award if the parties to the arbitration have actual knowledge of the hearing in advance. The court further found the essential requirement to be that the parties be afforded a reasonable opportunity to be heard. *Id.* See, also, *Murray v. Ferdie*, 431 So. 2d 724 (Fla. App. 1983) (finding arbitration award was not null and void because of alleged lack of proper notice concerning hearing). We conclude that under the facts of this case, the lack of formal notice in compliance with § 25-2606(a) of the postponement of the hearing previously scheduled and correctly noticed does not invalidate the award if the parties to the arbitration had actual knowledge of the postponed hearing in advance.

[5,6] The question then becomes whether Damrow had actual notice of the March 2002 postponed hearing before the hearing date. The evidence on the issue of actual notice is conflicting. The district court resolved this point in favor of the Appellees, implicitly finding the Appellees' evidence to be more credible. The credibility of witness testimony and weight to be given the testimony are questions for the trier of fact. *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006). An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Id.* We decline to reevaluate the evidence on the issue of actual notice and defer to the judgment of the trial court on this issue.

We also note the district court's conclusion that Damrow's failure to appear at the arbitration hearing was "more attuned to his prior statements to the arbitrators concerning his inability to financially afford to attend and participate." Damrow did express to the AAA on several occasions his intent not to participate further in the arbitration process. Section 25-2606(a) does allow the arbitrators to "hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear." We also note that despite Damrow's assertions that he became aware of the March 8, 2002, hearing on March 11, he did nothing subsequently to raise the notice issue before the arbitrators or to seek a further opportunity to produce evidence before the panel. Damrow has failed to show that his rights were substantially prejudiced with respect to the arbitration hearing. See § 25-2613(a)(4). Under the circumstances of this case, we conclude that the district court did not err in finding the lack of formal notice an insufficient ground to vacate the arbitration award.

(b) Venue

Damrow asserts that the district court should have vacated the award because the arbitrators failed to conduct the proceedings in the appropriate venue. Section 25-2606 provides in relevant part that "[a]rbitration proceedings shall take place in the county designated in section 25-403.01 unless the parties otherwise agree at a time subsequent to the arising of the controversy." Neb. Rev. Stat. § 25-403.01 (Reissue 1995) contains the general provisions with respect to venue in civil cases brought in Nebraska courts. Damrow lived in Kearney at the time of the arbitration proceedings and, in his demand for arbitration, requested that the hearing be held in Kearney. One of the attorneys who represented the Appellees during the arbitration proceedings testified at trial that the hearing was scheduled at one time to occur in Kearney, but that at some point, the parties opted to move it to Kansas City, where the arbitrators lived and where the AAA office was located. The attorney testified further that the change was made for the convenience of the arbitrators. Damrow testified that he did not know why the hearing was moved to Kansas City.

[7] Clearly, § 25-2606 does not prohibit holding an arbitration hearing in a location outside of Nebraska, and there is evidence in the record to support a conclusion that the parties agreed to the new location as required by statute. More importantly for our analysis, we note that Damrow did not raise any issues relating to venue in his pleadings before the district court; nor did the district court address venue in any of its orders found in the record. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006). We also observe that the February 2002 arbitration hearing, which was subsequently rescheduled for March, had been set to occur in Kansas City. There is nothing in the record to suggest that Damrow objected to the location of the hearing as originally scheduled in February 2002. Damrow's arguments concerning venue are without merit.

(c) Timeliness of Award

Damrow asserts that the arbitration panel failed to issue its award in the timeframe and manner required by statute. The district court found that the objections raised to the delay in the notice of the award to Damrow were without merit for the reason that Damrow had not been deprived of an opportunity "'to contest the award or to seek corrections and changes to the award in the manner provided by Nebraska statute.'"

Neb. Rev. Stat. § 25-2609 (Reissue 1995) provides:

> (a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered or certified mail or as provided in the agreement.
>
> (b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party but not more than thirty days after the hearing. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he or she notifies the arbitrators of his or her objection prior to the delivery of the award to him or her.

The arbitration hearing was conducted on March 8, 2002. On May 7, the AAA sent a copy of the arbitration award by first class and certified mail to Martin Damrow and a telecopy to the rest of the parties, but it did not send a copy by first class and certified mail to all of the parties until July 8. Although Damrow states in his brief on appeal that he objected to the delay in the arbitrators' issuance of the award, he does not specify when or to whom he objected. There is, in fact, nothing in the record to support a conclusion that Damrow notified the arbitrators of his objection prior to the delivery of the award to him. Accordingly, Damrow's objection has been waived. See § 25-2609.

(d) Evidence Received at Arbitration Hearing

Damrow argues that receipt by the arbitrators of the testimony taken at the offices of the Appellees' attorneys on June 4, 2001, without his participation in the proceeding led to an arbitration award procured by undue means. The nature of the June 2001 hearing or proceeding is a bit puzzling—none of the exhibits referenced in the transcription of that proceeding, including a copy of any notice from the AAA, are found in our record—but testimony at trial was given to explain the occurrence of the June 2001 hearing. One of the attorneys who represented the Appellees in the arbitration proceedings testified about the June 2001 hearing. The attorney testified:

> There was an order[,] I think it was issued February 6, 2001, scheduling the hearing for June 4 through the 8th at my law firm. And I'm just reading this to refresh my memory. Yes, the matter was set for hearing during that time. It was our understanding that it was going to be conducted at our law firm, and we had not heard differently from the [AAA]. They didn't show up. The arbitration panel was not there. Our witnesses were there, and we went ahead and made our record that day as you suggested before. This transcript was offered into evidence at the actual hearing in Kansas City.

Damrow questioned the attorney about her knowledge of any notice given to him of the June 2001 hearing. The attorney testified that she was certain Damrow had been informed of

the hearing because her firm "continued to serve [Damrow] as to the [AAA] even though [he] asked to be excluded." Damrow questioned the attorney about whether any documentary evidence existed that he had been notified, and the attorney responded:

> I would say that the answer I can give you is that in my practice — and it was always true when I was at [the firm representing the Appellees] and it's true now, in any sort of a legal proceeding, that I make sure that I copy all sides including the Court in pleadings. And so I'm certain that I did on this occasion or this wouldn't have given rise to an exception.

The attorney did agree, however, that she had no documentary proof that Damrow had been notified of the June 2001 hearing.

Section 25-2606(b) provides that "[t]he parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing." However, § 25-2606(a) provides, as noted previously, that "[t]he arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear." There is nothing in Nebraska's Uniform Arbitration Act that prevents the arbitrators from receiving evidence such as the transcript of the June 2001 hearing, and we see no evidence that the hearing was conducted contrary to the provisions of § 25-2606. Nor do we find the receipt of this evidence to show that the award was procured by undue means. There is nothing in the record to suggest that the June 2001 proceeding was hidden from Damrow in any way. As determined above, the record suggests that Damrow had actual notice of the March 2002 hearing at which this evidence was received, declined to attend, and did nothing to seek a further opportunity from the arbitration panel to present evidence in support of his position. Damrow's arguments concerning the evidence received at the arbitration hearing are without merit.

(e) Statute of Limitations

Damrow argues that the shareholder repayment agreement should be construed to find that he had a right to assert a statute of limitations defense in the arbitration proceedings, that the

lack of notice of the arbitration hearing and the district court's limitation of issues at trial denied him the right to assert this defense, and that the award should accordingly be vacated. Damrow argues that any shareholder could assert defenses based upon the statute of limitations, estoppel, and laches after October 11, 2001.

The repayment agreement, dated October 11, 1999, provided in part:

> The Shareholders hereby promise and agree to not plead the statute of limitations as a defense to repayment to [CFI] of any amount determined due hereunder and hereby waive the statute of limitations, estoppel and laches, as to any and all claims for repayment to [CFI] determined due hereunder for a period of two years from the date of this Agreement.

The district court's findings in the summary judgment order seem to relate more to whether the arbitration proceedings themselves were barred by this provision than to an argument that Damrow was free after the 2-year period to assert a statute of limitations defense to any claims that he owed money to CFI. Nevertheless, to the extent that Damrow's argument is based upon his claim that the arbitrators' failure to notify him of the arbitration hearing deprived him of his right to present his statute of limitations defense to the arbitrators, we have previously determined that the evidence supports the conclusion that Damrow had actual notice of the arbitration hearing and chose not to participate. Thus, any alleged deprivation of Damrow's right to assert a statute of limitations defense at the arbitration level resulted from Damrow's own actions or inactions. We conclude that Damrow's argument that he was denied a right to assert a statute of limitations defense at the arbitration hearing is without merit.

Further, while Damrow asserted, in his answer and resistance to the motion to confirm the arbitration award in the district court, that the award contained sums barred by the statute of limitations, he did not plead a specific statute of limitations; nor does he argue in his brief on appeal which statute of limitations he believes is applicable. The shareholder repayment agreement, dated October 11, 1999, contains provisions for determining

the individual shareholders' liability to CFI. Pursuant to this agreement, Damrow initiated a demand for arbitration on July 21, 2000, and an arbitration award was entered on May 3, 2002, establishing Damrow's individual liability. This award was ultimately confirmed by the district court, as amended by the bankruptcy judgment, on March 7, 2005. Because Damrow has not pled or argued how any statute of limitations barred the action to determine his individual shareholder liability, nor is it apparent from the pleadings or evidence, we find that Damrow has failed to show any error with respect to the district court's ruling on the statute of limitations defense.

(f) Conclusion

We conclude that the district court did not err in failing to vacate the arbitration award.

2. Limitation of Issues at Trial

Damrow argues that the district court erred in limiting the issues at trial to the issue of Damrow's alleged lack of notice of the arbitration hearing. Damrow takes issue with the statement in the court's order of March 7, 2005, that in ruling on the Appellees' motion for summary judgment, the court had "found in favor of the [Appellees] on all issues except the issue concerning whether or not . . . Damrow received notice of the arbitration hearing and whether there are grounds to vacate the award." Damrow essentially argues that the court's determination in the summary judgment order that there was an issue of fact as to whether Damrow received notice of the arbitration hearing did not equate with a determination that no other issues could be considered at trial, especially where the court did not state that it was entering a partial summary judgment on any other issues in favor of the Appellees. Damrow does admit, however, that the court made certain findings in the summary judgment order with regard to the statute of limitations issue.

[8,9] We note that at the start of trial, the court stated:

> The Court has previously ruled on some of the matters involved in this including pursuant to a motion for summary judgment, and it would be my understanding that basically the remaining issue — the sole factual issue that

> precluded the Court from granting the summary judgment for confirmation of the arbitration award was the allegations of lack of notice. And so I will direct that [Damrow] go ahead and proceed with that issue.

Damrow did not object to the court's framing the issues to be determined at trial in this manner and proceeded to present evidence and examine witnesses as directed by the court. A party cannot complain of error which that party has invited the court to commit. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004). However, we do not see that the court failed to consider any of the issues raised by Damrow in his answer and resistance to the Appellees' motion to confirm the arbitration award. In his pleading, Damrow raised issues with respect to expiration of the shareholder repayment agreement and statute of limitations, which issues were addressed by the trial court in ruling on the motion for summary judgment. Damrow also raised issues with regard to the alleged lack of notice of the arbitration hearing and issuance of the arbitration award. These issues were addressed by the district court in its order of March 7, 2005. Accordingly, we conclude that all issues raised by Damrow before the district court were addressed by the district court. Damrow's arguments on this point are without merit.

3. Motion for New Trial

[10] Damrow asserts that the district court erred in denying his motion for new trial. Because of our resolution of Damrow's other arguments, we need not address this assignment of error further. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

VI. CONCLUSION

The district court did not err in confirming the arbitration award or abuse its discretion in denying Damrow's motion for new trial.

Affirmed.

BILLY TYLER, APPELLANT, V. RICHARD KYLER AND MARLIN MCCLARTY, OMAHA POLICE OFFICERS, APPELLEES.

739 N.W.2d 463

Filed September 11, 2007. No. A-05-1445.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
4. **Pleadings.** A party will be bound by allegations in the pleadings and cannot subsequently take a position inconsistent thereto, as such allegations are judicial admissions.
5. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A person is seized by police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his or her freedom of movement.
6. ____: ____: ____. A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.
7. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
8. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** As part of a lawful traffic stop, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
10. **Constitutional Law: Public Officers and Employees: Liability.** Under 42 U.S.C. § 1983 (2000), public officials sued in their individual capacity are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
11. **Public Officers and Employees: Immunity.** Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.

12. **Constitutional Law: Public Officers and Employees: Proof.** For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right.
13. **Police Officers and Sheriffs: Intent.** The reasonableness inquiry in an excessive force case is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Billy Tyler, pro se.

