THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JUNE 22, 2001 and JANUARY 17, 2002

IN THE

Supreme Court of Nebraska

VOLUME CCLXII

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

2003

Copyright A. D. 2003

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

Members of the Appellate Courts v

Judicial Districts and District Judges vi

Judicial Districts and County Judges viii

Separate Juvenile Courts and Judges x

Workers' Compensation Court and Judges x

Attorneys Admitted xi

Table of Cases Reported xv

List of Cases Disposed of by
Filed Memorandum Opinion xxi

List of Cases Disposed of Without Opinion xxiii

List of Cases on Petition for Further Review xxv

Cases Reported 1

Headnotes Contained in this Volume 1065

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

JOHN V. HENDRY, Chief Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JOSEPH C. STEELE . . . . . .State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Orville L. Coady	Hebron
		Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke Alan G. Gless Michael Owens Mary C. Gilbride	Columbus Seward Aurora Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist Maurice Redmond F.A. Gossett III	Blair Dakota City Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz Patrick G. Rogers	Wayne Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William B. Cassel Ronald D. Olberding	Ainsworth Burwell
Ninth	Buffalo and Hall	John P. Icenogle James Livingston Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Stephen Illingworth Terri Harder	Hastings Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II James E. Doyle IV	McCook North Platte North Platte Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Robert O. Hippe Brian Silverman Randall L. Lippstreu Kristine R. Cecava	Chadron Gering Alliance Gering Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		Paul R. Robinson	Hartington
		C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Philip R. Riley	Creighton
		Richard W. Krepela	Madison
		Donna F. Taylor	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack Robert Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C.G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 261

Rocco Lawrence Adornato
Michael Alvano
Danielle J. Amorena
Deborah J. Anderson
Sara B. Anderson
Greg M. Ariza
Jason G. Ausman
Aimee C. Bataillon
Jill Marie Becker
Jennifer M. Betterman
Daniel Edward Blakely
Brian Bowman
Jonathan Mark Braaten
Joel P. Brady
Lonnie Ray Braun
Matthew Sean Brick
Brian J. Brislen
Elizabeth Callaghan
Amy M. Duval Carlson
Jason Charles Caul
Amy D. Cline
Jonathan M. Cohn
Martin J. Conboy IV
Justin J. Cook
Tony Coppola
Luanne Cornell
Kristin A. Cote
April Cover
Joni Cover
Joseph Patrick Cullan
Kelli A. Cummins-Brown
Gregory Scott Czaplewski
Jill S. Dashner
Adrienne S. Davis
Anthony Deitering
Grayson J. Derrick
Jeffrey Earl Dortch
Susan Doty
Patricia Ann Dow
Walter J. Downing
Cheryl M. Eastman
Matthew Eck
Jacqueline A. Egr
Todd Engleman
Jodie L. Epp
Kjestine L. Evans
Owen Farnham
Jason R. Fendrick
Daniel J. Fischer
Michael J. Flood
Michael David Fontaine
Dawn N. Fox
Daniel H. Friedman
Riley J. Garrigan
Kristine J. Gates
Jennifer A. Giebel
Aaron J. Glade
Rebecca L. Gould
Scott David Grafton
Nathan Thomas Grebasch

Kevin L. Griess
Maureen Hannon
Laurel Ann Heer-Clark
Jeffrey Hill
Tina M. Hodne
Michael Hoenig
Nicolle M. Hofer
Thomas Teddy Inkelaar II
Colby A. Irving
Joel B. Jay
Thomas E. Jeffers
Elizabeth Dawn Jensen
Andrew C. Johnson
Katherine J. Kaminsky
Ronald R. Kappelman
Susan M. Kemp
Jessica Anne Kerkhofs
Martin V. Klein
Jim Charles Klepper
Patrick John Knecht
Rosalynd Jean Koob
Cindy Lou Koupal
Matthew M. Kuhse
Amy L. Kuzila
Sara Anne Larson
Justin Lavene
James Robert Lee
Colby M. Lessmann
Matt E. Lierman
Jennifer Joy Long
Jisella Long
Hilary E. Longo
Lindsay Lundholm
Jacqueline Azur Madara-Campbell
David McClure
Julie A. McEwen
John K. McGill
Brian Thomas McKernan
Jane McNeil
Barbara K. Medbery
Robert Meyer
Kara E. Mickle
Lori J. Mikl
Travis S. Moomey
Jason Nelsen
Joy A. Nesbitt
Amber Nichole Neubert
Brent W. Nicholls
Brian Spencer Nielsen
Gregory Matthew O'Boyle
Jason A. Ossian
Lyn T. Patyskiwhite
Angela M. Pelan
Carol Irene Pinard-Cronin
Kristen Deanne Randall
Susan Lee Reff
Dale Reicheneder
Jamie D. Reiter
Robert J. Remack
Hazell G. Rodriguez
Michael G. Rogers
Kevin Daniel Rose
Amy Lynn Sayer
Alan M. Scarrow
Erika B. Schafer
Jeffery R. Schaffart
Byron Lee Schneringer
Ricky Allen Schreiner
Thomas E. Simmons
Julia Kay Skinner
Tonya Peters Skinner
David W. Smiley
Charles A. Smith
Justin R. Sorensen
Jean Marie Sorich
Amanda Marie Speichert
Matthew Maxwell Stamp

JASON LEE STAPELMAN
TRENTON W. STEELE
ERIC STROVERS
DOUGLAS SWITZER
SEAN MICHAEL TANKO
TIM ROBERT TEETER
LINDA GRIMALDI TERNENT
TIMOTHY J. THALKEN
DREW K. THEOPHILUS
SHILEE MICHELE THERKELSEN
COLLEEN E. TIMM
MICHAEL A. TREBOLD
STEVEN J. TWOHIG
LORI UBBINGA
BRIAN BLANE VAKULSKAS
ENRENE VAN TONDER
SCOTT VOGT
AMY VYHLIDAL
CHRISTOPHER JAY WALKER
MICHAELA M. WARDEN
DAVID M. WEAR
CHRISTOPHER P. WELSH
DOUGLAS D. WHITE
LORI C. WOOD

TABLE OF CASES REPORTED

Abrahamson; State ex rel. NSBA v. 632
Adoption of Baby Girl H., In re 775
Agland Coop; Schafersman v. 215
American Bus. Info.; Malone v. 733
Anderson, In re Conservatorship of 51
Anderson; State v. Hochstein and 311
Arellano; State v. 866
Aust; Suburban Air Freight v. 908

Baby Girl H., In re Adoption of 775
Becker Warehouse, Inc.; Cincinnati Ins. Co. v. 746
Bellevue Vol. Fire Dept.; Hatcher v. 23
Blum; Cole v. 1058
Brunzo; State v. 598
Burlington Northern Santa Fe Ry. Co. v. Chaulk 235

Caddy; State v. 38
Carman Cartage Co.; Ohio Cas. Ins. Co. v. 930
Caruso v. Parkos 961
Casady; V.C. v. 714
Castor; State v. 423
Cedar Bluffs Jr./Sr. Pub. Sch.; Cerny v. 66
Central Lab. Assocs.; Paulk v. 838
Central Neb. Pub. Power; Jeffrey Lake Dev. v. 515
Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch. 66
Chaulk; Burlington Northern Santa Fe Ry. Co. v. 235
Cincinnati Ins. Co. v. Becker Warehouse, Inc. 746
City of McCook; Wilcox v. 696
Cole v. Blum 1058
Complaint Against Krepela, In re 85
Conn; Continental Western Ins. Co. v. 147
Conservatorship of Anderson, In re 51
Conservatorship of Donley, In re Guardianship & 282
Conservatorship of Garcia, In re Guardianship & 205
Continental Western Ins. Co. v. Conn 147
Counsel for Dis., State ex rel. v. Furlong 973
Counsel for Dis., State ex rel. v. Huston 481
Counsel for Dis., State ex rel. v. Hynes 307
Counsel for Dis., State ex rel. v. Lopez Wilson 653
Counsel for Dis., State ex rel. v. Parker 819
Counsel for Dis., State ex rel. v. Sopinski 526
County of Douglas v. Nebraska Tax Equal. & Rev. Comm. 578

Crossroads Joint Venture; Holmes v. 98
Curtright; State v. 975

Donley, In re Guardianship & Conservatorship of 282
Douglas, County of v. Nebraska Tax Equal. & Rev. Comm. 578
Dunster; State v. 329