Thomas O. Mumgaard, Deputy Omaha City Attorney, and Rosemarie R. Horvath for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Billy Tyler appeals from the order of the district court overruling his motion for summary judgment, sustaining a cross-motion for summary judgment, and dismissing his complaint. Because two police officers were entitled to qualified immunity on Tyler's claims that his constitutional rights were violated as a result of a traffic stop, in which Tyler had been a passenger in a vehicle but had left the vehicle prior to the time of the stop and refused to comply with an officer's command to return to the vehicle, we affirm.

BACKGROUND

On November 7, 2004, Omaha police officers Richard Kyler and Marlin McClarty interacted with Tyler in association with a traffic stop of a vehicle in which Tyler had been the passenger. Tyler ignored Kyler's order to return to the vehicle, and at some point, Kyler drew his weapon. McClarty later responded to Kyler's call for assistance and helped arrest Tyler.

On March 1, 2005, Tyler initiated suit against Kyler and McClarty under Neb. Rev. Stat. § 25-101 et seq. (Reissue 1995) for assault and battery, illegal arrest, and false imprisonment. In Tyler's brief to this court, he asserts that "this was a 42 [U.S.C.

§] 1983 [(2000)] action," brief for appellant at 1; however, his complaint did not expressly refer to 42 U.S.C. § 983 (2000). Tyler alleged in the complaint that even though he had not committed a crime, Kyler and McClarty leveled their service revolvers at Tyler after he left the vehicle in which he had been a passenger and which vehicle was stopped for running a red light.

In their responsive pleading, Kyler and McClarty admitted that they were Omaha police officers and that they arrested Tyler on November 7, 2004, but they denied the remaining allegations of the complaint. They asserted as affirmative defenses that they were entitled to qualified immunity and that Tyler's intentional actions of resisting the lawful orders of a law enforcement officer proximately caused any injuries or damages suffered by Tyler.

Tyler filed a motion for summary judgment, and the officers filed a cross-motion for summary judgment. The district court subsequently held a hearing on the motions and received the affidavits of Tyler, Kyler, and McClarty.

Tyler stated in his affidavit that on the date in question, he was walking up stairs to a friend's home when Kyler turned east on Ellison Avenue and, upon seeing Tyler, ordered him to return to the vehicle. Tyler refused. Tyler stated that the reason for Kyler's contact with Tyler was a traffic violation but that the driver of the vehicle was still in the driver's seat. Tyler asserted that there was no cause to arrest him and that the arrest was illegal and in violation of the Fourth Amendment and the Omaha police department's standard operating procedure.

Kyler stated in his affidavit that on November 7, 2004, at approximately 8:10 a.m., he conducted a traffic stop of a vehicle for a signal violation. The driver was leaving the illegally parked vehicle as Kyler pulled up behind it. As Kyler instructed the driver to get back into the vehicle, the passenger, later identified as Tyler, got out of the vehicle and began to walk away from the traffic stop. Kyler told Tyler several times to stop and to get back into the vehicle, but Tyler did not comply. Kyler stated that Tyler stated several times, "'You don't have no [expletive] right to detain me.'" Kyler called dispatch for assistance because he felt uncertain of Tyler's actions and because Tyler was not heeding commands. After handcuffing the driver, Kyler saw Tyler hiding next to a building in an empty lot. Kyler again

commanded Tyler to stop, but Tyler did not comply. Kyler got into the police cruiser, followed Tyler, and saw that Tyler had climbed a fence onto a college campus. Kyler stopped the cruiser, drew his weapon, and commanded Tyler to stop. Tyler finally stopped. McClarty stated in his affidavit that he then conducted a preliminary search of Tyler and handcuffed him without resistance. McClarty stated that he used only the amount of force reasonably necessary to handcuff and search Tyler and place him into the cruiser. Tyler was later booked into custody for obstructing a police investigation, providing false information to an officer, and having outstanding warrants. Kyler stated that the police department's standard operating procedure is to use only that force reasonably necessary to effectively bring an incident under control while protecting the lives of the officers. He attached to his affidavit his incident report of November 7 and the police department's policy on the use of deadly and nondeadly force.

On November 21, 2005, the district court entered its order ruling on the motions. The court liberally construed Tyler's complaint to be an action under § 1983 and Nebraska's Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2004), alleging a deprivation of constitutional rights and assault, battery, false imprisonment, and excessive force. The court overruled Tyler's motion for summary judgment, sustained the officers' cross-motion for summary judgment, and dismissed Tyler's complaint.

Tyler timely appeals.

ASSIGNMENTS OF ERROR

Tyler alleges, restated, that the district court erred in (1) granting summary judgment to Kyler and McClarty without a trial to resolve conflicts of fact and (2) finding no violation of Tyler's Fourth Amendment right to be free from an illegal search and seizure.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may

be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

ANALYSIS

[4] The crux of Tyler's argument is that Kyler had no right to draw his weapon and stop Tyler when the only reason for the stop was the driver's running of a red light. There is no dispute that Tyler had been a passenger in the stopped vehicle; he stated in his complaint that he was a passenger in the vehicle stopped for running a red light. A party will be bound by allegations in the pleadings and cannot subsequently take a position inconsistent thereto, as such allegations are judicial admissions. *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

We recognize, however, that a factual dispute exists as to whether Tyler was in the vehicle at the time of the stop. Tyler stated that he was out of the vehicle and going up some stairs when Kyler turned the corner in his cruiser and approached the vehicle. Kyler, on the other hand, stated that Tyler got out of the stopped vehicle as Kyler pulled up behind it and after Kyler instructed the driver to get back inside the vehicle. Kyler does not claim that the vehicle stopped in response to his activating the overhead lights on the cruiser; indeed, Kyler's affidavit never states that he turned on the overhead lights. Viewing the evidence in the light most favorable to Tyler, we must accept that Tyler was already out of the vehicle when Kyler pulled up behind it to initiate a traffic stop.

[5-7] Tyler alleges that he was unlawfully seized by Kyler and that the officers used excessive force. The Fourth Amendment to the U.S. Constitution provides for "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." A person is seized by police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement. *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. *Id.* A "seizure" in the Fourth Amendment context occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

[8,9] There is no dispute that Kyler stopped the vehicle for a traffic violation. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006). Once stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *Id.* The investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, asking the driver about the purpose and destination of his or her travel, running a computer check to determine whether there are outstanding warrants for any of the vehicle's occupants, and questioning the passengers in the vehicle on similar routine matters to verify information provided by the driver. See *id.* In *State v. Sparr*, 13 Neb. App. 144, 688 N.W.2d 913 (2004), we determined that the detention of a former passenger should be examined as though the former passenger was a bystander to the investigation of a crime rather than as a passenger in a traffic stop. In *Sparr*, the former passenger had exited her friend's car, was entering her own vehicle, and was not suspected of a crime at the time that the police officer interacted with her. Similarly, in the instant case,

when we view the evidence in the light most favorable to Tyler, he was not in the vehicle and was no longer a passenger at the time of the stop. Thus, the investigatory authority flowing from an observed traffic violation, which under *State v. Voichahoske* extends to passengers, cannot in the instant case be applied to Tyler. The officers do not contend, nor do we find any support in the record, that apart from his former status as a passenger, the officers had a reasonable suspicion of criminal conduct on the part of Tyler. While we conclude that in the instant procedural context, we must examine the existence of probable cause or reasonable suspicion viewing Tyler as a bystander rather than a passenger, we cannot say that this distinction was immediately clear to the officers arriving on the scene.

[10-12] Tyler does not assign error to the district court's finding that the officers were entitled to qualified immunity. Under § 1983, public officials sued in their individual capacity are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law. *Id.* For a constitutional right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. *Id.*

[13] In the instant case, there is no dispute that Tyler did not stop as commanded by Kyler and did not return to the vehicle. A reasonable person in Tyler's circumstances would not have felt free to leave when commanded by an officer to stop and to return to a vehicle. By the time Tyler finally submitted to Kyler's authority and stopped—which did not occur until Kyler raised his weapon—Tyler had continued to disobey Kyler's orders to stop and return to the vehicle, spoken to Kyler in a hostile manner, and tried to evade and hide from Kyler. To a reasonable official, it would not be clear that Kyler violated Tyler's constitutional rights; thus, Kyler is entitled to qualified immunity.

Tyler argues that Kyler used excessive force in leveling his service revolver, but the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The reasonableness inquiry in an excessive force case is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *id.* Under the circumstances, Kyler's drawing of his weapon was reasonable in order to compel Tyler to comply with Kyler's order to stop. Tyler failed to allege facts to show that McClarty's use of force in handcuffing him was unreasonable or excessive. Further, at the time of Tyler's arrest, his actions had provided the officers with probable cause to arrest him for obstruction of an officer. The officers' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. They were entitled to qualified immunity.

CONCLUSION

We conclude that the district court did not err in entering summary judgment in favor of the officers and in dismissing Tyler's complaint.

AFFIRMED.

CARA WEICHMAN, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT E. WEICHMAN, DECEASED, APPELLANT, V. LOWER PLATTE SOUTH NATURAL RESOURCES DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, AND NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

739 N.W.2d 764

Filed September 18, 2007. No. A-05-1147.

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

2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court.
4. **Tort Claims Act: Liability.** Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State Tort Claims Act.
5. **Tort Claims Act: Liability: Words and Phrases.** That which is protected under Neb. Rev. Stat. § 81-8,219(1) (Reissue 2003) of the State Tort Claims Act is the discretion of a governmental executive or administrator to act according to his or her judgment of the best course to be taken. Such discretion includes more than the initiation of programs and activities; it includes determinations or judgments made in establishing plans, specifications, or schedules of operations.
6. **Tort Claims Act: Liability.** Where policy judgment exists, there also exists discretion exempted from liability under the State Tort Claims Act.
7. ____: ____. The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions.
8. **Tort Claims Act: Negligence: Liability.** The State is liable for negligence of its employees at the operational level, where there is no room for policy judgment.
9. **Tort Claims Act: Liability.** It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.
10. ____: ____. In cases where the facts are undisputed, the application of the discretionary function exemption of the State Tort Claims Act presents a question of law.
11. ____: ____. In applying the discretionary function exemption, courts must look to whether the judgment being exercised is of the kind that the discretionary function exception was designed to shield.
12. **Tort Claims Act: Liability: Public Policy.** The discretionary function exception was designed to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy by tort actions; the exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.
13. **Tort Claims Act: Liability: Evidence.** When there is conflicting evidence surrounding whether discretionary function applies, there cannot be a determination as a matter of law.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded.

Ronald J. Palagi and Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Jennifer M. Tomka for appellee Nebraska Department of Correctional Services.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Cara Weichman, special administrator of the estate of Robert E. Weichman, appeals from the decision of the district court granting summary judgment in favor of the Nebraska Department of Correctional Services (DCS). The district court found that DCS had not waived its sovereign immunity, because the discretionary function or duty exception to such waiver provided by Neb. Rev. Stat. § 81-8,219 (Reissue 2003) was involved in the claim against DCS. We find that the district court erroneously granted summary judgment in favor of DCS. Therefore, we reverse, and remand.

FACTUAL BACKGROUND

On June 6, 2002, while incarcerated at Community Corrections Center-Lincoln (CCCL), Robert was part of an inmate work detail for Lower Platte South Natural Resources District (NRD). NRD and DCS entered into a contract beginning in 1999 which provided that DCS would "supply to [NRD] certain inmates to perform useful labor on behalf of [NRD]" and that in consideration for the labor, NRD agreed to make monthly payments to DCS. As determined by the unit manager at CCCL, Robert was initially ranked as a "skilled worker," and then was promoted to "advanced skilled worker" on the inmate work detail.

On June 6, 2002, while working for NRD, Robert was assigned to drive an all-terrain vehicle (ATV) with a tank and weed sprayer attached and to spray weeds along a horse trail with another inmate. NRD owned the ATV and the attached tank and sprayer, as well as a safety video that the inmates watched prior to operating the ATV. Robert had operated the ATV on prior occasions for NRD and had stated to NRD personnel that the ATV was light and "squirrelly" in the front end. During the prior occasions, Robert had driven the ATV slowly through washouts and ravines because of the lightness in the front end. Prior to his incarceration, Robert had driven an ATV.

Cpl. Allen Langdale, a "Corporal/Detail Crew Supervisor" at CCCL and a DCS employee, was onsite on June 6, 2002. Corporal Langdale was approximately 200 feet away from Robert when Robert attempted to drive the ATV through an indented or washed-out area. Robert had driven the ATV through the same area weeks earlier without incident. As Robert started up the other side of the indent, the ATV rolled over backward and pinned Robert. As a result of the accident, Robert broke his neck and was paralyzed. While Robert remained incarcerated, the State paid his medical expenses. Robert was paroled in August 2002. Robert died on June 24, 2004.

PROCEDURAL BACKGROUND

On March 14, 2003, Robert and his wife, Cara, filed a complaint in the district court for Lancaster County against NRD and DCS. In the complaint, Robert claimed that at the time he was injured, he was under the custody and supervision of DCS, and that as a result of the negligence of NRD and DCS in failing to train, instruct, and supervise him in the use of the ATV, he sustained personal injuries. Robert attached to the complaint both the letter he sent to NRD in September 2002 presenting his claim and his subsequent withdrawal of the claim after 6 months. Robert also attached to the complaint both his claim to the State in September 2002 alleging a state tort claim and a letter from the State denying such claim. On April 17, 2003, NRD filed its answer. Then, on June 10, DCS filed its answer, asserting as an affirmative defense that DCS "fall[s] within the discretionary function exception to the State Tort Claims Act pursuant to . . . § 81-8,219(1)."

After Robert died on June 24, 2004, Cara filed a motion for revivor on August 26, and the district court granted the revivor. From this point forward, we will refer to Cara, the plaintiff-appellant, as "Weichman."

On October 27, 2004, DCS filed a motion for summary judgment alleging that DCS was immune from suit and that there were no issues as to any material fact. The summary judgment hearing was held on March 9, 2005. Weichman's counsel was not present at the hearing. The district court received DCS' 14 exhibits into evidence, including Robert's deposition, dated

December 3, 2003; Corporal Langdale's affidavit; and DCS and NRD's contract in effect at the time of the accident.

On May 16, 2005, the district court filed its order granting DCS' summary judgment motion. The district court found that the State had not waived its sovereign immunity and that the case was barred by the discretionary function exception from waiver of sovereign immunity found in § 81-8,219(1). The district court found that there was "no specific statute, rule or regulation that specifically mandates the nature of supervision of inmates assigned to work detail" and that thus, the specifics of such inmate supervision are discretionary. The district court concluded that the "State made [a] policy decision to leave the training and supervision of the inmates' work to their respective employers, in this case, the NRD."

On June 10, 2005, Weichman filed a motion to vacate the order granting summary judgment in favor of the State or, in the alternative, for an entry of a final order. On August 31, the district court overruled Weichman's motion to vacate and directed that a final order pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2006) be entered as to DCS. Weichman now appeals.

We note that after Weichman filed the motion to vacate or, in the alternative, for an entry of a final order, the district court held a hearing on August 18, 2005, on NRD's motion for summary judgment, which motion the court thereafter overruled. Thus, but for the order of August 31, the order granting summary judgment in favor of DCS would be interlocutory, and not subject to appeal. The transcript from the August 18 hearing, the exhibits received, and the district court's decision on NRD's motion are in our record but cannot be properly considered by this court in the present appeal, because such were not part of the record created during DCS' summary judgment hearing. Specifically, we have not considered exhibits 16 through 19, which, while part of our record, were not introduced into evidence in the present summary judgment proceeding involving DCS.

ASSIGNMENTS OF ERROR

Weichman asserts, restated and consolidated, that the district court erred in determining that the failures of the correctional

officers were a discretionary function and, thus, erred as a matter of law in finding that DCS was immune from suit.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] A question of law raised in the course of consideration of a motion for summary judgment, as with any question of law, must be decided by the appellate court without reference to the decision of the trial court. See *Essen v. Gilmore*, 259 Neb. 55, 607 N.W.2d 829 (2000).

ANALYSIS

[4-10] The broad question in this appeal is whether the discretionary function exception to the waiver of sovereign immunity found in the State Tort Claims Act prevents the imposition of liability on DCS so as to mandate judgment in favor of DCS as a matter of law. The district court found that the "method and manner in which inmates on work crews are supervised is the type of discretion the Nebraska Legislature intended to shield from liability." The discretionary function or duty exception found in § 81-8,219(1) provides that the State Tort Claims Act shall not apply to

> [a]ny claim based upon an act or omission of an employee of the state . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.

"'Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State

Tort Claims Act.'" *Jasa v. Douglas County*, 244 Neb. 944, 955, 510 N.W.2d 281, 288 (1994). That which is protected under the State Tort Claims Act, § 81-8,219(1), is the discretion of a governmental executive or administrator to act according to his or her judgment of the best course to be taken. *D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997). "Such discretion includes more than the initiation of programs and activities. Discretion includes determinations or judgments made in establishing plans, specifications, or schedules of operations." *Id.* at 89, 560 N.W.2d at 466. Where policy judgment exists, there also exists discretion exempted from liability under the State Tort Claims Act. *Jasa v. Douglas County, supra.* However, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions. *D.K. Buskirk & Sons v. State, supra.* That is, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment. *Id.* "'"[I]t is the nature of the conduct, rather than the status of the actor[,] that governs whether the discretionary function exception applies in a given case."'" *Security Inv. Co. v. State*, 231 Neb. 536, 544, 437 N.W.2d 439, 445 (1989), quoting *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). In cases where the facts are undisputed, the application of the discretionary function exemption of the State Tort Claims Act presents a question of law. *D.K. Buskirk & Sons v. State, supra.*

In the instant case, even though Weichman's counsel failed to appear at the summary judgment hearing and to contradict or contest DCS' evidence, there are a number of unresolved facts—remembering that on summary judgment, we view the evidence most favorably to Weichman. We begin by noting that the record provides the following uncontested evidence: NRD was the contracting agency hiring the inmates on June 6, 2002, and NRD owned the ATV, the attached tank and sprayer, and the video concerning ATV use and operation. Despite this uncontested evidence, there appears to be a factual dispute about Corporal Langdale's supervisory responsibilities and general duties while the inmates are working for NRD.

In Robert's deposition, he testified that on the day of the accident, there was an NRD employee present who was the supervisor, who supervised all of the inmates on the work detail, and who set up the jobs for that day—but Robert does not say that this person was present during the day or at the time of the accident. Robert also testified that the NRD employee "trusted us enough to go out — [another inmate] and I to go on our own to [spray weeds on] the horse trails." However, at the time of Robert's accident, Corporal Langdale, the only supervising DCS employee at the worksite, said that he was approximately 200 feet away from Robert, supervising three other inmates spraying weeds on a bike trial. Corporal Langdale's "Incident Report" makes no mention of any NRD employee being present when Robert was injured. While Corporal Langdale stated in his affidavit that his responsibilities "are limited to security and do not include supervision of the inmates' work while on the detail crew," his affidavit is clearly contradictory, because he later states the following:

> [P]ersonal instruction on how to use the ATV is given by employees of the NRD and the NRD employees are the persons who ensure that the inmates are comfortable and proficient in operating the ATV before the inmate is allowed to operate it. Inmates are instructed through the safety video as well as personal instruction by NRD employees that no more than one person should ride on the ATV at any time. When an NRD employee is unavailable or requests my assistance, I will help with the above described tasks as needed.

The totality of the evidence, viewed most favorably to Weichman, allows the inference that Corporal Langdale, a DCS employee, was the sole supervisor of the inmates on this work detail, including Robert, and that Corporal Langdale was supervising three other inmate workers spraying weeds on the bike trail at the time of Robert's injury and was approximately 200 feet away from Robert. This evidence suggests that contrary to a statement in Corporal Langdale's affidavit, his responsibility on June 6, 2002, was not limited to "security," and creates an issue of material fact.

Langdale, a corporal correctional officer, admitted in his affidavit that he helps with the tasks described therein—i.e., showing a safety video owned by NRD, giving personal instruction on using the ATV, and ensuring that the inmates are comfortable and proficient in operating said ATV—when an NRD employee "is unavailable or requests [his] assistance." This evidence also creates an issue of material fact as to whether Corporal Langdale's activities were solely "security" and whether he was working at an operational level at the time of the injury.

[11,12] This case seems to provide a cogent example of the difference between operational (ministerial) and policy (discretionary) matters. In this regard, we are particularly mindful of the cautionary holding of *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 417, 591 N.W.2d 532, 540 (1999), that in applying the discretionary function exemption, courts must look to whether the judgment being exercised "'"'is of the kind that the discretionary function exception was designed to shield.'"'" Quoting *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). In *Security Inv. Co. v. State*, 231 Neb. 536, 545, 437 N.W.2d 439, 445 (1989), the Nebraska Supreme Court explained that the discretionary function exception was designed to "'"prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy"'" by tort actions and that the "'exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.'"

Deciding whether to have incarcerated inmates do work for NRD is a policy decision of the kind that the Legislature does not intend that the courts be involved with through tort litigation. However, once the policy is decided to have inmates do such work, there are the basic "nuts and bolts" ministerial matters such as who shall provide supervision and training, as well as the nature and extent of such. DCS' decision to allow inmates to participate in work details for NRD was clearly a discretionary function. However, if Corporal Langdale becomes involved with the training, instructing, and supervising of the inmates who use the ATV while working for NRD, and there is some evidence of such, when the record is viewed most favorably to Weichman, then whether the discretionary function or

duty exception from liability applies is a material issue of fact for trial.

[13] Viewing the evidence in a light most favorable to Weichman and giving Weichman the benefit of all reasonable inferences deducible from the evidence, it cannot be said as a matter of law that all of Corporal Langdale's activities on the day of the injury rose to the level of discretionary policy decisions. The record does not establish as a matter of law that the rather elementary decisions being made by Corporal Langdale on June 6, 2002, were social, economic, or political policy decisions which the Legislature intended to be shielded from tort liability by the discretionary function or duty exception. Moreover, there are issues of fact as to what decisions Corporal Langdale made on June 6, because while he says his responsibilities "are limited to security" and do not include supervision of the inmates' work, the record reveals, at least inferentially, that he was the only person present to supervise the inmates and that on occasions "[w]hen an NRD employee is unavailable or requests [his] assistance," he will become involved in instruction concerning use of the ATV. Whether he did so on the day of the injury is uncertain—but a factual question is presented by this inconsistency. See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004) (remanding case because conflicting evidence surrounding whether discretionary function applied prevented determination of such as matter of law). Therefore, the district court erred in granting summary judgment in favor of DCS on the basis of the discretionary function exemption under the State Tort Claims Act.

REVERSED AND REMANDED.

JOHNATHAN LESSLEY, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

739 N.W.2d 470

Filed September 18, 2007. No. A-05-1155.

1. **Administrative Law: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act.

2. ____: ____: ____. A 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.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. ____: ____. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. **Constitutional Law: Administrative Law: Prisoners: Disciplinary Proceedings.** Prison disciplinary proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant does not apply; instead, there must be a mutual accommodation between the institutional needs and objectives and the provisions of the Constitution.
7. **Due Process: Statutes: Administrative Law.** Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations.
8. **Prisoners: Disciplinary Proceedings: Notice: Time.** At least a brief period of time after notice of a disciplinary hearing, no less than 24 hours, should be allowed to an inmate to prepare for the hearing.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Linda L. Willard for appellant.

No appearance for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

The Nebraska Department of Correctional Services (DCS) appeals from an order of the district court for Johnson County, Nebraska, reversing the decision of the DCS Appeals Board. DCS challenges the district court's holding that DCS denied Johnathan Lessley due process when it denied Lessley's request for a continuance in a disciplinary proceeding. We find that the district court erred in finding a denial of due process, and we

reverse, and remand with directions to affirm the order of the appeals board.

II. BACKGROUND

On March 25, 2005, a misconduct report was written alleging that Lessley had committed several rule infractions. On March 31, Lessley was informed of the alleged rule infractions and the basis for the charges. Lessley was also informed that a disciplinary hearing would be held on April 4. Lessley requested that a Courtney Starks represent him at the hearing and requested that a number of witnesses be at the hearing. On March 31, Lessley wrote two inmate requests; in one, he requested two additional witnesses, and in the other, he requested a 2-week continuance "to be able to attend [the] law library & have time to consult with legal aide Ernie Harper."

On April 4, 2005, a disciplinary hearing was conducted. The chairperson of the disciplinary committee denied Lessley's request for a continuance and held that Lessley had had ample time to prepare a defense.

The evidence presented at the disciplinary hearing indicated that Lessley was accused of using threatening language concerning another inmate. Reports were presented detailing the observations of corrections officers concerning the alleged incident. Lessley denied making the alleged statement and argued that he had had inadequate time to prepare and that he does not "get to go to the law library [over the] weekends." Lessley was found guilty of making the threatening statement, and discipline was imposed.

Lessley appealed the disciplinary committee's ruling to the DCS Appeals Board. The appeals board ruled that due process requires that an inmate be provided at least 24 hours' notice prior to a disciplinary hearing, that Lessley received several days' notice, and that there was no harm evident concerning the availability of witnesses or Lessley's representation at the disciplinary hearing. The appeals board noted that Lessley did not attempt to present any documentary evidence at the disciplinary hearing. The appeals board affirmed the decision of the disciplinary committee.

On May 24, 2005, Lessley filed a petition in the district court seeking review of the appeals board's ruling. Lessley alleged that his due process and equal protection rights were violated and that he was not provided sufficient time to prepare a defense.