Ehlers; State v. 247
Eickmeyer, In re Estate of 17
Estate of Eickmeyer, In re 17
Estate of Mecello, In re 493

Falotico v. Grant Cty. Bd. of Equal. 292
Folgers Architects v. Kerns 530
Fontenelle Equip. v. Pattlen Enters. 129
Foote v. O'Neill Packing 467
Frank; State ex rel. NSBA v. 299
Frederiksen; State ex rel. NSBA v. 562
French; State v. 664
Furlong; State ex rel. Counsel for Dis. v. 973

Garcia, In re Guardianship & Conservatorship of 205
General Cas. Co. of Wis.; Nicholson v. 879
Grand Island Contract Carriers; Thornton v. 740
Grant Cty. Bd. of Equal.; Falotico v. 292
Guardianship & Conservatorship of Donley, In re 282
Guardianship & Conservatorship of Garcia, In re 205

Hamik; State v. 761
Hatcher v. Bellevue Vol. Fire Dept. 23
Hawkins; State v. 906
Heesacker v. Heesacker 179
Heitman; State v. 185
Hochstein and Anderson; State v. 311
Holmes v. Crossroads Joint Venture 98
Home Pride Foods v. Johnson 701
Hunt; State v. 648
Hunt v. Trackwell 688
Huston; State ex rel. Counsel for Dis. v. 481
Hynes; State ex rel. Counsel for Dis. v. 307

Ildefonso; State v. 672
In re Adoption of Baby Girl H. 775
In re Complaint Against Krepela 85
In re Conservatorship of Anderson 51
In re Estate of Eickmeyer 17
In re Estate of Mecello 493
In re Guardianship & Conservatorship of Donley 282
In re Guardianship & Conservatorship of Garcia 205
In re Interest of Kiana T. 60
In re Interest of Sabrina K. 871
In re Search Warrant for 3628 V St. 77

Jeffrey Lake Dev. v. Central Neb. Pub. Power 515
Johnson; Home Pride Foods v. 701
Jones v. Summit Ltd. Partnership Five 793

Keef v. State 622
Keller v. Tavarone 2
Kendel Homes Corp.; Mondelli v. 263
Kendel Homes Corp.; Mondelli v. 663
Kerns; Folgers Architects v. 530
Kiana T., In re Interest of 60
Kinney; State v. 812
Kirchner v. Wilson 607
Knudtson; State v. 917
Krepela, In re Complaint Against 85
Kula; State v. 787

Lopez Wilson; State ex rel. Counsel for Dis. v. 653

Malone v. American Bus. Info. 733
Maxwell v. Montey 160
McCook, City of; Wilcox v. 696
McDonald v. Myre 171
Mecello, In re Estate of 493
Mondelli v. Kendel Homes Corp. 263
Mondelli v. Kendel Homes Corp. 663
Monfort, Inc.; Rodriguez v. 800
Montey; Maxwell v. 160
Myre; McDonald v. 171

Nebraska Tax Equal. & Rev. Comm.; County of Douglas v. 578
Nelson; State v. 896
Nicholson v. General Cas. Co. of Wis. 879
NSBA, State ex rel. v. Abrahamson 632
NSBA, State ex rel. v. Frank 299
NSBA, State ex rel. v. Frederiksen 562

Ogallala Pub. Sch. Dist. No. 1; Skinner v. 387
Ohio Cas. Ins. Co. v. Carman Cartage Co. 930
O'Neill Packing; Foote v. 467

Parker; State ex rel. Counsel for Dis. v. 819
Parkos; Caruso v. 961
Pattlen Enters.; Fontenelle Equip. v. 129
Paulk v. Central Lab. Assocs. 838
Peter v. Peter 1017
Presle v. Presle 729

Redmond; State v. 411
Rhea; State v. 886
Rodriguez v. Monfort, Inc. 800
Roeder; State v. 951
Russell v. Stricker 853
Ruzicka v. Ruzicka 824

Sabrina K., In re Interest of 871
Schafersman v. Agland Coop 215
Search Warrant for 3628 V St., In re 77
Sedlacek; Steele v. 1
Skinner v. Ogallala Pub. Sch. Dist. No. 1 387
Sopinski; State ex rel. Counsel for Dis. v. 526
State ex rel. Counsel for Dis. v. Furlong 973
State ex rel. Counsel for Dis. v. Huston 481
State ex rel. Counsel for Dis. v. Hynes 307
State ex rel. Counsel for Dis. v. Lopez Wilson 653
State ex rel. Counsel for Dis. v. Parker 819
State ex rel. Counsel for Dis. v. Sopinski 526
State ex rel. NSBA v. Abrahamson 632
State ex rel. NSBA v. Frank 299
State ex rel. NSBA v. Frederiksen 562
State; Keef v. 622
State v. Arellano 866
State v. Brunzo 598
State v. Caddy 38
State v. Castor 423
State v. Curtright 975
State v. Dunster 329
State v. Ehlers 247
State v. French 664
State v. Hamik 761
State v. Hawkins 906
State v. Heitman 185
State v. Hochstein and Anderson 311
State v. Hunt 648
State v. Ildefonso 672
State v. Kinney 812
State v. Knudtson 917
State v. Kula 787
State v. Nelson 896
State v. Redmond 411
State v. Rhea 886
State v. Roeder 951
State v. Taylor 639
State v. Thomas 138
State v. Thomas 985
State v. Trotter 443
State v. Tucker 940
State v. Whitlock 615
Steele v. Sedlacek 1
Stricker; Russell v. 853
Suburban Air Freight v. Aust 908
Summit Ltd. Partnership Five; Jones v. 793
Sur-Gro; Vonderschmidt v. 551

Tavarone; Keller v. 2
Taylor; State v. 639
Thomas; State v. 138

Thomas; State v. 985
Thornton v. Grand Island Contract Carriers 740
Trackwell; Hunt v. 688
Trotter; State v. 443
Tucker; State v. 940

V.C. v. Casady 714
Vogel v. Vogel 1030
Vonderschmidt v. Sur-Gro 551

Wagner v. Wagner 924
Whitlock; State v. 615
Wilcox v. City of McCook 696
Wilson; Kirchner v. 607
Workman v. Workman 373

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-99-1091: **Hess v. Heger**. Reversed and remanded with directions. Wright, J. Stephan, J., not participating.

No. S-00-232: **Everts v. Hardcopf-Bickley**. Reversed and remanded for further proceedings. McCormack, J.

No. S-00-347: **State ex rel. Hoskinson v. Clarke**. Appeal dismissed. Gerrard, J.

No. S-00-358: **State v. Swartz**. Vacated and remanded with directions. McCormack, J.

No. S-00-798: **State v. Jones**. Affirmed. Per Curiam.

No. S-01-020: **In re Interest of Ammons**. Reversed and remanded with directions to dismiss. Hendry, C.J. McCormack, J., participating on briefs.

No. S-01-531: **State v. Keyser**. Sentence vacated, and cause reversed and remanded for resentencing. Miller-Lerman, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-99-1200: **Stewart v. Stenberg**. Appeal dismissed as moot.

No. S-00-385: **Narine v. Mercer**. Stipulation allowed; appeal dismissed with prejudice.

No. S-00-692: **State ex rel. NSBA v. Abrahamson**. Application for reinstatement sustained; future audits ordered in *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001), shall contain some level of assurance that all client funds required to be in respondent's possession are in fact being held in trust.

No. S-00-766: **State ex rel. Callan v. Minnesota Corn Processors**. Motion of appellee for summary dismissal for mootness sustained.

Nos. S-00-903 through S-00-905: **State v. McCroy**. Motion of appellee for summary dismissal under rule 7C sustained. Appeal dismissed. See, *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993); *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993).

No. S-00-944: **Klauschie v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-00-1003: **State v. Iverson**. On the court's own motion, appeal dismissed. See, rule 7A(2); *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001).

No. S-00-1281: **Barleen v. Bakewell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-00-1303: **State ex rel. City of Alma v. Furnas County Farms**. Appellee's motion for summary dismissal granted for lack of a final, appealable order; appeal dismissed. See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000).

No. S-00-1304: **Loucks v. Henderson**. Appellee's motion for summary dismissal is overruled. On the court's own motion, district court's judgment is affirmed pursuant to rule 7A(1).

No. S-01-112: **Dees v. Andrus Enterprises**. Stipulation allowed; appeal dismissed with prejudice.