On August 29, 2005, the district court entered an order reversing the decision of the appeals board as upheld by the disciplinary committee. The district court held that the Nebraska Administrative Code allows for the granting of a continuance for a reasonable period of time "for good cause shown." The court held that Lessley was provided "[o]nly" 4 days to prepare a defense. The court held that Lessley's request for a continuance was not a delay tactic and held that the case was "not complicated." The court held that the refusal of Lessley's request for a continuance was a denial of due process. The court reversed the disciplinary decision and ordered it expunged from Lessley's record. This appeal followed.

III. ASSIGNMENTS OF ERROR

DCS' only assignment of error is that the district court erred in finding that the denial of Lessley's request for a continuance was a due process violation.

IV. ANALYSIS

DCS argues that the district court erred in finding that the denial of Lessley's request for a continuance was a due process violation. DCS argues that minimum requirements of due process were satisfied, that Lessley had adequate time to prepare, and that Lessley made no showing that additional time to prepare was needed. We agree.

[1-5] An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act (APA). See Neb. Rev. Stat. § 84-918 (Reissue 1999). A final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Louis v. Nebraska Dept. of Corr. Servs.*, 12 Neb. App. 944, 687 N.W.2d 438 (2004). When reviewing an order of a district court under the APA for errors appearing on the record, the

inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[6,7] Prison disciplinary proceedings are not treated as criminal prosecutions, and therefore, the full panoply of rights due a criminal defendant does not apply; instead, there must be a mutual accommodation between the institutional needs and objectives and the provisions of the Constitution. *Louis, supra.* "'Disciplinary hearings are sui generis, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations are those imposed by due process, a statute, or administrative regulations.'" *Id.* at 950, 687 N.W.2d at 443, quoting *Claypool v. Nebraska Dept. of Corr. Servs.*, 12 Neb. App. 87, 667 N.W.2d 267 (2003).

[8] In *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the U.S. Supreme Court held that at least a brief period of time after notice of a disciplinary hearing, no less than 24 hours, should be allowed to an inmate to prepare for the hearing. Similarly, 68 Neb. Admin. Code, ch. 6, § 006.05 (2000), provides that "[n]o less than twenty-four hours before the [disciplinary] hearing is scheduled to be held, each inmate charged with an offense shall be given written notice of the charge or charges."

In this case, the record indicates that the alleged incident occurred on March 25, 2005. On March 31, Lessley was provided notice that the disciplinary hearing would be held on April 4. On the same date, Lessley filed a request for a 2-week continuance to meet with "legal aide Ernie Harper," who the record indicates did represent Lessley at the hearing on April 4.

At the disciplinary hearing, Lessley denied making the statement which was the basis for the charge. Lessley presented no evidence, in the form of sworn testimony or otherwise, to

support his argument that he was not allowed to access the law library between March 31 and April 4, 2005. Lessley made no indication what good cause existed for a 2-week continuance or what legal issue might have been raised or researched.

As the district court noted, this was not a complicated case. Lessley was alleged to have made a threatening statement, and he denied making the statement. There does not appear to have been any legal question involved in this case. Lessley was provided with approximately 4 days to prepare a defense, received requested representation at the hearing, and made no attempt to introduce any evidence or make any legal challenge to the charge. The district court erred in determining that Lessley was deprived of due process when his requested continuance was denied.

V. CONCLUSION

For the foregoing reasons, we reverse the decision of the district court and remand the case with directions to affirm the order of the appeals board.

REVERSED AND REMANDED WITH DIRECTIONS.

RICKIE F. BEVARD AND KEITH BEVARD, PERSONAL REPRESENTATIVES OF THE ESTATE OF DANIEL BEVARD, JR., DECEASED, APPELLANTS, V. TONY S. KELLY, DOING BUSINESS AS KELLY CONSTRUCTION, REAL NAME UNKNOWN, ET AL., APPELLEES, AND CONTINENTAL WESTERN GROUP, FORMERLY KNOWN AS CONTINENTAL WESTERN INSURANCE COMPANY, INTERVENOR-APPELLEE.

739 N.W.2d 243

Filed September 25, 2007. No. A-05-1126.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
2. **Dismissal and Nonsuit.** When a case is voluntarily dismissed by a party, the controversy between the parties upon which a court may act ends.
3. **Judgments.** A district court has no authority to correct clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission by an order nunc pro tunc when the mistake or error is a party's own.

4. ____. A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Appeal dismissed.

William A. Wieland and Allen L. Fugate for appellants.

Kevin L. Griess and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees Neosho Construction Company and Union Pacific Railroad Company.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

In this case, Rickie F. Bevard and Keith Bevard (the Bevards), personal representatives of the estate of Daniel Bevard, Jr. (Daniel), appeal from orders of the district court for Lincoln County granting summary judgment in favor of Neosho Construction Company, Incorporated (Neosho); Union Pacific Railroad Company (UP); and Ritterbush Construction, Inc. (Ritterbush), and dismissing them from the action. For the reasons set forth below, we dismiss this appeal for lack of jurisdiction.

BACKGROUND

In June 2003, the Bevards filed suit against seven defendants for injuries Daniel sustained in a motor vehicle accident: Tony S. Kelly, doing business as Kelly Construction (Kelly); Scott Fry; Ritterbush; Mann Hay, Co., Inc. (Mann Hay); Wausau Underwriters Insurance Company (Wausau); Neosho; and UP. Subsequently, an eighth defendant, Continental Western Group (Continental), was granted leave to intervene.

The record shows that after the Bevards filed suit, the following occurred: In September 2003, the allegations against Mann Hay and Wausau were stricken from the Bevards' petition, and a court order reflects this. In April 2005, the trial court granted Ritterbush's motion for summary judgment and

dismissed Ritterbush from the action. On June 28, 2005, the trial court granted a summary judgment motion filed by Neosho and UP and dismissed those two defendants.

On September 19, 2005, the trial court indicated that the upcoming trial as to Kelly, Fry, and Continental was canceled because a settlement had been reached. On the same date, the Bevards filed a dismissal which states, "The Plaintiff dismisses the above captioned proceeding without prejudice." Also on that date, the Bevards appealed from the court's orders granting summary judgment in favor of Neosho, UP, and Ritterbush.

On September 26, 2005, the Bevards filed a motion requesting that the court enter an order nunc pro tunc stating the proceedings to be dismissed were those pending against the defendants Kelly, Fry, and Continental and that the court enter an order of dismissal accordingly. On the same date, the court entered an order nunc pro tunc stating that it was dismissing the proceedings against Kelly, Fry, and Continental without prejudice, as requested by the Bevards. The Bevards appeal.

ASSIGNMENTS OF ERROR

On appeal, the Bevards contend that the trial court erred in (1) granting Neosho and UP's motion for summary judgment, (2) finding that Daniel assumed the risk of Neosho's and UP's negligence, and (3) overruling the Bevards' motion for new trial.

ANALYSIS

[1] Neosho and UP argue that this court lacks jurisdiction to hear this appeal, because the dismissal filed by the Bevards on September 19, 2005, was broad enough to operate as a dismissal of the entire action against all defendants. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

Specifically, the Bevards' dismissal states, "The Plaintiff dismisses the above captioned proceeding without prejudice." The caption lists all eight of the above-named defendants. Neosho and UP argue that because the action was dismissed against all

defendants, there was no longer a pending case or controversy from which the Bevards could appeal.

[2] In *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999), the Nebraska Supreme Court held that the district court had no jurisdiction over the State's appeal from county court filed after the State voluntarily dismissed the county court proceedings. In *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004), the Nebraska Supreme Court held that a trial court acted beyond its authority when it granted a plaintiff's motion to dismiss her action without prejudice and allowed the plaintiff to reserve her right to appeal from a partial summary judgment in the defendant's favor. In short, when a case is voluntarily dismissed by a party, the controversy between the parties upon which a court may act ends. *Id.*

The Bevards argue that even if their dismissal was broad enough to dismiss all eight defendants, the nunc pro tunc order entered by the court was effective to modify the dismissal so as to specify that the Bevards were dismissing only Kelly, Fry, and Continental. As stated above, after filing the dismissal, the Bevards asked for a nunc pro tunc order stating that the dismissal acted only against Kelly, Fry, and Continental. The trial court then entered a nunc pro tunc order to that effect.

Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2006), which section is the result of legislative amendments entered in 2000, states, "Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time . . . ." The Bevards acknowledge that the error was not that of the court or its clerk, but, rather, their own error in failing to specify that they wished to dismiss only certain defendants. The Bevards contend that their error constitutes an "oversight or omission" and fits squarely within the language of § 25-2001(3). We disagree.

In *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995), the Nebraska Supreme Court addressed a similar argument under § 25-2001(3) (Reissue 1989), which allowed the district court to vacate or modify its own judgments or orders after the term in which those judgments or orders were made "for mistake, neglect, or omission of the clerk, or irregularity in

obtaining a judgment or order." Accord § 25-2001(4)(a) (Cum. Supp. 2006).

In *Roemer v. Maly*, a patient whose medical malpractice action had been dismissed for lack of prosecution brought a motion seeking the reinstatement of her lawsuit under § 25-2001(3) (Reissue 1989). The patient's suit was dismissed after the court clerk sent the patient an order to show cause as to why her case should not be dismissed and the patient failed to respond. The patient argued that the trial court ought to modify its dismissal of her action, because the clerk had made a mistake in issuing the show cause order. The district court denied the patient's motion, and the patient appealed.

The Nebraska Supreme Court held that the patient was not entitled to reinstatement of her action, stating that the patient's argument "ignores our precedent on the issue of 'mistake' versus 'fault.'" 248 Neb. at 744, 539 N.W.2d at 44. The Supreme Court noted that the dismissal of the patient's action, resulting from the failure of the patient to receive notice of the show cause hearing, was caused by an error on the part of the patient rather than on the part of the court clerk.

The Nebraska Supreme Court concluded that the district court had no authority to set aside a judgment after term when any mistake, inadvertence, or neglect was a party's own. Rather, the court held that the purpose of § 25-2001(3), allowing vacation or modification of a judgment after term, was to address mishaps beyond a party's control.

[3] Similarly, in the instant case, the Bevards make the argument that § 25-2001(3) (Cum. Supp. 2006), which now allows for the correction of "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission" by an order nunc pro tunc, should apply regardless of whether the mistake or error is that of the court clerk or that of a party or the party's attorney. As in *Roemer v. Maly*, we decline to allow an order nunc pro tunc to be used when the mistake or error at issue is a party's own. We conclude that "clerical mistakes" and "errors therein arising from oversight or omission" refer only to mistakes or errors made by the court clerk and not those made by a party or the party's attorney.

[4] Furthermore, according to case law, a nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended. *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d. 190 (2004). In essence, the Bevards' dismissal could be construed as a judgment rendered, given that a voluntary dismissal by a party ends the litigation and the dismissal need not be entered by the court. See *Werner v. Werner*, 186 Neb. 558, 184 N.W.2d 646 (1971).

In the Bevards' dismissal, they dismissed all of the defendants named in their lawsuit. In the court's nunc pro tunc order, the court revised the Bevards' dismissal by stating that the Bevards intended to dismiss only Kelly, Fry, and Continental and entered a dismissal of those three parties. Thus, the court's nunc pro tunc order rendered a judgment different from the judgment set out in the Bevards' dismissal. For this additional reason, the nunc pro tunc order entered by the trial court was not proper.

After reviewing the record, we conclude that the Bevards' order of dismissal acted to dismiss all defendants and that the nunc pro tunc order entered by the court was of no effect because it was not a proper nunc pro tunc order. Because the Bevards dismissed their entire action, we have no jurisdiction over this appeal, given that there is no remaining case or controversy.

CONCLUSION

Because the Bevards voluntarily dismissed their entire action and the court's nunc pro tunc order was of no effect, there is no case or controversy before us, and therefore, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. RAUL MOLINA-NAVARRETE, APPELLANT.

739 N.W.2d 771

Filed September 25, 2007. No. A-06-1362.

1. **Pleas: Appeal and Error.** A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
4. ____. With respect to withdrawal of a plea of guilty or nolo contendere after sentencing, a withdrawal is proper only where it is necessary to correct a manifest injustice.
5. **Pleas: Proof.** In an action to withdraw a plea of guilty or nolo contendere, the burden is on the defendant to establish the manifest injustice by clear and convincing evidence.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Michael D. Nelson and Cathy R. Saathoff, of Nelson Law, L.L.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Following a guilty plea, Raul Molina-Navarrete was convicted in the district court for Dawson County, Nebraska, of attempted possession of a controlled substance and was sentenced to a term of imprisonment with full credit for time served. Molina-Navarrete thereafter filed a motion to vacate his conviction, asserting that the district court failed to properly advise him of the potential immigration consequences of his conviction as required by Neb. Rev. Stat. § 29-1819.02(2)

(Cum. Supp. 2006). Molina-Navarrete appeals from the denial of his motion to vacate. Finding no abuse of discretion in the district court's denial of the motion to vacate, we affirm.