No. S-01-138: **Anderson v. Kenney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

Nos. S-01-199, S-01-232: **State v. Moses, Jr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-01-594: **State v. Warren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-01-721: **Spanish Oaks v. Hy-Vee**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-01-800: **Jameson v. Blackmer**. Cause not having been shown, appeal dismissed for lack of jurisdiction pursuant to rule 7A(2).

No. S-01-964: **Duff v. Clarke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-01-997: **State v. Chapman**. Stipulation allowed; appeal dismissed.

No. S-01-1013: **State v. Huff**. Cause having not been shown, appeal dismissed. See rule 7A(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-99-504: **State v. Oldenburg**, 10 Neb. App. 104 (2001). Petition of appellee for further review overruled on June 29, 2001.

No. A-99-1304: **Cox v. Bonifas**. Petition of appellant for further review overruled on July 11, 2001.

No. S-99-1358: **Polinski v. Sky Harbor Air Serv**. Petition of appellant for further review sustained on August 29, 2001.

No. A-99-1376: **FirsTier Bank v. Lane**. Petition of appellant for further review overruled on November 15, 2001.

No. A-99-1376: **FirsTier Bank v. Lane**. Petition of appellee FirsTier Bank for further review overruled on November 15, 2001.

No. A-99-1407: **Strand v. Alberts**. Petition of appellant for further review overruled on August 29, 2001.

No. A-99-1434: **Johnson v. Johnson**. Petition of appellant for further review overruled on October 24, 2001.

No. A-00-012: **Lakeview Acres Lot Owners v. Central Neb. Pub. Power**. Petition of appellee for further review overruled on August 29, 2001.

No. S-00-023: **Crawford v. Crawford**. Petition of appellant for further review sustained on August 29, 2001.

No. A-00-025: **State v. Lupien**. Petition of appellant for further review overruled on June 28, 2001.

No. A-00-086: **Cole v. State**. Petition of appellee for further review overruled on October 31, 2001.

No. A-00-096: **Leytham v. Huck**. Petition of appellant for further review overruled on June 20, 2001.

Nos. A-00-112, A-00-313: **Tyler v. Langan**. Petition of appellant for further review overruled on July 18, 2001.

No. A-00-115: **State v. Livingston**. Petition of appellant for further review overruled on July 11, 2001.

No. A-00-127: **State on behalf of Nigro v. Brunken**. Petition of appellant for further review overruled on August 29, 2001.

No. A-00-132: **Elkhorn Prof. Firefighters Assn. v. City of Elkhorn**. Petition of appellant for further review overruled on September 12, 2001.

No. S-00-177: **State v. Baker**. Petition of appellant for further review dismissed on September 12, 2001, as having been improvidently granted.

Nos. A-00-241 through A-00-243: **State v. Golden**. Petition of appellant for further review overruled on August 29, 2001.

No. A-00-253: **Radecki v. Burns**. Petition of appellant for further review overruled on September 12, 2001.

No. A-00-273: **Cole v. Hopkins**. Petition of appellant for further review overruled on December 12, 2001.

No. A-00-282: **Hinze v. Shivvers Enters**. Petition of appellant for further review overruled on July 18, 2001.

No. A-00-283: **Kentfield v. City of Omaha**. Petition of appellee for further review overruled on August 29, 2001.

No. A-00-287: **MBH, Inc. v. John Otte Oil & Propane**. Petition of appellee for further review overruled on October 11, 2001.

No. A-00-302: **State v. Bringus**. Petition of appellant for further review overruled on July 11, 2001.

No. A-00-319: **American Driver Serv. v. Truck Ins. Exch.**, 10 Neb. App. 318 (2001). Petition of appellee for further review overruled on August 15, 2001.

No. A-00-352: **Kardell v. Kardell**. Petition of appellant for further review overruled on September 12, 2001.

No. A-00-375: **Koch v. Norris Pub. Power Dist.**, 10 Neb. App. 453 (2001). Petition of appellee for further review overruled on October 24, 2001.

No. A-00-391: **Diers, Inc. v. Whited**. Petition of appellee for further review overruled on August 29, 2001.

No. A-00-407: **West-E-Con v. Blue Cross-Blue Shield**. Petition of appellant for further review overruled on June 28, 2001.

No. A-00-419: **Jackson v. Board of Equal. of City of Omaha**, 10 Neb. App. 330 (2001). Petition of appellant for further review overruled on August 29, 2001.

No. A-00-436: **Navarette v. Settle**, 10 Neb. App. 479 (2001). Petition of appellee for further review overruled on November 21, 2001.

No. A-00-467: **Simpson v. Demman**. Petition of appellee for further review overruled on November 15, 2001.

No. A-00-470: **Newton v. Huffman**, 10 Neb. App. 390 (2001). Petition of appellant for further review overruled on September 19, 2001.

No. A-00-511: **State v. Coleman**, 10 Neb. App. 337 (2001). Petition of appellant for further review overruled on August 29, 2001.

No. A-00-511: **State v. Coleman**, 10 Neb. App. 337 (2001). Petition of appellee for further review overruled on August 29, 2001.

No. S-00-513: **Newman v. Rehr**, 10 Neb. App. 356 (2001). Petition of appellee for further review sustained on October 11, 2001.

No. A-00-584: **Culver v. Culver**. Petition of appellant for further review overruled on July 9, 2001.

No. A-00-585: **Graham Graphics v. Baer Mktg. Internat.**, 10 Neb. App. 382 (2001). Petition of appellant for further review overruled on September 12, 2001.

No. S-00-604: **Giron v. Safeway Store of Alliance**. Petition of appellant for further review sustained on October 24, 2001.

No. A-00-619: **State v. Mueller**. Petition of appellee for further review overruled on December 12, 2001.

No. A-00-621: **Geist v. Midwest Mechanical Contractors**. Petition of appellant for further review overruled on July 11, 2001.

No. A-00-644: **In re Interest of Saville**, 10 Neb. App. 194 (2001). Petition of appellant for further review overruled on July 11, 2001.

No. A-00-684: **Moriarty v. Augustin**. Petition of appellee for further review overruled on November 15, 2001.

Nos. A-00-709, A-00-710: **In re Interest of Sarah C. & Jason C.**, 10 Neb. App. 184 (2001). Petition of appellant for further review overruled on June 28, 2001.

No. A-00-745: **Fuller v. Central Dev. Indus**. Petition of appellant for further review overruled on August 29, 2001.

No. A-00-762: **Reiss v. Gellermann**. Petition of appellant for further review overruled on August 29, 2001.

No. S-00-791: **State v. Hookstra**, 10 Neb. App. 199 (2001). Petition of appellant for further review sustained on July 18, 2001.

No. A-00-796: **State ex rel. Borrink v. State**, 10 Neb. App. 293 (2001). Petition of appellant for further review overruled on September 12, 2001.

No. A-00-814: **Dahlheimer v. Dahlheimer**. Petition of appellant for further review overruled on October 31, 2001.

No. A-00-868: **Rambla v. Drivers Management**. Petition of appellant for further review overruled on August 29, 2001.

No. A-00-878: **State v. Boggess**. Petition of appellant for further review overruled on October 22, 2001.

No. A-00-881: **State v. Butler**, 10 Neb. App. 537 (2001). Petition of appellee for further review overruled on December 20, 2001.

No. A-00-917: **State v. Anderson**, 10 Neb. App. 163 (2001). Petition of appellee for further review overruled on August 29, 2001.

No. A-00-923: **State v. Parker**. Petition of appellant for further review overruled on December 20, 2001.

No. A-00-934: **Huryta on behalf of Huryta v. Huryta**. Petition of appellant for further review overruled on December 20, 2001.

No. A-00-935: **State v. Mohr**, 10 Neb. App. 442 (2001). Petition of appellant for further review overruled on October 11, 2001.

No. A-00-951: **Wilson v. Mobley**. Petition of appellant for further review overruled on July 11, 2001.

No. A-00-957: **State v. Damme**. Petition of appellant for further review overruled on July 11, 2001.

No. A-00-974: **State v. McClain**. Petition of appellant for further review overruled on August 29, 2001.

Nos. S-00-984, S-00-1029: **State v. Birge**. Petition of appellee for further review sustained on October 17, 2001.

No. S-00-1003: **State v. Iverson**. Petition of appellant for further review sustained on August 29, 2001.

No. A-00-1009: **Chavez v. IBP, inc**. Petition of appellant for further review overruled on September 26, 2001.

No. A-00-1023: **State v. Powers**, 10 Neb. App. 256 (2001). Petition of appellant for further review overruled on August 29, 2001.