BACKGROUND

On April 14, 2006, pursuant to a plea agreement, Molina-Navarrete pled guilty to an amended information charging him with attempted possession of a controlled substance, methamphetamine, a Class I misdemeanor. At the plea hearing, the district court advised Molina-Navarrete of his constitutional rights, the possible penalties, and the effect of his plea. The court also advised Molina-Navarrete as follows:

> In addition, if you are not a United States citizen, any conviction of this offense may have the consequence of causing you to be removed from the United States; that is, deported or denied naturalization of the laws of the United States. Do you understand all of the penalties?

Molina-Navarrete, via his interpreter, responded "[y]es" to the above question. The court then asked Molina-Navarrete whether, after listening to the penalties he faced, he still wanted to plead guilty, to which Molina-Navarrete again responded "[y]es."

After further inquiry by the court into the voluntariness of the plea and a factual basis was given, the district court found beyond a reasonable doubt that a factual basis existed for the plea; that Molina-Navarrete understood his constitutional and statutory rights, the nature of the charges, the possible penalties, and the effect of his plea; and that he made his plea freely, voluntarily, knowingly, and intelligently.

Molina-Navarrete thereafter waived presentence investigation and asked to be sentenced immediately. Molina-Navarrete's attorney made the following statement during the sentencing phase:

> All the information we've been getting from immigration attorneys says that even though this was reduced to a misdemeanor, it's going to make no difference to immigration. He's going to be treated the same as a felon and almost certainly going to be taken into [Immigration and Customs Enforcement] custody and deported hereafter.

The district court sentenced Molina-Navarrete to 260 days in jail, with credit for all time served, which was 263 days. The

district court then advised Molina-Navarrete that "[i]f you are held in jail after today, it is because the Immigration Customs Enforcement office is holding you there."

On July 17, 2006, Molina-Navarrete filed a motion to vacate judgment, seeking to withdraw his guilty plea. Molina-Navarrete alleged that as a direct result of the guilty plea, he became ineligible for admission to the United States, pursuant to the Immigration and Nationality Act. See 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2000). Molina-Navarrete further alleged that he was not advised at any stage of the proceedings by the court, the State, or his counsel of the immigration consequences of his guilty plea. Molina-Navarrete alleged that as a result, he was unable to enter a knowing, voluntary, and intelligent plea. Pursuant to § 29-1819.02(2), Molina-Navarrete sought vacation of the judgment of conviction and permission to withdraw his guilty plea.

At the hearing on Molina-Navarrete's motion, held on October 27, 2006, the court received as an exhibit the transcript from the plea and sentencing hearing on April 14, 2006. Molina-Navarrete thereafter testified that if his conviction is not set aside, he will be deported. He also testified that he relied upon the court's advisement prior to entering his guilty plea. Molina-Navarrete's counsel then asked the court to take judicial notice of titles 8 and 21 of the U.S. Code, "[i]mmigration [s]tatutes dealing with removal and deportation" and "controlled substance offenses," in order to determine whether there are immigration consequences as a result of the conviction in this case. The court agreed to take judicial notice of the statutes and took the matter under advisement.

On November 15, 2006, the district court entered an order denying the motion to vacate judgment. The district court rejected Molina-Navarrete's argument that because the court's advisement did not match the exact words of § 29-1819.02(1), he should be allowed to withdraw his plea. The district court found that under the totality of the circumstances, Molina-Navarrete was aware of the possible consequence of deportation or denial of naturalization under the laws of the United States at the time he entered his guilty plea and that the warning required

by § 29-1819.02(1) was given. Molina-Navarrete timely appeals from this order.

ASSIGNMENT OF ERROR

Molina-Navarrete asserts that the district court erred by finding that the advisement set forth in § 29-1819.02 is not required to be given verbatim.

STANDARD OF REVIEW

[1] A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion. See, *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005).

ANALYSIS

Molina-Navarrete argues that the district court abused its discretion when it denied his motion to vacate judgment and allow for withdrawal of his guilty plea by finding that he was properly advised of the possible immigration consequences.

[3] We must first discuss the question of the burden required of the defendant in establishing entitlement to a withdrawal of a guilty plea *after* sentencing. The vast majority of cases address withdrawal of a plea *prior* to sentencing and hold that after the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance upon the plea. See, *State v. Schneider, supra*; *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001); *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000); *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

[4,5] However, with respect to withdrawal of a plea of guilty or nolo contendere *after* sentencing, the Nebraska Supreme Court has recognized that withdrawal is proper only where it is

necessary to correct a manifest injustice. See, *State v. Minshall, supra*; *State v. Holtan, supra*. The burden is on the defendant to establish the manifest injustice, justifying such withdrawal by clear and convincing evidence. *State v. Holtan, supra*.

Because Molina-Navarrete filed his motion to withdraw his guilty plea after his sentencing, we review this appeal to determine whether he met his burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice.

Section 29-1819.02 provides in part:

> (1) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.
>
> (2) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

Molina-Navarrete argues that a plain reading of the statute, together with the fact that the advisement language is contained in a blocked paragraph with text written in capitalization, makes it clear that the Legislature intended that the verbatim language must be read to a defendant prior to a guilty plea. Because the

district court's advisement did not exactly match the statutory language, Molina-Navarrete argues that his judgment of conviction must be vacated and that he should be allowed to withdraw his plea of guilty.

This statute has not been directly addressed by appellate courts in Nebraska. Molina-Navarrete argues that the case of *State v. Douangmala*, 253 Wis. 2d 173, 646 N.W.2d 1 (2002), is instructive. Wisconsin's advisement statute is essentially the same as that of Nebraska. In *Douangmala*, the defendant was not advised by the court of the immigration consequences of his conviction, although there was evidence that he knew the consequences. The Wisconsin Supreme Court held that the defendant had a right to withdraw his guilty plea, regardless of whether he was aware of the deportation consequences at the time of the plea. The court noted that the statute was a clear directive and that it "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter.'" *Id.* at 182, 646 N.W.2d at 5. The court went on to hold that because "the [lower] court did not advise the defendant in any manner regarding the deportation consequences of entering a plea of no contest," the defendant must be permitted to withdraw his plea. *Id.* at 192, 646 N.W.2d at 10.

We find that *Douangmala* is clearly distinguishable from the case at hand, in that Molina-Navarrete was given the statutory advisement, albeit with a few minor wording changes. Specifically, the only differences between the district court's advisement and the exact statutory language were that the district court did not use the words "you are hereby advised," used the words "causing you to be removed" instead of "removal from," used the words "deported or denied naturalization" instead of "denial of naturalization," and failed to include "pursuant to" prior to "laws of the United States." We conclude that these minor language differences are inconsequential and that Molina-Navarrete was properly advised of the immigration consequences of his plea as required by § 29-1819.02.

It is also clear from a review of the plea and sentencing hearing that Molina-Navarrete did not bring himself within

the manifest injustice standard. The only reason he advances for entitlement to a withdrawal of his plea is that the district court did not read the statutory advisement verbatim. Molina-Navarrete does not assert that the plea was involuntary or was entered without knowledge of the charge or the potential sentences and consequences. In fact, the record shows that in addition to receiving and acknowledging his understanding of the court's statutory advisement, Molina-Navarrete was aware of the immigration consequences of the plea. We therefore conclude that there was no evidence of manifest injustice entitling Molina-Navarrete to withdraw his plea, which was made knowingly, intelligently, and voluntarily. The district court did not abuse its discretion in overruling the motion to vacate.

CONCLUSION

Finding no abuse of discretion in the district court's denial of the motion to vacate Molina-Navarrete's conviction pursuant to § 29-1819.02, we affirm.

AFFIRMED.

EAGLE RUN SQUARE II, L.L.C., A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE, V. LAMAR'S DONUTS INTERNATIONAL, INC., A NEBRASKA CORPORATION, APPELLEE, AND JACK L. IRWIN, APPELLANT.

740 N.W.2d 43

Filed October 2, 2007. No. A-05-1038.

1. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Contracts.** A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
4. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.

6. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.
8. **Contracts.** The meaning of an unambiguous contract is a question of law.
9. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
10. **Contracts.** When the terms of the 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.
11. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a type of contract by which a guarantor promises to make payment if the principal debtor defaults.
12. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
13. ____: ____. Nebraska adheres to the rule of strict construction of guaranty contracts.
14. **Guaranty: Liability.** When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
15. **Contracts: Guaranty: Liability.** The liability of a guarantor is not to be enlarged beyond the strict terms of the contract.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded with directions.

Jerrold L. Strasheim, of Baird Holm, L.L.P., for appellant.

James E. Lang and Kathleen M. Foster, of Laughlin, Peterson & Lang, for appellee Eagle Run Square II, L.L.C.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Eagle Run Square II, L.L.C. (Eagle Run), a Nebraska limited liability company, brought an action in the district court for Douglas County to recover on a personal guaranty signed by Jack L. Irwin. The trial court found that the guaranty was ambiguous and allowed the jury to hear extrinsic evidence to

determine the meaning of the guaranty. The jury subsequently determined that Irwin was liable to Eagle Run on the guaranty in the amount of $95,032.78. On appeal, Irwin contends that among other errors, the trial court erred in finding that the guaranty was ambiguous. For the reasons stated below, we reverse, and remand with directions.

BACKGROUND

On November 16, 1999, Eagle Run and Lamar's Donuts International, Inc. (Lamar's), entered into a written lease whereby Eagle Run leased property in a shopping center near 129th Street and Maple Road in Omaha, Nebraska, to Lamar's for a retail doughnut store. The lease required Lamar's to make monthly rental payments as well as payments for other charges. The lease had a guaranty agreement attached to it.

The guaranty at issue was executed by Irwin as guarantor on October 11, 1999. Just below the title of the one-page document, before the text begins, the document reads, "TO: EAGLE RUN SQUARE II L.L.C." and, on the same line, "TENANT: LAMAR'S DONUTS INTERNATIONAL, INC." The first paragraph of the typed text reads as follows:

> For the purpose of inducing *M & M Property Partners, (herein called "Owner")* to enter into a Lease, dated September ____, 1999, with the tenant named above (herein called "Tenant"), the undersigned (herein called "Guarantor" whether one or more), jointly and severally, unconditionally guaranty the prompt and full payment of all rent to be paid by the Tenant, Paragraph # 3, and the performance by the Tenant of all the terms, conditions, covenants and agreements of the Lease irrespective of any invalidity or unenforceability of any provision thereof or the security therefore [sic].

(Emphasis supplied.) On the executed copy, "September" is crossed out and "Oct" is handwritten in above it, along with "11th" in the space for the day. The guaranty sets forth other rights and obligations of the property owner and lease guarantor, and the final paragraph states that the guaranty "shall inure to the benefit of Owner." The guarantor is not named in the

typed text of the document. At the bottom of the document, October 11, 1999, is filled in as the date the guaranty was executed, and it is signed by Irwin.

On March 26, 2002, Eagle Run initiated a lawsuit against Lamar's and Irwin. The petition alleged that Lamar's had failed and refused to pay rental and other charges due under the November 16, 1999, lease for the months of November 2000 through March 2002. The petition further alleged that Irwin executed a lease guaranty, attached to the lease, in which Irwin unconditionally guaranteed the payment of all rental and other charges due by Lamar's to Eagle Run under the lease and the performance by Lamar's of all the lease's terms, conditions, covenants, and agreements. The petition alleged that demand had been made upon Irwin under his personal guaranty for the payment of such sums, but that such payment had not been made.

On April 23, 2003, Irwin filed a motion for summary judgment alleging that the guaranty signed by Irwin on which Eagle Run based its cause of action against him does not inure to the benefit of Eagle Run or apply to the November 16, 1999, lease as claimed by Eagle Run, but, rather, by its own terms, inures to the benefit of M & M Property Partners and applies to an October 11, 1999, lease. The trial court ultimately overruled Irwin's motion on January 12, 2004.

On June 5, 2003, Eagle Run filed a motion for summary judgment against Lamar's. On April 12, 2004, the trial court granted Eagle Run's motion and entered judgment against Lamar's in the amount of $84,084.10.

On March 3, 2005, Eagle Run filed an amended complaint against Lamar's and Irwin, restating the allegations made in the initial petition but alleging that Lamar's had failed and refused to pay rent and other charges from November 2000 through the date of filing.