No. A-00-1044: **State v. Taylor**. Petition of appellant for further review overruled on October 24, 2001.

No. A-00-1045: **Butler v. Drivers Mgmt., Inc**. Petition of appellee for further review overruled on October 11, 2001.

No. A-00-1047: **State v. Cox**, 10 Neb. App. 501 (2001). Petition of appellee for further review overruled on December 12, 2001.

No. A-00-1054: **State v. Avery**. Petition of appellant for further review overruled on December 20, 2001.

No. A-00-1057: **Jacobson v. Jacobson**, 10 Neb. App. 622 (2001). Petitions of appellant for further review overruled on December 28, 2001.

No. S-00-1074: **In re Interest of DeWayne G. & Devon G.**, 10 Neb. App. 177 (2001). Petition of appellee for further review sustained on August 29, 2001.

No. A-00-1080: **State v. Perkins**. Petition of appellant for further review overruled on September 26, 2001.

No. A-00-1099: **Bierbower v. Bierbower**. Petition of appellant for further review overruled on October 31, 2001.

Nos. A-00-1118, A-00-1119: **State v. Bottolfson**. Petition of appellant for further review overruled on July 11, 2001.

No. A-00-1135: **State v. Lyons**. Petition of appellant for further review overruled on June 28, 2001.

No. A-00-1151: **Strotheide v. Neth**. Petition of appellant for further review overruled on August 29, 2001.

No. S-00-1156: **Green v. Drivers Mgmt., Inc.**, 10 Neb. App. 299 (2001). Petition of appellant for further review sustained on August 29, 2001.

No. A-00-1170: **In re Interest of Brittany S**. Petition of appellant for further review overruled on October 31, 2001.

No. S-00-1184: **Chojolan v. Armour Food Co**. Petition of appellant for further review sustained on October 17, 2001.

No. A-00-1185: **Hoffart v. Fleming Cos.**, 10 Neb. App. 524 (2001). Petition of appellee for further review overruled on December 12, 2001.

No. A-00-1251: **State v. Finney**. Petition of appellee for further review overruled on December 12, 2001.

Nos. A-00-1289, A-00-1290: **State v. Dotson**. Petition of appellant for further review overruled on July 18, 2001.

No. A-00-1296: **State v. Champ**, 10 Neb. App. 416 (2001). Petition of appellant for further review overruled on October 11, 2001.

No. A-00-1306: **State v. Gonzalez-Faguaga**. Petition of appellant for further review overruled on August 29, 2001.

Nos. A-00-1310 through A-00-1312: **State v. Prokopec**. Petition of appellant for further review overruled on August 29, 2001.

No. A-00-1317: **Caton v. Department of Corr. Servs**. Petition of appellant for further review overruled on August 29, 2001.

No. S-00-1333: **In re Interest of Albert H**. Petition of appellant for further review sustained on July 18, 2001.

No. A-01-006: **State v. McKimmey**, 10 Neb. App. 595 (2001). Petition of appellant for further review overruled on November 28, 2001.

No. A-01-026: **State v. Marcy**. Petition of appellant for further review overruled on October 1, 2001.

No. A-01-032: **State v. Matlock**. Petition of appellant for further review overruled on July 18, 2001.

No. A-01-055: **State v. Roberts**. Petition of appellant for further review overruled on August 29, 2001.

No. A-01-073: **Christensen v. Memorial Hosp. of Dodge Cty**. Petition of appellant for further review overruled on November 21, 2001.

No. A-01-084: **State v. Overstreet**. Petition of appellant for further review overruled on September 12, 2001.

No. A-01-100: **In re Conservatorship of Marshall**, 10 Neb. App. 589 (2001). Petition of appellant for further review overruled on November 28, 2001.

No. A-01-103: **Nesbitt v. Fiedler**. Petition of appellant for further review overruled on July 11, 2001.

No. A-01-105: **State v. Cunningham**. Petition of appellant for further review overruled on October 11, 2001.

No. A-01-135: **Wiley v. IPB, inc**. Petition of appellant for further review overruled on December 20, 2001.

No. A-01-136: **State v. Tyrrell**. Petition of appellant for further review overruled on August 29, 2001.

No. A-01-190: **Bert Murphy L.L.C. v. Bellevue Health & Emergency Clinic**. Petition of appellant for further review overruled on July 11, 2001.

No. A-01-191: **Lukes v. Department of Revenue**. Petition of appellant for further review overruled on December 12, 2001.

No. S-01-193: **Waite v. City of Omaha**. Petition of appellant for further review sustained on July 18, 2001.

No. A-01-201: **State v. Boysen**. Petition of appellant for further review overruled on August 29, 2001.

No. A-01-231: **State v. Villanueva**. Petition of appellant for further review overruled on August 29, 2001.

No. A-01-244: **Echols v. Stenberg**. Petition of appellant for further review overruled on November 5, 2001.

No. A-01-247: **State v. Brunia**. Petition of appellant for further review overruled on November 21, 2001.

No. A-01-259: **State v. Ross**. Petition of appellant for further review overruled on August 29, 2001.

No. A-01-259: **State v. Ross**. Petition pro se of appellant for further review overruled on August 29, 2001.

No. A-01-261: **State v. Doyle**. Petition of appellant for further review overruled on October 11, 2001.

Nos. A-01-352, A-01-353: **State v. Bent**. Petitions of appellant for further review overruled on September 12, 2001.

No. A-01-379: **State v. Daniels**. Petition of appellant for further review overruled on October 31, 2001.

No. A-01-393: **Johnson v. Kenney**. Petition of appellant for further review overruled on October 11, 2001.

No. A-01-396: **State v. Caldwell**. Petition of appellant for further review overruled on October 17, 2001.

No. A-01-402: **State v. Houle**. Petition of appellant for further review overruled on December 28, 2001.

No. A-01-443: **State ex rel. Free The Innocent v. Scotts Bluff Cty. Sheriff**. Petition of appellant for further review overruled on September 4, 2001.

No. A-01-450: **State v. Brown**. Petition of appellant for further review overruled on December 20, 2001.

No. A-01-483: **State v. Holliman**. Petition of appellant for further review overruled on November 15, 2001.

No. A-01-536: **State v. Russell**. Petition of appellant for further review overruled on October 24, 2001.

No. A-01-547: **Classic Auto Sales, Inc. v. Lombardi**. Petition of appellant for further review overruled on October 11, 2001.

No. A-01-550: **State v. Williams**. Petition of appellant for further review overruled on October 31, 2001.

No. A-01-619: **State v. Erhart**. Petition of appellant for further review overruled on December 12, 2001.

No. A-01-647: **State v. Gilpin**. Petition of appellant for further review overruled on December 20, 2001.

No. A-01-663: **In re Estate of Marcy**. Petition of appellant for further review overruled on November 28, 2001.

No. A-01-698: **State v. Peterson**. Petition of appellant for further review overruled on December 20, 2001.

No. A-01-702: **Pserros v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 19, 2001.

No. A-01-705: **State v. Pleines**. Petition of appellant for further review overruled on December 12, 2001.

No. A-01-751: **State v. Price**. Petition of appellant for further review overruled on October 1, 2001.

No. A-01-879: **Argyrakis v. Ueda**. Petition of appellant for further review overruled on December 12, 2001.

No. A-01-977: **Tyler v. Stennis**, 10 Neb. App. 655 (2001). Petition of appellant for further review overruled on December 4, 2001.

No. A-01-999: **Provancha v. Boche**. Petition of appellant for further review overruled on December 20, 2001.

No. S-33-10041: **Mumin v. Likes**. Petition of appellant for further review overruled on December 18, 2001.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JAYNE STEELE, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES E. STEELE II, DECEASED, APPELLANT, V. RITA C. SEDLACEK, PERSONAL REPRESENTATIVE OF THE ESTATE OF LISA M. SEDLACEK, DECEASED, APPELLEE.

626 N.W. 2d 224

Filed June 22, 2001. No. S-99-760.

SUPPLEMENTAL OPINION

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Vincent Valentino and Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Michael F. Coyle and Andrea Friedlander Scioli, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

PER CURIAM.

This matter is before us on the motion for rehearing of the appellant regarding our opinion reported at *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001). The appellant argues that the district court should, after remand, direct a verdict in favor of the appellant on the issue of liability and limit the new trial to the issue of damages. We agree.