On April 26, 2005, Eagle Run filed a second amended complaint, the operative complaint in this case, against Irwin only. The second amended complaint alleged that Lamar's was in default under the lease for failing to make rent payments as well as other payments due under the lease from November 2000 through the date of filing. It further alleged that judgment had been entered in favor of Eagle Run and against Lamar's

in the amount of $84,084.10, that additional amounts had become due and owing after the judgment was entered, and that no sums had been paid by Lamar's. The second amended complaint alleged that Irwin was liable for the default in lease payments and other charges by Lamar's pursuant to the lease guaranty executed by Irwin and attached to the lease, that demand for payment had been made, and that no payments had been made. Eagle Run prayed for judgment against Irwin in the amount of $95,032.78.

A jury trial was held on August 1 through 3, 2005. Prior to the beginning of trial, the court addressed a motion in limine that Irwin had filed on February 7 which asked the court to prohibit any extrinsic evidence in regard to the guaranty. Irwin argued that the key terms of the guaranty were not ambiguous terms and that thus, evidence of the intention of the parties in signing the guaranty was irrelevant. The trial court overruled Irwin's motion in limine.

During the trial, Eagle Run presented evidence to explain the parties' intent in regard to the guaranty. At the end of Eagle Run's evidence, Irwin made a motion for directed verdict, arguing several grounds, one of which was that the terms in the guaranty were not ambiguous. Irwin's motion for directed verdict was overruled. At the end of all the evidence, Irwin renewed his motion for directed verdict, which was overruled. Irwin also asked the court to put on the record its rulings as a matter of law in regard to whether the guaranty and lease were ambiguous. The trial court stated that it found that the guaranty was ambiguous and that the lease was unambiguous.

The jury found that Irwin guaranteed the obligations of Lamar's under the lease between Eagle Run and Lamar's, and it rendered a verdict in favor of Eagle Run in the amount of $95,032.78. The trial court entered judgment on the verdict. The trial court also awarded Eagle Run prejudgment interest in the amount of $13,331.20.

ASSIGNMENTS OF ERROR

Irwin assigns that the trial court erred in (1) finding that the guaranty was ambiguous, (2) concluding that the guaranty and the lease should be considered and interpreted together,

(3) overruling relevance objections to "evidence concerning the wrong [l]ease," (4) overruling Irwin's motions for directed verdict, (5) finding that there was sufficient competent evidence to establish that the guaranty was enforceable by Eagle Run and covered the lease between Eagle Run and Lamar's, (6) giving certain instructions to the jury and refusing to give other instructions requested by Irwin, and (7) awarding prejudgment interest to Eagle Run.

STANDARD OF REVIEW

[1] The meaning of a contract and whether a contract is ambiguous are questions of law. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006); *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

[3-5] Irwin's assignments of error include the trial court's finding that the guaranty was ambiguous. A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous. *Kluver v. Deaver, supra.* See *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006). A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Kluver v. Deaver, supra*; *Gary's Implement v. Bridgeport Tractor Parts, supra.* A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Kluver v. Deaver, supra*; *Hillabrand v. American Fam. Mut. Ins. Co., supra.*

[6-9] A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000); *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560

N.W.2d 424 (1997). If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. *Ruble v. Reich, supra*; *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). In contrast, the meaning of an unambiguous contract is a question of law. *Ruble v. Reich, supra*; *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994). When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Id.*

[10] When the terms of the 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. *Hillabrand v. American Family Mut. Ins. Co., supra*; *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

[11,12] The instant case involves a guaranty, which is a type of contract by which a guarantor promises to make payment if the principal debtor defaults. See *780 L.L.C. v. DiPrima*, 9 Neb. App. 333, 611 N.W.2d 637 (2000), citing *Northern Bank v. Dowd*, 252 Neb. 352, 562 N.W.2d 378 (1997). A guaranty is interpreted using the same general rules as are used for other contracts. *780 L.L.C. v. DiPrima, supra*, citing *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

[13-15] Further, Nebraska adheres to the rule of strict construction of guaranty contracts. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988). When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms. See *Knox v. Cook, supra*, quoting *Federal Deposit Ins. Corp. v. Heyne*, 227 Neb. 291, 417 N.W.2d 162 (1987). The Nebraska Supreme Court has also held that the liability of a guarantor is not to be enlarged beyond the strict terms of the contract. *In re Estate of Fischer, supra*; *Federal Deposit Ins. Corp. v. Heyne, supra.*

Knox v. Cook, supra, demonstrates that the terms of a guaranty agreement alone identify and determine the scope of liability under the guaranty. In *Knox*, the plaintiffs leased premises

for a term of 15 years to N Double C, Inc. The defendants were the sole shareholders of N Double C. The defendants had guaranteed rent under the lease by signing a guaranty which was attached to the lease. The lease provided that the defendants "'will guarantee the monthly payments as . . . set out [in the lease] until the property [t]herein described is re-leased or up to a term of thirty-six (36) months, whichever is sooner.'" *Id.* at 388, 446 N.W.2d at 2. The guaranty differently provided that "[i]n the event that [N Double C] should default under this lease agreement *at any time during its term*, the guarantors will guarantee the monthly payments set out in the original lease until the property is re-leased or up to a term of thirty-six (36) months, whichever is sooner." *Id.* at 389, 446 N.W.2d at 2 (emphasis supplied).

N Double C defaulted on the lease, and the plaintiffs brought suit against the defendants on the personal guaranty. The defendants contended that the language "'up to a term of thirty-six (36) months'" in the guaranty meant that the guaranty existed only for the first 36 months of the lease between the plaintiffs and N Double C, and not for 36 months after a default at any time during the lease term. *Id.* at 390, 446 N.W.2d at 3. The trial court concluded that the guaranty's language "'up to a term of thirty-six (36) months'" was ambiguous and allowed the defendants to testify concerning their intention for the guaranty. *Id.* At the conclusion of trial, the trial court concluded that the phrase "'up to a term of thirty-six months'" meant the 36 months starting at the beginning of the lease term and did not mean 36 months starting at any time that N Double C defaulted on the lease. *Id.* Since more than 3 years had elapsed from the beginning of the lease before the default, the trial court dismissed the action.

The Nebraska Supreme Court reversed. It held that the guaranty standing alone governed the scope of the guaranteed liability and that the language in the guaranty was unambiguous. It found that the guaranty's provision limiting the defendants' liability to "'a term of thirty-six (36) months'" clearly referred to the period of the defendants' liability after N Double C's default on the lease from the plaintiffs. *Id.* at 392, 446 N.W.2d at 4. The court found that while the defendants pointed out that

the lease provision regarding a guaranty did not include the language "'at any time during its term,'" it could not ignore that "the terms of the defendants' guaranty for performance of the lease, not the terms of the lease, identify and determine the scope of the defendants' personal liability under their guaranty." *Knox v. Cook*, 233 Neb. 387, 393, 446 N.W.2d 1, 5 (1989). The court further stated:

> "The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral."

Id., quoting *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978).

Similarly, in *National Bank of Commerce Trust & Sav. Assn. v. Katleman, supra*, the defendants signed a commitment letter and guaranty agreement guaranteeing a loan extended by the plaintiff bank to Boetel & Co. and Boetel Properties, Inc. The plaintiff brought an action to enforce payment by the guarantors. The trial court instructed the jury that the contract between the plaintiff and the defendants consisted only of the commitment letter and the guaranty. The jury returned a verdict in favor of the defendants. The plaintiff argued on appeal that it was prejudicial error for the court to have excluded the loan agreement in the instruction of what constituted the contract between the parties. The Nebraska Supreme Court found that the evidence fully supported the instruction that the contract at issue was composed of the commitment letter and the guaranty agreement, because those were the only two documents signed by the defendants and they were aware only of the provisions of those documents. The court determined that the commitment letter and the guaranty agreement were the only two documents that composed the defendants' agreement with the plaintiff.

Based on *Knox v. Cook, supra*, and *National Bank of Commerce Trust & Sav. Assn. v. Katleman, supra*, the scope of Irwin's liability under the guaranty is determined solely by the terms of the guaranty. The guaranty is the only agreement signed by Irwin. Irwin is not a party to the lease between Eagle

Run and Lamar's. The undertaking of Irwin in the guaranty is independent of the undertaking of Eagle Run and Lamar's under the lease.

Applying the foregoing rules of construction or interpretation for a document, we conclude as a matter of law that the guaranty in the present case is unambiguous. The guaranty refers to "M & M Property Partners," and only "M & M Property Partners," as the "Owner." Given its plain meaning as an ordinary, average reasonable person would understand it, the phrase "M & M Property Partners" is not ambiguous, as it has only one reasonable meaning—an entity known as M & M Property Partners. The language in the first paragraph of the guaranty which states that it was made "[f]or the purpose of inducing M & M Property Partners, (herein called 'Owner')[,] to enter into a Lease" also only has one reasonable meaning, that being that M & M Property Partners was the owner entering into a lease with Lamar's, the tenant. Similarly, the concluding language that the guaranty "shall inure to the benefit of Owner" is clear that the guaranty inures to the benefit of M & M Property Partners. The language in the guaranty clearly sets forth that Irwin was guaranteeing a lease between M & M Property Partners and Lamar's, and not between Eagle Run and Lamar's. M & M Property Partners is the entity identified as the "Owner" that is entering into a lease with Lamar's, and it is the entity to which the guaranty runs.

Eagle Run argues that the phrase "TO: EAGLE RUN SQUARE II L.L.C." at the top of the guaranty, in conjunction with the use of the phrase "M & M Property Partners," creates ambiguity in that the two phrases are susceptible of two reasonable but conflicting meanings regarding to whom the guaranty runs. Eagle Run relies on *780 L.L.C. v. DiPrima*, 9 Neb. App. 333, 611 N.W.2d 637 (2000), in support of its argument. In *780 L.L.C.*, the plaintiff entered into a lease for commercial property with M.B.D. Midwest, Inc. A guaranty was also executed by the defendant, the president of M.B.D. Midwest. After M.B.D. Midwest defaulted on the lease, the plaintiff brought an action seeking to enforce the guaranty against the defendant. Trial was held, and extrinsic evidence regarding discussions that occurred prior to the execution of the guaranty was

admitted. The defendant took the position that he executed the guaranty in his capacity as president of M.B.D. Midwest and not personally, since when he executed the document entitled "'Personal Guarantee,'" he executed it by inserting "'Pres'" after his signature and wrote in the name and address of the corporation under his signature. *Id.* at 335-36, 611 N.W.2d at 641-42. After hearing the evidence, the trial court entered judgment in favor of the plaintiff.

On appeal, this court determined that the title on the guaranty was inconsistent with the manner in which the defendant signed the document and that the document was therefore ambiguous. We held that such an inconsistency regarding the capacity in which a defendant signs a guaranty creates an ambiguity which permits the admission of extrinsic evidence to explain the true intent of the parties.

However, the *780 L.L.C. v. DiPrima* case is distinguishable from the present case. The language "TO: EAGLE RUN SQUARE II L.L.C." does not create an inconsistency as to what entity is identified as the "Owner" in the guaranty agreement. There is no uncertainty that M & M Property Partners is the owner and no uncertainty that the guaranty inures to the benefit of M & M Property Partners. The "TO: EAGLE RUN SQUARE II L.L.C." language does not identify Eagle Run's role or how it ties into the guaranty. This is the only reference to Eagle Run in the entire document. Most importantly, the sole reference to Eagle Run does not refer to Eagle Run as owner or lessor. Such a reference could create an inconsistency within the guaranty, but such is not the case we are faced with. The guaranty is not inconsistent and, thus, not ambiguous regarding to whom the guaranty runs or who the "Owner" is.

Accordingly, we conclude that the trial court erred as a matter of law in determining that the guaranty was ambiguous. The terms of the guaranty are clear that M & M Property Partners is the owner identified in the guaranty, that Irwin was guaranteeing a lease between M & M Property Partners and Lamar's, and that the guaranty runs to the benefit of M & M Property Partners.

We further address what effect an assignment of rights by M & M Property Partners to Eagle Run has on Eagle Run's

ability to hold Irwin liable on the lease between Eagle Run and Lamar's. The record before us contains a document in which M & M Property Partners "assigns all of its right, title and interest that it has under the Lease Guaranty dated October 11, 1999," to Eagle Run. The guaranty allows for such an assignment within its terms. Specifically, it provides: "If any obligation or liability of [Lamar's] guaranteed hereby should be assigned by [M & M Property Partners], this Guaranty will inure to the benefit of [M & M Property Partners'] assignee to the extent of such assignment . . . ."

We conclude that the assignment is a nullity because M & M Property Partners had no rights to assign. Any rights that M & M Property Partners had to assign would stem from a lease between M & M Property Partners and Lamar's. There is nothing in the record to indicate that a lease between M & M Property Partners and Lamar's exists. M & M Property Partners has no interest to assign in the lease between Eagle Run and Lamar's. Thus, the assignment does not affect and is unrelated to the lease between Eagle Run and Lamar's. Accordingly, Eagle Run gets nothing from the assignment and the assignment does not affect Eagle Run's ability to hold Irwin liable on the lease between Eagle Run and Lamar's.