We overrule the motion for rehearing, but substitute for the present paragraph following the heading "Conclusion," *id.* at 800, 626 N.W.2d at 229, the following paragraph:

For the reasons set forth herein, we reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to further remand the cause to the trial court, with directions to enter a directed verdict in favor of Charles' estate on the issue of liability and conduct a new trial on the issue of damages only.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

BRENDA L. KELLER, APPELLANT, V.
THOMAS N. TAVARONE, M.D., APPELLEE.

628 N.W. 2d 222

Filed June 22, 2001. No. S-00-107.

1. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In an action brought pursuant to the Political Subdivisions Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are 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. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. By stating "where the inference is clear," the Nebraska Supreme Court means that there can be no dispute as to facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom.
4. **Employer and Employee: Independent Contractor.** There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.

5. ____: ____. Generally, the right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
6. **Master and Servant.** Whether the parties believed that they were creating a master-servant relationship is an important guideline in determining the legal nature of the relationship.
7. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
8. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
9. **Statutes: Immunity: Waiver.** Statutes that purport to waive the State's sovereign immunity must be clear in their intent, and are strictly construed in favor of the sovereign and against the waiver.
10. **Statutes: Legislature: Intent.** In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute.
11. **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.
12. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.

Appeal from the District Court for Cherry County: WILLIAM B. CASSEL, Judge. Affirmed.

Richard A. DeWitt and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellant.

Robert W. Wagoner for appellee.

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

GERRARD, J.

NATURE OF CASE

The appellant, Brenda L. Keller, sued Thomas N. Tavarone, M.D., for alleged medical malpractice. The district court dismissed Keller's petition after determining that Tavarone was an employee of the Cherry County Hospital (the Hospital) and that Keller had not complied with the claim requirements of the Political Subdivisions Tort Claims Act (Tort Claims Act), Neb. Rev. Stat. ch. 13, art. 9 (Reissue 1997). This case requires that we examine the interaction between the Tort Claims Act and the

Nebraska Hospital-Medical Liability Act (NHMLA), Neb. Rev. Stat. ch. 44, art. 28 (Reissue 1993 & Cum. Supp. 1996).

PROCEDURAL BACKGROUND

Keller filed a petition in the district court on December 31, 1998. The petition alleged that Tavarone had performed an abdominal hysterectomy on Keller on May 27, 1997, and that complications had ensued, including a fistula and an obstructed ureter. The petition further alleged that Tavarone was negligent in failing to obtain Keller's informed consent to the procedure, in failing to advise Keller of the possible complications, and in failing to consider and follow nonsurgical treatment options. The petition waived review of the claim by a medical review panel pursuant to the NHMLA. See § 44-2840(4). The petition did not allege compliance with the Tort Claims Act. See § 13-920(1).

Tavarone answered and alleged that he was at all relevant times an employee of the Hospital, a county medical facility in Valentine, Nebraska. Tavarone alleged that Keller was admitted to and treated at the Hospital. Tavarone also alleged that no notice of tort claim had been filed with Cherry County. See § 13-905. It was stipulated at trial that Keller was admitted to the Hospital for a hysterectomy and that no notice of tort claim was filed.

The district court ordered a bifurcated trial, with the first part of the proceeding to address whether the Tort Claims Act applied to Keller's claim. Trial was had to the court, and the district court concluded, based on the evidence set forth below, that Tavarone was an employee of the Hospital and that the Hospital was a political subdivision. Accordingly, the district court dismissed Keller's petition for failure to comply with the Tort Claims Act. Keller appeals.

FACTUAL BACKGROUND

Tavarone graduated from the Creighton University School of Medicine in May 1991 and completed his residency at the University of Medicine and Dentistry of New Jersey in June 1996. Tavarone was hired by the Hospital pursuant to a "Surgeon Employment Agreement," executed on June 3, 1996 (the agreement). The agreement stated that the Hospital wished to recruit Tavarone to relocate to Valentine and to employ Tavarone to

provide full-time medical services. Tavarone's employment was to commence on July 15 and continue indefinitely. The agreement required Tavarone to provide services at the Hospital and its clinic facilities in Valentine, as well as "such other locations as [the Hospital] may reasonably require from time to time."

The agreement provided that Tavarone was to receive a base annual salary paid in 26 equal installments and incentives based on the fees billed by the Hospital for services rendered by Tavarone. The Hospital issued Internal Revenue Service W-2 forms for Tavarone's wages for 1996 to 1998, and Tavarone accordingly filed individual income tax returns for those years showing his wage income from the Hospital. Tavarone was also provided with a signing bonus, moving expenses, and student loan repayment. The Hospital issued Internal Revenue Service 1099 forms for those expenses. The agreement set forth the number of days Tavarone would have for vacation and sick leave, the provision for leave and expenses for continuing medical education, and Tavarone's participation in the Hospital's insurance and retirement plans. The agreement also provided that the Hospital would buy professional liability insurance for Tavarone. Tavarone's application for professional liability insurance listed the Hospital as his employer.

The agreement stated that the Hospital would provide all needed facilities for Tavarone's medical practice. All employees assisting Tavarone were to be employees of the Hospital, "under the administrative and executive control of [the Hospital] and under the technical and medical supervision of [Tavarone]." The agreement provided that all referral and admission decisions were to be made by Tavarone, in the best medical interests of the patients, and that neither the Hospital nor any layperson associated with the Hospital was to have or exercise any control over Tavarone's professional medical judgment in the performance of his duties.

The Hospital was to bill, receive, and retain all fees for professional services rendered by Tavarone during the term of Tavarone's employment by the Hospital. Tavarone was not permitted to engage in the practice of medicine in any other form without the express written permission of the Hospital. The agreement barred Tavarone, if the agreement was terminated,

from soliciting business from his former patients at the Hospital for a period of 6 months following termination. The Hospital was to maintain all medical and clinical records, which were to be the property of the Hospital.

Tavarone testified that he considered himself bound to the Hospital, with no other employment of any nature. Tavarone said that he received his paycheck from the Hospital and that all budgeting and billing for his treatment of patients was performed by the Hospital. Tavarone testified that all of his facilities and equipment were provided by the Hospital with the exception of his cellular telephone.

Tavarone testified that he made all medical decisions regarding patient management, including admission and discharge decisions. Tavarone did not need anyone's permission to perform surgery or use the Hospital operating room. If Tavarone had questions about patient management, he would discuss those with his colleagues, but questions about "business function" were directed to Hospital administrator Brent Petersen. Tavarone stated that he believed general surgery was a part of the business of the Hospital. Tavarone testified that Keller's care took place on Hospital premises and that at the time of Keller's care, Tavarone considered himself to be an employee of the Hospital.

Petersen testified that Tavarone was listed as an employee of the Hospital for payroll and benefit purposes on documentation provided by the Hospital to third parties. Petersen stated that Tavarone was treated like any other employee. Petersen said that he supervised Tavarone on personnel issues and did not personally critique Tavarone's medical judgment, but did have procedures in place and available to ensure that work was being performed and was within acceptable standards of care. Petersen stated that he considered Tavarone to be an employee of the Hospital, and it was stipulated that members of the Hospital's board of trustees would have testified to the same effect.

Petersen testified that the Hospital conducted billings, kept records, and provided all the supplies for Tavarone's care of patients. Petersen also testified that the Hospital paid Tavarone's malpractice insurance premium and NHMLA surcharge. Petersen testified that both Tavarone and the Hospital were covered under the NHMLA.

Petersen stated that other physicians had staff credentials at the Hospital and that three other "independent physicians," or "active staff," practiced in Valentine. Those physicians leased office space from the Hospital in an adjacent building, unlike Tavarone, whose office was part of the Hospital building. Petersen testified that the Hospital had no control over the activities of the independent physicians, other than as a lessor, and with respect to certain hospital policies when the independent physicians were using staff privileges at the Hospital. Petersen stated that the independent physicians performed their own billing.

Keller testified that she was not told that Tavarone was an employee of the Hospital. Keller stated that she did not receive a bill from anyone for Tavarone's services, but that she was covered at the time by medicare or medicaid.

ASSIGNMENTS OF ERROR

Keller assigns, consolidated and restated, that the district court erred in (1) finding Tavarone to be an employee of the Hospital and (2) concluding that the Tort Claims Act provided the exclusive remedy for Keller's medical malpractice claim.

STANDARD OF REVIEW

[1] In an action brought pursuant to the Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are clearly wrong. See, *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001); *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000).

[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. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001); *Brandon v. County of Richardson, supra*.