CONCLUSION

We determine that the guaranty executed by Irwin was unambiguous as a matter of law. Therefore, we conclude that the trial court erred in overruling Irwin's motion for directed verdict on that basis. Accordingly, we reverse the order of the trial court denying Irwin's motion for directed verdict and remand the cause to the district court with directions to vacate the judgment entered upon the jury's verdict and to enter judgment granting Irwin's motion for directed verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLANT, V. WILLIE ARP FARMS, INC., AS SUBSTITUTE FOR BRENT ARP, APPELLEE.

739 N.W.2d 776

Filed October 2, 2007. No. A-05-1387.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Eminent Domain: Appeal and Error.** Neb. Rev. Stat. § 76-717 (Reissue 2003) states that in an appeal from the award of appraisers in a condemnation proceeding, the appeal shall be tried de novo in the district court.
3. **Eminent Domain: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 76-718 (Reissue 2003) provides that after entry of final judgment in the district court on the appeal, a certified copy thereof shall be prepared and transmitted by the clerk of the district court to the county judge.
4. **Eminent Domain: Damages.** The securing of an appraisal of damages by appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding.
5. **Eminent Domain: New Trial: Pleadings: Appeal and Error.** The method of appeal from the award of appraisers in a condemnation proceeding is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court.
6. **Eminent Domain.** A condemnee cannot be "forced" on a condemnor seeking to acquire land by eminent domain.
7. ____. When the condemnation of land is effected by judicial decree, failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party.
8. **Eminent Domain: Words and Phrases.** Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.
9. **Eminent Domain: Constitutional Law.** While the property owner in an inverse condemnation action cannot compel the return of the property taken, because of the eminent domain power of the condemnor, he has a constitutional right, as a substitute, to just compensation for what was taken.
10. **Eminent Domain: Appeal and Error.** A condemnee who does not appeal is bound by his award, because it has the effect of a judgment if unappealed from.
11. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it

uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

12. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
13. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded with directions.

Paul F. Peters, P.C., L.L.O., of Taylor, Peters & Drews, for appellant.

Gregory P. Drew and David V. Drew, of Drew Law Firm, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

Papio-Missouri River Natural Resources District (Papio-Missouri) appeals from the decision of the district court for Washington County which granted Brent Arp's motion to substitute Willie Arp Farms, Inc., as condemnee in Papio-Missouri's appeal from the county court award made to Brent for the taking of certain farm property in an eminent domain proceeding. We find that the district court improperly allowed Willie Arp Farms to be substituted for Brent as condemnee, and we therefore vacate the jury's award to Willie Arp Farms.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a Washington County farm owned by Wright Investments, Inc., and leased to Willie Arp Farms. The verbal lease is for a 50-50 crop share and automatically renews every year without either party taking any action. Willie Arp, individually, began farming the land in the late 1950's. Willie Arp Farms was established in 1975. Willie Arp Farms consisted of Willie, his wife, and their son, Brent. After Willie's death, Brent and his mother continued as shareholders. Brent is the vice president and treasurer of Willie Arp Farms, and Brent is also the only employee of Willie Arp Farms.

The leased land became part of an eminent domain proceeding in May 2001. On May 16, Papio-Missouri filed its "Petition for Appointment of Appraisers," naming Wright Investments as the sole condemnee. The amended petitions for appointment of appraisers, filed on June 4 and 6, also named "Brent Arp, tenant," as a condemnee. The county court "Report of Appraisers" was filed on July 2. By reason of the taking of the property by Papio-Missouri, Wright Investments was awarded the sum of $630,233 and Brent was awarded the sum of $10,096.

On July 19, 2001, Papio-Missouri filed its notice of appeal from the report of the appraisers. On November 30, Papio-Missouri filed its petition on appeal, alleging that the awards made by the board of appraisers "greatly exceeded" the damages sustained by Wright Investments and Brent as a result of the taking. Papio-Missouri's appeal from the $630,233 award to Wright Investments was subsequently settled without trial and is not part of this appeal.

On March 4, 2002, Brent filed his answer to the petition on appeal and admitted the petition's allegations that the condemned property was leased by Brent. Brent asked that the district court award him (1) damages arising out of the taking and (2) attorney fees pursuant to Neb. Rev. Stat. § 76-720 (Reissue 2003).

In a deposition taken November 20, 2002, Brent testified that Willie Arp Farms was the farm tenant of the subject property for the 2001 fiscal year. Brent testified that he is the vice president, the treasurer, and an employee of Willie Arp Farms. On December 13, Papio-Missouri filed a motion for summary judgment against Brent, alleging that there was no genuine issue as to any material fact and that Papio-Missouri was entitled to "an adjudication as a matter of law" because Brent "did not have a leasehold or other compensable interest in the property taken or involved in this case." On January 6, 2003, Brent filed a "Motion to Substitute Defendant," asking the court for an order substituting Willie Arp Farms for Brent as condemnee. On March 14, the district court filed its order (1) sustaining Brent's motion to substitute defendant and (2) overruling Papio-Missouri's motion for summary judgment.

On April 14, 2003, Papio-Missouri filed a "Motion for Leave to File Amended Petition on Appeal" that would have deleted

the previous allegation that the property was under lease to Brent and instead would have alleged that Brent was not the tenant and had no interest in the property taken. In its order filed on May 29, the district court found that the order of March 14, 2003, was not intended to create a new cause of action, but merely allowed a substitution of parties. Thus, the district court denied Papio-Missouri's motion to file an amended petition on appeal.

On March 3, 2004, Papio-Missouri filed an amended motion in limine asking the court for an order prohibiting Brent, or Willie Arp Farms, from introducing evidence of, or in any way referring to, crop damages. On March 16, Willie Arp Farms filed a motion in limine asking the court for an order prohibiting Papio-Missouri from (1) producing any evidence regarding crop production after the date of taking, June 6, 2001, and (2) producing any evidence in any way implying that Willie Arp Farms was not entitled to the full compensation determined to be due for tenant's interest. In an order filed on May 25, 2004, the district court found that "each of the pending motions in limine should be, and hereby is, overruled."

Immediately prior to trial on May 18, 2005, Willie Arp Farms orally renewed its motion in limine, asking that "all parties be prohibited from introducing any evidence of actual crop production for the years 2001 and subsequent," because "the law indicates that damages have to be assessed as of the date of the filing of the condemnation petition, which in this case was June 6th of 2000." The district court sustained Willie Arp Farms' motion in limine.

Trial was held on May 18, 2005. Papio-Missouri's motion for directed verdict was overruled by the district court orally and in the court's minutes. A jury verdict "for the Condemnee" (which, by the time of trial, was Willie Arp Farms) was rendered on May 18 in the amount of $14,000. The district court accepted the verdict and entered judgment thereon.

On May 20, 2005, Papio-Missouri filed a motion for judgment notwithstanding the verdict, reasoning as follows: (1) The evidence showed that Brent did not have a leasehold or other interest in the property taken by Papio-Missouri in the eminent domain proceedings, and therefore, Brent was not entitled to the

award of $10,096, and (2) Willie Arp Farms had the burden of proof, and there was no evidence of damages from the taking upon which the jury could have properly proceeded to find a verdict for more than nominal damages. On July 20, the district court entered an order overruling Papio-Missouri's motion for judgment notwithstanding the verdict.

On October 14, 2005, the district court ordered Papio-Missouri to pay attorney fees in the amount of $11,500.14 to the attorney for the "[c]ondemnee." Papio-Missouri now appeals.

ASSIGNMENTS OF ERROR

Papio-Missouri alleges that the district court erred in (1) sustaining condemnee Brent's motion to substitute defendant and permitting Willie Arp Farms to substitute for condemnee Brent in Papio-Missouri's appeal from the county court award made to condemnee Brent, (2) refusing to allow Papio-Missouri to amend its petition on appeal, (3) overruling Papio-Missouri's motion in limine and permitting Willie Arp Farms to offer evidence of fictional or theoretical damages to the crops growing on the condemned property as of the date of the filing of the eminent domain proceedings, (4) sustaining Willie Arp Farms' motion in limine and prohibiting Papio-Missouri from introducing evidence that the crops growing on the condemned property as of the date of the filing of the eminent domain proceedings were subsequently harvested by Willie Arp Farms, (5) overruling Papio-Missouri's motions for directed verdict and judgment notwithstanding the verdict, and (6) awarding attorney fees to the attorney for the "condemnee."

STANDARD OF REVIEW

[1] A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

ANALYSIS

[2-5] In an appeal from the award of appraisers in a condemnation proceeding, "[t]he appeal shall be tried de novo in the district court." Neb. Rev. Stat. § 76-717 (Reissue 2003). "After entry of final judgment in the district court on the appeal, a

certified copy thereof shall be prepared and transmitted by the clerk of the district court to the county judge." Neb. Rev. Stat. § 76-718 (Reissue 2003). Though it was decided under a prior statute, we take note of *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 283, 66 N.W.2d 591, 596 (1954), wherein the Nebraska Supreme Court said:

> It is well established, in an action of this kind, the function of the county court is as described in Higgins v. Loup River Public Power Dist., 157 Neb. 652, [657, 661,] 61 N. W. 2d 213, [216, 218 (1953),] as follows: "The procedure in the county court contemplates an informal hearing by the appraisers, a view of the lands, no record of the testimony, and a report of damages assessed to be filed subject only to the right of appeal, not to confirmation by the appointing court. . . . On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings." See, also, Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333 [(1954)].
>
> The securing of an appraisal of damages by appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceedings in the district court. See Scheer v. Kansas-Nebraska Natural Gas Co., *supra*.

Therefore, we now review the district court's "new trial" of the eminent domain proceedings in this case.

Substitution of Parties.

Brent was listed as the tenant of the subject property from the time the amended petitions for appointment of appraisers were filed on June 4 and 6, 2001. During its appeal to the district court, Papio-Missouri discovered that Willie Arp Farms, and not Brent, was the tenant of the subject property in this

case. In a deposition taken November 20, 2002, Brent testified that Willie Arp Farms was the farm tenant of the subject property for the 2001 fiscal year. Brent testified that he is the vice president, the treasurer, and an employee of Willie Arp Farms. Following the deposition, on December 13, Papio-Missouri filed a motion for summary judgment against Brent, alleging that there was no genuine issue as to any material fact and that Papio-Missouri was entitled to "an adjudication as a matter of law" because Brent "did not have a leasehold or other compensable interest in the property taken or involved in this case." Brent subsequently filed a "Motion to Substitute Defendant," asking the court for an order substituting Willie Arp Farms for Brent as condemnee. The district court sustained Brent's motion to substitute defendant and overruled Papio-Missouri's motion for summary judgment. Papio-Missouri argues that the district court erred in sustaining condemnee Brent's motion to substitute defendant and in permitting Willie Arp Farms to substitute for condemnee Brent in Papio-Missouri's appeal from the county court award made to condemnee Brent.

Papio-Missouri argues that the district court should not have allowed Willie Arp Farms to be substituted for Brent, because it was up to Papio-Missouri to condemn the interest of Willie Arp Farms if Papio-Missouri so desired, and that the district court could not compel Papio-Missouri to condemn the interest of Willie Arp Farms. Furthermore, Papio-Missouri submits that since the taking did not include Willie Arp Farms as a named condemnee, Papio-Missouri did not extinguish whatever interest Willie Arp Farms had in the property taken, and that if Willie Arp Farms felt it sustained damages as a result of the taking, Willie Arp Farms could pursue a cause of action against Papio-Missouri for inverse condemnation.

Papio-Missouri argues that Brent's award and any award involving Willie Arp Farms would be completely separate and distinct matters under Nebraska law. In support of its position, Papio-Missouri cites the proposition in *Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc.*, 191 Neb. 663, 665, 217 N.W.2d 184, 186 (1974), that "the awards to the various condemnees are several and should be separately determined by the appraisers in their report."

[6,7] We agree with Papio-Missouri that a condemnee cannot be "forced" on it. In *Consumers Public Power District v. Eldred*, 146 Neb. 926, 942, 22 N.W.2d 188, 197 (1946), the Nebraska Supreme Court said:

> In Nichols on Eminent Domain, (2d ed.) Vol. 2, Par. 403, p. 1074, it is said: "It is the duty of a corporation seeking to acquire land by eminent domain to ascertain the state of the title so that it may designate in its petition and make parties respondent or defendant all persons or corporations having any such interest in the property sought to be taken as will entitle them under the constitution or laws of the state to compensation for the taking."
>
> The effect, according to Nichols, Eminent Domain, (2d ed.) Vol. 2, Par. 404, p. 1075, is that: "It is generally held that, when the condemnation of land is effected by judicial decree, failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party . . . ."

[8,9] Papio-Missouri had the right to decide whose interest it would condemn. Because Papio-Missouri did not choose to condemn Willie Arp Farms' interest in the property, Willie Arp Farms remained the "owner" and "possessor" of whatever interest it had in the land at issue—which interest the record suggests was at best a tenant's interest in growing crops. If Willie Arp Farms was damaged by Papio-Missouri's taking of Wright Investments' interest in the land, then Willie Arp Farms has the right to pursue a cause of action against Papio-Missouri for inverse condemnation to collect such damage. Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). While the property owner cannot compel the return of the property taken, because of the eminent domain power of the

condemnor, he has a constitutional right, as a substitute, to just compensation for what was taken. *Id.*

We note that in its brief, Willie Arp Farms relies on Neb. Rev. Stat. § 25-852 (Reissue 1995) and the case law related to such statute in support of its position that the district court correctly allowed Willie Arp Farms to be substituted for Brent, the named condemnee. However, § 25-852 was repealed by 2002 Neb. Laws, L.B. 876, operative January 1, 2003. And, "[w]here there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal." *Jackson v. Branick Indus.*, 254 Neb. 950, 956, 581 N.W.2d 53, 56 (1998). Brent did not file his motion to substitute until January 6, 2003, 6 days after § 25-852 had been repealed. Thus, he could not rely on such statute to substitute Willie Arp Farms for himself as condemnee in the appeal. Thus, the repealed statute, § 25-852, and precedent utilizing it do not support the district court's action.

Plain Error.

[10-12] Although not assigned as error by Papio-Missouri, we necessarily must examine whether the district court committed plain error when it overruled Papio-Missouri's motion for summary judgment, because the erroneous substitution has the effect of making Brent a party who holds an appraiser's award of $10,096—an appraiser's award has the effect of a judgment. See *Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc.*, 191 Neb. 663, 217 N.W.2d 184 (1974) (condemnee who does not appeal is bound by his award, because it has effect of judgment if unappealed from). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Id.*

Papio-Missouri filed a motion for summary judgment against Brent, alleging that there was no genuine issue as to any material

fact and that Papio-Missouri was entitled to "an adjudication as a matter of law" because Brent "did not have a leasehold or other compensable interest in the property taken or involved in this case." The district court overruled Papio-Missouri's motion for summary judgment at the same time that it granted Brent's motion to substitute Willie Arp Farms as condemnee. At the time that the district court ruled on Papio-Missouri's motion for summary judgment, the court had in its possession the following: (1) Brent's affidavit stating that Willie Arp Farms was the tenant of the condemned real estate; (2) the affidavit of Stave Wright, a principal in Wright Investments, stating that "at all times material Willie Arp Farms . . . has been the tenant of the farm ground involved in the condemnation"; and (3) Brent's deposition, in which he testified that Willie Arp Farms was the farm tenant of the subject property for the 2001 fiscal year.

[13] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005). It is clear from the two affidavits and the deposition that Willie Arp Farms, not Brent, was the tenant of the farm ground involved in the condemnation. Thus, there was not a genuine issue of material fact and Papio-Missouri was entitled to judgment as a matter of law regarding its claim that Brent "did not have a leasehold or other compensable interest in the property taken or involved in this case." The district court's failure to grant Papio-Missouri's motion for summary judgment with respect to Brent was plain error, and of course, such error naturally followed from the improper substitution of Willie Arp Farms for Brent.

Remaining Assignments of Error.

Because we have already found that neither Brent nor Willie Arp Farms was a proper party to this case, we need not address Papio-Missouri's remaining assignments of error, save the award of attorney fees to the attorney for the "condemnee." See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005) (appellate court is not obligated to engage in analysis

which is not needed to adjudicate case and controversy before it). Having concluded that neither Brent nor Willie Arp Farms was a proper party, we find that neither would be entitled to attorney fees. Therefore, we vacate the district court's October 14, 2005, award of attorney fees to the attorney for the "condemnee."

CONCLUSION

For the reasons stated above, we find the district court improperly allowed Willie Arp Farms to be substituted for Brent as condemnee. We therefore vacate the jury's award to Willie Arp Farms. We also find that it was plain error for the district court to deny Papio-Missouri's motion for summary judgment regarding Brent.

Furthermore, because Papio-Missouri's motion for summary judgment against Brent should have been sustained and the substitution of Willie Arp Farms for Brent was improper, neither Brent nor Willie Arp Farms was entitled to an award of attorney fees. Therefore, we vacate the district court's October 14, 2005, award of attorney fees to the attorney for the "condemnee."

Consequently, we remand the cause to the district court with directions to vacate the jury's award to Willie Arp Farms, to vacate the award of attorney fees, and to enter summary judgment in favor of Papio-Missouri and against Brent.

REVERSED AND REMANDED WITH DIRECTIONS.

HEADNOTES
Contained in this Volume

Abandonment 666
Abatement, Survival, and Revival 666
Actions 33, 85, 212, 363, 605, 648, 666, 821, 893, 914
Administrative Law 67, 191, 410, 446, 867, 893, 907, 955
Aiding and Abetting 323
Appeal and Error 1, 13, 33, 47, 67, 77, 85, 100, 114, 129, 148, 164, 191, 199, 212, 221, 234, 241, 260, 267, 280, 292, 297, 308, 323, 341, 357, 363, 390, 398, 405, 410, 416, 422, 446, 457, 463, 470, 486, 502, 523, 529, 534, 538, 548, 554, 590, 605, 616, 624, 641, 648, 656, 666, 706, 717, 755, 764, 796, 811, 821, 836, 847, 854, 867, 884, 893, 907, 914, 920, 939, 946, 955, 960, 966, 972, 984
Arbitration and Award 85, 920
Arrests 100
Assault 169
Attorney and Client 114
Attorney Fees 241, 405, 666

Blood, Breath, and Urine Tests 446
Bonds 666
Breach of Contract 341

Child Custody 77, 292, 297, 717
Child Support 297, 452, 518
Circumstantial Evidence 148
Civil Rights 893
Claims 666
Collateral Attack 398
Colleges and Universities 907
Commission of Industrial Relations 470
Compromise and Settlement 114
Confessions 554
Constitutional Law 85, 100, 212, 405, 416, 554, 893, 939, 955, 984
Contracts 85, 341, 666, 764, 884, 972
Conveyances 267
Convictions 212, 416, 422, 616
Corporations 666
Costs 267, 405, 523, 666
Counties 656, 893
Courts 1, 85, 100, 164, 534, 538, 648, 893
Criminal Law 13, 100, 169, 212, 323, 416, 422, 486, 554, 590, 616

Damages 234, 341, 390, 470, 502, 666, 821, 984
Debtors and Creditors 972
Decedents' Estates 624, 755, 796

Deceptive Trade Practices 666
Declaratory Judgments 267
Disciplinary Proceedings 955
Discrimination 470
Dismissal and Nonsuit 960
Divorce 297, 579, 706
Domicile 796
Double Jeopardy 616
Drunk Driving 191, 446
Due Process 554, 955

Easements 267
Effectiveness of Counsel 398, 486, 554
Eminent Domain 984
Employer and Employee 666, 854
Equity 267, 624, 666
Estoppel 341
Evidence 13, 47, 100, 114, 148, 169, 323, 363, 422, 446, 470, 502, 554, 590, 616, 847, 920, 946, 972
Expert Witnesses 854
Eyewitnesses 486

Federal Acts 666
Fees 1, 410, 523, 534
Final Orders 1, 33, 67, 191, 212, 292, 323, 357, 398, 405, 416, 446, 523, 641, 648, 893, 907, 914, 939, 955, 984
Foreign Judgments 867

Garnishment 811
Good Cause 836
Goodwill 666
Governmental Subdivisions 893
Guaranty 972

Habeas Corpus 523
Habitual Criminals 13, 457

Identification Procedures 554
Immunity 212, 939
Injunction 267, 666
Insurance 579
Intent 67, 191, 280, 308, 323, 463, 529, 579, 656, 666, 811, 854, 884, 939, 972
Interest 241
Intoxication 554
Investigative Stops 100, 199, 486, 554, 939

Joinder 554
Judges 77, 267, 280, 292, 590, 706, 764, 893
Judgments 1, 47, 67, 85, 191, 212, 221, 234, 241, 260, 297, 357, 390, 398, 405, 410, 416, 446, 457, 486, 502, 523, 529, 548, 579, 624, 648, 656, 666, 821, 836, 867, 884, 893, 907, 955, 960, 966, 972
Judicial Notice 416

Juries 554, 590, 616
Jurisdiction 1, 47, 212, 292, 323, 398, 405, 410, 416, 446, 534, 641, 648, 836, 847, 867, 893, 907, 914, 960
Jury Instructions 169, 821
Jury Trials 548
Juvenile Courts 47, 148, 179, 323, 437, 534, 641, 847

Labor and Labor Relations 470
Legislature 280, 405, 463, 529, 534, 648, 656, 666, 811
Lesser-Included Offenses 169
Liability 33, 114, 538, 666, 821, 893, 939, 946, 972
Licenses and Permits 67, 191, 446
Limitations of Actions 363, 470, 624

Malpractice 363
Mandamus 221, 656
Master and Servant 538
Mental Competency 554
Merger 666
Minors 148, 297, 308, 422, 437
Modification of Decree 292, 297, 518
Moot Question 666
Motions for New Trial 648, 821, 920
Motions to Dismiss 164, 405, 893
Motions to Suppress 13, 100, 486, 554
Motor Vehicles 67, 199, 234, 390, 446, 502, 554, 939

Names 666, 893
Negligence 164, 538, 821, 946
Negotiable Instruments 529
New Trial 616, 984
Notice 1, 33, 534, 648, 656, 955

Ordinances 416
Other Acts 308, 323

Parent and Child 148, 179, 437, 755, 796
Parental Rights 77, 148, 323
Parties 85, 341, 605, 648, 893, 914
Penalties and Forfeitures 241
Plea Bargains 764
Pleadings 114, 164, 221, 363, 666, 893, 907, 939, 984
Pleas 260, 457, 966
Police Officers and Sheriffs 100, 199, 234, 390, 446, 502, 939
Political Subdivisions 656
Political Subdivisions Tort Claims Act 234, 390, 502
Postconviction 398, 523
Presentence Reports 764
Presumptions 13, 280, 486, 529, 666
Pretrial Procedure 486, 590, 836
Principal and Agent 538
Principal and Surety 529

Prior Convictions 457, 486
Prisoners 169, 374, 955
Probable Cause 100, 199, 486, 554, 939
Probation and Parole 260, 416, 452, 764
Proof 47, 85, 100, 129, 148, 169, 221, 297, 308, 323, 341, 457, 486, 518, 538, 554, 605, 616, 656, 666, 706, 755, 796, 821, 836, 893, 939, 966
Property 706
Property Division 706
Property Settlement Agreements 579
Prosecuting Attorneys 554, 764
Proximate Cause 234, 390, 502, 821
Public Meetings 656
Public Officers and Employees 13, 836, 893, 939
Public Policy 656, 946

Real Estate 410
Records 1, 13, 114, 398, 416, 554, 836, 893
Recusal 280
Res Judicata 297
Restrictive Covenants 666
Revocation 67, 191, 446
Right to Counsel 457
Rules of Evidence 308, 422, 486, 590
Rules of the Supreme Court 164, 405, 893

Sales 341, 666
Schools and School Districts 538
Search and Seizure 100, 554, 939
Sentences 212, 260, 280, 374, 416, 422, 452, 457, 764
Service of Process 893
Sexual Assault 308, 616
Speedy Trial 212, 836
Standing 605
States 893
Statutes 47, 67, 114, 148, 191, 212, 234, 241, 280, 390, 410, 416, 463, 470, 502, 529, 548, 656, 755, 796, 811, 836, 884, 893, 920, 955, 966
Stipulations 398
Summary Judgment 221, 297, 363, 538, 579, 605, 666, 884, 914, 939, 946, 984
Supreme Court 405

Taxation 410, 755, 796
Testimony 308, 486, 920
Time 67, 191, 199, 221, 241, 323, 341, 363, 374, 398, 416, 486, 534, 648, 836, 955
Tort Claims Act 946
Trial 13, 169, 308, 422, 486, 554, 590, 616, 666, 836, 920
Trust Funds 114
Trusts 624

Uniform Commercial Code 341

Valuation 410
Vendor and Vendee 666
Venue 67
Verdicts 590, 984
Visitation 77

Waiver 67, 114, 241, 341, 363, 416, 457, 666, 764
Warrantless Searches 100, 199, 486, 554
Witnesses 13, 308, 486, 554, 755, 920
Words and Phrases 1, 67, 77, 114, 148, 169, 191, 199, 212, 221, 234, 241, 260, 267, 292, 297, 308, 323, 341, 357, 363, 390, 405, 422, 486, 502, 518, 529, 548, 554, 605, 666, 755, 764, 796, 854, 884, 907, 946, 972, 984
Workers' Compensation 33, 114, 129, 241, 357, 854