ANALYSIS

EMPLOYEE/INDEPENDENT CONTRACTOR

It is undisputed on appeal that the Hospital is a governmental entity which is subject to the provisions of the Tort Claims Act. Thus, the initial question is whether Tavarone was an employee

of the Hospital. In this regard, Keller argues that the district court erred in finding Tavarone to be an employee of the Hospital, as opposed to an independent contractor.

[3] Ordinarily, a party's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Reeder v. State*, 254 Neb. 707, 578 N.W.2d 435 (1998); *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997). By stating "where the inference is clear," this court means that there can be no dispute as to facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom. *Kime v. Hobbs, supra*; *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996).

[4] There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Reeder v. State, supra*; *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997); *Kime v. Hobbs, supra*; *Pettit v. State, supra*.

[5] In considering these factors, Keller relies primarily upon evidence showing that Tavarone's medical decisionmaking was not controlled by the Hospital's administration. Generally, the right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Id.*

However, the record shows that while Tavarone was responsible for medical decisions, he was to make those decisions in the best interests of the patients and within established Hospital guidelines. The record also shows that Tavarone was under the control and supervision of the Hospital in most other aspects of his employment. The Hospital maintained all medical and clinical records, which were to be the property of the Hospital. In addition, Tavarone was not permitted to engage in the practice of medicine in any other form without the permission of the Hospital, and Tavarone considered himself bound to the Hospital, with no other employment of any nature. Tavarone's application for professional liability insurance clearly listed the Hospital as his employer. The Hospital also controlled, by agreement, where Tavarone would provide his medical services. Thus, while the record shows that Tavarone had the authority to use his professional medical judgment, this authority was not so unfettered as to demonstrate that the district court was clearly wrong in finding, as a matter of fact, that Tavarone was an employee of the Hospital.

[6] The district court's finding is further supported by the other criteria set forth above. The record does show that Tavarone is engaged in a distinct occupation; that in this locality, that occupation is often performed without supervision; and that Tavarone's occupation is, to say the least, a skilled profession. These factors generally weigh in favor of finding an independent contractor relationship. See *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996). However, the record also shows that the Hospital provided all the facilities and supplies for Tavarone's employment and performed all the billing and administrative functions. All employees assisting Tavarone were also employees of the Hospital. The record establishes that Tavarone was engaged to work for an indefinite period of time, during which he would be paid a fixed salary, albeit with incentives. These factors are suggestive of an employment relationship. See *Omaha World-Herald v. Dernier, supra*. The record also indicates, by the terms of the agreement and from their own testimony, that the parties to the agreement believed they had created an agency relationship. Whether the parties believed that

they were creating a master-servant relationship is an important guideline in determining the legal nature of the relationship. *Id.*

The record also shows that the Hospital is in business and that the work performed by Tavarone was a part of the regular business of the Hospital. Keller concedes that the Hospital is in business, but argues briefly that the Hospital is not in the business of practicing medicine and surgery, because medicine and surgery can be practiced only by licensed professionals. This argument taken to its logical conclusion would mean that no physician could ever be an employee. Keller's argument is similar to one rejected by this court in *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). In that case, the question was whether an individual who purchased and resold daily newspapers was an employee of the newspaper publisher. The publisher argued that it was in the business of publishing, but not selling, newspapers. We rejected that argument, concluding that the sale of newspapers was clearly an "integral part" of the business in which the publisher was engaged. *Id.* at 228, 570 N.W.2d at 517.

Similarly, the provision of medical services, through its appropriately licensed employees, is clearly an "integral part" of the business of the Hospital. Indeed, Keller does not address what, if anything, the business of the Hospital could be, if not the provision of medical and surgical health care services. Tavarone's work is an evident part of the regular business of the Hospital; this is further indication of an employment relationship. See *id.*

In sum, while there is some evidence regarding Tavarone's professional status and decisionmaking regarding medical issues that could weigh in favor of an independent contractor status, there is also substantial evidence of the Hospital's control over Tavarone's practice and other factors that support the district court's finding that Tavarone was an employee of the Hospital. Given the reasonable inferences that can be drawn from the record, this was a question of fact for the district court to determine, and the district court's determination was not clearly wrong.

Tort Claims Act/NHMLA

Since Tavarone was found to be an employee of a political subdivision, and it is not disputed that Keller's alleged cause of

action arose within the scope of Tavarone's employment by the Hospital, Keller's claim falls subject to the provisions of § 13-920(1), which provides:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment occurring after May 13, 1987, unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued in accordance with section 13-905.

[7,8] While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. See, *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990); *Knight v. Hays*, 4 Neb. App. 388, 544 N.W.2d 106 (1996). The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. See § 13-902. Keller stipulated that at the time of trial, she had not presented or filed a claim pursuant to § 13-905.

Keller argues, however, that because her action was brought pursuant to the NHMLA, she was not required to comply with the Tort Claims Act. It is not disputed that both Tavarone and the Hospital were qualified health care providers within the meaning of the NHMLA. Section 44-2821(2) provides, in relevant part:

> If a health care provider shall qualify under the act, the patient's exclusive remedy against the health care provider . . . for alleged malpractice, professional negligence, failure to provide care, breach of contract relating to providing medical care, or other claim based upon failure to obtain informed consent for an operation or treatment shall be as provided by the act unless the patient shall have elected not to come under the provisions of the act.

Section 44-2840 further states, in relevant part:

> (1) Provision is hereby made for the establishment of medical review panels to review all malpractice claims against health care providers covered by the Nebraska

> Hospital-Medical Liability Act in advance of filing such actions.
>
> (2) No action against a health care provider may be commenced in any court of this state before the claimant's proposed petition has been presented to a medical review panel established pursuant to section 44-2841 and an opinion has been rendered by the panel.
>
> . . . .
>
> (4) The claimant may affirmatively waive his or her right to a panel review, and in such case the claimant may proceed to file his or her action directly in court.

Keller argues that the NHMLA purports to be an exclusive remedy for medical malpractice claims and, thus, that although she waived a panel review under § 44-2840(4), her action pursuant to the NHMLA still did not need to comply with the requirements of any other act, including the Tort Claims Act.

[9] The first problem with Keller's argument is that the Tort Claims Act is not simply a statutory remedy, but is also a waiver of sovereign immunity. The NHMLA, on the other hand, provides no explicit waiver of sovereign immunity. Statutes that purport to waive the State's sovereign immunity must be clear in their intent, and are strictly construed in favor of the sovereign and against the waiver. See, *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000); *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). The NHMLA contains no waiver of sovereign immunity that would permit its application as a remedy against the State or a political subdivision of the State.

More significant, however, is that the Tort Claims Act provides, in no uncertain terms, for interaction between the Tort Claims Act and the NHMLA. Section 13-919(4) provides:

> If a claim is brought under the Nebraska Hospital-Medical Liability Act, the filing of a request for review under section 44-2840 shall extend the time to begin suit under the Political Subdivisions Tort Claims Act an additional ninety days following the issuance of the opinion by the medical review panel if the time to begin suit under the Political Subdivisions Tort Claims Act would otherwise expire before the end of such ninety-day period.

This section clearly contemplates that litigants would be required to comply with both the NHMLA and the Tort Claims Act. The legislative history of this provision, and its analog in the Tort Claims Act, Neb. Rev. Stat. § 81-8,227(3) (Reissue 1996), reveals that the intent of this provision was to harmonize the requirements of the Tort Claims Act and the NHMLA. As stated by the senator introducing the legislation:

> Section 3 is intended to eliminate a procedural trap which has bothered plaintiff's lawyers that have claims for professional negligence against public hospitals which have qualified under the act. There are two sets of statutes which affect these claims, the Tort Claims laws and the Hospital-Medical Liability Act. Under current law if you file a claim against a hospital run by a county, for example, and the claim is denied by the county board, it must then be submitted to the medical review panel before lawsuit may be filed. Because of the time limitations in the Tort Claims Acts [sic], there can be problems if the medical review panel procedure is delayed. Part of the problem has already been solved by [this bill] because it makes the review panels optional. However, there may be situations where persons claiming against public hospitals want to use medical review panels. In those situations these amendments provide that the request for the medical review panel will toll or delay the applicable section of the Tort Claims Act. While the panel procedure is pending, the claimant will have 90 days after the panel is completed to file suit if the limitations period is expired.

Floor Debate, L.B. 692, 88th Leg., 2d Sess. 9331-32 (Mar. 9, 1984). See, also, Banking Committee Hearing, L.B. 692, 88th Leg., 2d Sess. (Jan. 16, 1984).

Keller argues that § 13-919(4) does not apply in this case, because it only extends the time for filing suit after a panel review under the NHMLA, while Keller expressly waived a panel review. Keller's observation is correct, but beside the point. Section 13-919(4) evinces the Legislature's intent to harmonize the operation of the two acts in question and, thus, contradicts Keller's claim that the acts operate exclusive of one another.

In the first place, if Keller's argument about the exclusivity of the NHMLA was correct, then § 13-919(4) would have been unnecessary. Section 13-919(4) extends the time for filing suit under the Tort Claims Act after the completion of a panel review under the NHMLA. If a suit pursuant to the NHMLA excused a litigant from the requirements of the Tort Claims Act, then the extension provided by § 13-919(4) would not have been needed. Instead, the Legislature amended the statute to harmonize the NHMLA and the Tort Claims Act, signaling its intent that both the NHMLA and the Tort Claims Act were to apply to medical malpractice claims against qualifying political subdivisions.

[10,11] In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute. See, *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998). Here, Keller asks us to adopt a construction of the NHMLA that would nullify provisions of the Tort Claims Act, despite evidence of clear legislative intent to the contrary. Keller's construction of the statute would also require us to disregard the Legislature's purpose in amending the Tort Claims Act—to harmonize its provisions with those of the NHMLA. However, 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. *In re Invol. Dissolution of Battle Creek State Bank, supra.*

In this instance, a reasonable construction of the statute is apparent in the statutory scheme contemplated by the Legislature, which is reflected in the legislative history and the language of the statute. The Tort Claims Act requires that a claim must be submitted to a political subdivision within 1 year after such claim accrued, and no suit will be permitted under the Tort Claims Act until the political subdivision makes final disposition of the claim, except that a claimant may withdraw the claim and bring suit if the political subdivision does not make final disposition of the claim within 6 months after the claim is filed. See, § 13-906; § 13-919(1). In short, a litigant must first file a claim, and then may bring suit only after the claim is disposed of or withdrawn.

The language of § 13-919(4) specifically provides an extension for the time to "begin suit" under the Tort Claims Act—not the time to file a claim. The statutory language contemplates that a claim under the Tort Claims Act must be filed and disposed of or withdrawn prior to presentation of the proposed petition to a medical review panel, or the waiver of a medical review panel, under § 44-2840.

In other words, the procedure the statutes required Keller to follow was, first, to file a claim with the appropriate officer of the political subdivision, pursuant to § 13-905, within 1 year of the accrual of her claim. After the claim was disposed of or withdrawn, pursuant to § 13-906, Keller would have been permitted to either submit a proposed petition to a review panel, or waive such review, pursuant to § 44-2840(3) and (4). If she had presented the petition to a review panel, she would have had an extra 90 days, after the issuance of the opinion of the review panel, to file suit under the Tort Claims Act. See § 13-919(4). If she had waived the panel review, the action under the Tort Claims Act would have been filed directly in the district court. See, § 44-2840(4); § 13-907.

The operation of the NHMLA, however, did not excuse Keller from compliance with the requirement under the Tort Claims Act that the claim be presented to the political subdivision prior to filing suit. As Keller concedes that no claim was filed with the political subdivision prior to filing suit, her petition was properly dismissed pursuant to § 13-920(1). Keller's assignment of error to the contrary is without merit.

Tort Claims Act Savings Clause

Keller argues that even if she was subject to the presentment requirement of the Tort Claims Act, the district court erred in not maintaining her petition pursuant to the "savings clause" contained in § 13-919(2). Brief for appellant at 30. That section provides, in relevant part:

> If a claim is made or filed under any other law of this state and a determination is made by a political subdivision or court that the act provides the exclusive remedy for the claim, the time to make a claim and to begin suit under the act shall be extended for a period of six months from the

> date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim and to begin suit under the act would otherwise expire before the end of such period.

Keller argues that she filed a "claim" under "any other law of this state," i.e., filed suit under the NHMLA, and that the time for her to make a claim under the Tort Claims Act should be extended. This argument, however, was not properly before the district court and is not properly before this court. Even assuming, without deciding, that § 13-919(2) would apply under the circumstances of Keller's case to extend the time for her to file a claim pursuant to § 13-905, the record before this court does not show whether such a claim has in fact been filed.

[12] In other words, while an argument could be made that § 13-919(2) potentially provides an extension of time to permit the filing of an otherwise untimely claim, there is no indication in the instant record that a claim, untimely or otherwise, has been filed at all. Keller's argument is, at best, premature. Because § 13-919(2) is not implicated by the record in this case, we do not opine on whether Keller's suit under the NHMLA would constitute a claim "made or filed under any other law of this state," or whether § 13-919(2) would otherwise be applicable. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999).

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in determining that Tavarone was an employee of a political subdivision and that Keller's suit was barred by her failure to comply with the provisions of the Tort Claims Act. We, therefore, affirm the judgment of the district court.

AFFIRMED.

IN RE ESTATE OF OTTO A. EICKMEYER, DECEASED. LANA NALEZINEK, APPELLANT, V. UNION BANK AND TRUST COMPANY OF LINCOLN, NEBRASKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF OTTO A. EICKMEYER, DECEASED, ET AL., APPELLEES.

628 N.W. 2d 246

Filed June 22, 2001. No. S-00-158.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
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. **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.
4. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
5. ____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
6. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.

Appeal from the County Court for Lancaster County: JEAN A. LOVELL, Judge. Reversed and remanded for further proceedings.

Don R. Janssen and Jolene M. Papa, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

John C. Hurd and Fred B. Campbell, Jr., of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee Erma Schwartz.

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

STEPHAN, J.

We are asked to determine how the residue of the estate of Otto A. Eickmeyer (testator) should be distributed. Three of the five devisees named in the residuary clause of the testator's will predeceased him. Two died without issue. The third was survived

by a daughter, appellant Lana Nalezinek. The parties agree that pursuant to the antilapse statute, Neb. Rev. Stat. § 30-2343 (Reissue 1995), Nalezinek is entitled to that portion of the residuary estate specifically devised to her father, Harry Eickmeyer. The single question of law presented for review is whether Nalezinek is also entitled to a portion of the residuary devised to the two persons who predeceased the testator without issue.

BACKGROUND

The relevant facts are not disputed. The testator died on March 3, 1999. His will, dated January 12, 1987, provided in pertinent part:

> All the rest, residue and remainder of my property, both personal and real, I give, devise and bequeath as follows: 50% thereof to my sister, LaVerne Schuelke, 20% to my sister Emma Sunderman, and the remaining 30% to my brother Harry Eickmeyer and to my sisters Mabel Jones and Erma Schwartz, share and share alike.

LaVerne Schuelke and Mabel Jones predeceased the testator, leaving no issue. Harry Eickmeyer also predeceased the testator and has one surviving issue, Nalezinek. Appellees Emma Sunderman and Erma Schwartz survived the testator.

On April 28, 1999, the registrar issued a statement of informal probate. The registrar declared the January 12, 1987, will valid and appointed Union Bank and Trust Company as personal representative. The personal representative then filed a petition, and later an amended petition, to construe the will. In its amended petition, the personal representative alleged that "[i]t is unclear through the application of Nebraska Probate Code Section 30-2343 and 30-2344 whether 'residuary devisees' means the persons named in the residual clause or the persons who receive under the residual clause and those who receive pursuant to Nebraska Probate Code Section 30-2343." The personal representative alleged that

> [i]t is possible to construe the application of 30-2344 to divide the failed amount (60% of residual estate) only to the residuary devisees named in the will without the application of 30-2343 whereby the 60% residual will be distributed proportionately among Emma H. Sunderman and

> Erma L. Schwartz. It is also possible to construe Section 30-2344 with Section 30-2343 whereby the residual amount would be distributed proportionately among Emma H. Sunderman, Erma L. Schwartz and Lana Nalezinek.

The personal representative further alleged that under the first construction, Sunderman would receive 60 percent of the residue, Schwartz would receive 30 percent, and Nalezinek would receive the remaining 10 percent. However, under the second construction of the statutes, Sunderman would receive 50 percent of the residue, Schwartz would receive 25 percent, and Nalezinek would be entitled to a 25-percent share.

Following a hearing, the county court entered an order determining that Nalezinek was not a "residuary devisee" within the meaning of § 30-2344 and therefore "the failed amount of 60 percent of the residue should be distributed proportionately between Emma Sunderman and Erma Schwartz, the residuary devisees named in the will." Nalezinek perfected this appeal, which we moved to our docket pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Nalezinek assigns that the county court erred in finding that she was not a "substitute residuary devisee" of the testator's estate pursuant to § 30-2343 and Neb. Rev. Stat. § 30-2344(b) (Reissue 1995). She also assigns that the county court erred in failing to instruct the personal representative to distribute the estate proportionately between Sunderman, Schwartz, and Nalezinek.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001); *North Bend Senior Citizens Home v. Cook*, 261 Neb. 500, 623 N.W.2d 681 (2001).

ANALYSIS

Resolution of the issue presented for appeal requires that we construe statutory language found in two sections of the Nebraska Probate Code. The first is § 30-2343, which provides in pertinent part:

> If a devisee related to the testator in any degree of kinship is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by one hundred twenty hours take in place of the deceased devisee . . . .

The second statute is § 30-2344, which delineates how failed devises should be distributed. Specifically, § 30-2344(b) provides:

> Except as provided in section 30-2343, if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

Nalezinek argues that because § 30-2344(b) makes specific reference to § 30-2343, the phrase "other residuary devisee" as used in § 30-2344(b) would include residuary devisees specifically named in the will *and* those who take in their place by operation of the antilapse statute. Thus, Nalezinek contends she is entitled not only to that portion of the estate specifically devised to Harry Eickmeyer, but also that share of the devises to Schuelke and Jones which Harry Eickmeyer would have received under § 30-2344 if he had survived the testator.

On the other hand, Schwartz argues that because the term "devisee" is defined by Neb. Rev. Stat. § 30-2209(8) (Cum. Supp. 2000) as "any person designated in a will to receive a devise," the phrase "other residuary devisee" as used in § 30-2344(b) must be narrowly construed to include only persons or entities who are specifically named in the will as devisees. She argues that the Legislature did not intend to treat people who take the place of another through the operation of the antilapse statute in the same manner as persons who are actually named in the will.

We have not previously addressed the issue presented. Neither our research nor the parties' briefs identify pertinent authority from other jurisdictions which have adopted the Uniform Probate Code, from which §§ 30-2343 and 30-2344 are derived. See, Unif. Probate Code §§ 2-605 and 2-606, 8 U.L.A. 423-27 (1998); Donald H. Kelley, *The Nebraska Probate Code: Its Background and Development*, 9 Creighton L. Rev. 454 (1976). Two courts, however, have addressed the issue under

statutes which are similar to §§ 30-2343 and 30-2344. See, *Fidelity Union Trust Co. v. Berenblum*, 91 N.J. Super. 551, 555, 221 A.2d 758, 760 (1966) (construing statute that provided that share of predeceased residuary devisee " 'shall go to and be vested in the remaining devisee[s] or legatee[s]' " and holding that statute should be read in pari materia with state's antilapse statute, so that descendants of two deceased residuary devisees would take that which was devised to their deceased ancestors, as well as their ancestors' share of devise to third person who predeceased testator but left no issue); *Kammer v. Raver*, 96 N.E.2d 439 (Ohio Prob. 1950) (holding that share of residuary devisee who predeceased testator and left no issue would be divided in half, with surviving residuary devisee to receive one share and issue of residuary devisee who predeceased testator to receive other share).

[2-6] 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. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001); *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001). In resolving the dispute as to the manner in which §§ 30-2343 and 30-2344(b) apply to the facts of this case, we are guided by certain familiar principles. 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 Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001); *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001). A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001); *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001). It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001); *Central States Found. v. Balka*, 256 Neb. 369, 590

N.W.2d 832 (1999). In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000); *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000).

Upon application of these principles, we reject the restrictive reading of §§ 30-2343 and 30-2344(b) urged by Schwartz and adopted by the county court. Harry Eickmeyer was designated in the will to receive a devise of a portion of the residuary estate and was therefore a residuary "devisee" as defined by § 30-2209(8). Had he survived the testator, he would have been entitled to the share devised to him in the will, as well as a proportionate share of any failed residuary devises by operation of § 30-2344(b). Because he predeceased the testator, his issue takes in his place by operation of § 30-2343. Neither that statute nor § 30-2344(b) places any limitation upon the estate which passes to the issue of a deceased devisee by operation of the antilapse statute. Accordingly, we conclude that the failed devises to Schuelke and Jones, representing 60 percent of the residue, should be distributed proportionately between Nalezinek, Sunderman, and Schwartz in addition to the devises made to Sunderman and Schwartz and that which Nalezinek takes in the place of Harry Eickmeyer. This will result in a distribution of 25 percent of the total residue to Nalezinek, 25 percent to Schwartz, and 50 percent to Sunderman.

CONCLUSION

For the reasons discussed above, we reverse the judgment of the county court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and GERRARD, JJ., not participating.

THERESA S. HATCHER, APPELLANT, V. BELLEVUE VOLUNTEER FIRE DEPARTMENT, APPELLEE.

628 N.W. 2d 685

Filed June 22, 2001. No. S-00-197.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Political Subdivisions Tort Claims Act: Waiver: Immunity.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.
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.** A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute.
7. **Principal and Agent: Liability.** Under the doctrine of respondeat superior, the principal's liability is derived solely from that of its agent. Unless the agent is liable, there can be no liability on the part of the principal.
8. **Conspiracy: Liability: Proof.** In proving conspiracy to tortiously interfere with a business relationship, a claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy.
9. **Conspiracy: Liability.** A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. Without such underlying tort, there can be no cause of action for a conspiracy to commit the tort.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Thomas F. Hoarty, Jr., and Scott A. Calkins, of Byam & Hoarty, and John K. Green for appellant.

Tim Engler and Dana M. Van Beek, of Harding, Shultz & Downs, for appellee.

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

STEPHAN, J.

Dr. Theresa S. Hatcher brought this civil action for damages against the Bellevue Volunteer Fire Department (BVFD), based upon separate theories of intentional interference with a business relationship and conspiracy. Hatcher appeals from an order of the district court for Sarpy County entering summary judgment in favor of BVFD. She contends that contrary to the holding of the district court, BVFD is not immune from suit under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997), and that there is a genuine issue of material fact regarding whether BVFD tortiously interfered with her business relationship with Nebraska Emergency Consultants, P.C. (NEC). We conclude that BVFD is immune from suit under the act and therefore affirm the judgment of the district court.

I. BACKGROUND

Evidence submitted by the parties with respect to the motion for summary judgment discloses the following facts: Dr. Michael Westcott is the sole shareholder of NEC, a professional corporation which provides physician emergency room services to Midlands Community Hospital (Midlands Hospital) in Papillion, Nebraska. Hatcher entered into a written employment agreement with NEC in May 1991 and was employed by that entity as an emergency room physician at Midlands Hospital until the employment agreement was terminated by Westcott on April 15, 1998. Westcott took this action pursuant to a provision in the agreement authorizing termination without cause upon 60 days' prior written notice.

BVFD is a nonprofit corporation, organized and existing under the laws of the State of Nebraska. BVFD provides fire protection and rescue services to residents of the city of Bellevue and to portions of rural Sarpy County. All of the members of BVFD are employed by other entities or are retired. No member is required to respond to rescue calls. The city of

Bellevue owns all of the fire equipment and buildings utilized by BVFD, and all of BVFD's operating funds come from the city of Bellevue. There is no written contract between BVFD and the city of Bellevue. Pursuant to its bylaws, BVFD controls the means and manner of its provision of services. BVFD answers approximately 1,600 rescue calls per year and, on 75 to 80 percent of these calls, transports patients to Midlands Hospital. BVFD charges $100 for each rescue call and uses this revenue to fund a "Length of Service Awards Program." This program entitles members who have served as volunteers for 20 years and who have reached the age of 60 to receive payments of $100 per month. Additional payments can be received for years of service exceeding 20 years, with a maximum monthly benefit of $150. BVFD members also receive reimbursement for training expenses but receive no other form of compensation.

From 1993 to 1998, Hatcher served as medical director of BVFD in addition to her duties with NEC. In approximately November 1997, a question arose concerning morphine allegedly missing from the rescue squad supplies of BVFD. Extensive investigations by state and federal authorities determined that no morphine was actually missing, but that BVFD personnel had not followed state and federal regulations in the restocking and resupplying of morphine. Hatcher, in her role as medical director of BVFD, was substantially involved in these investigations. The investigations garnered local publicity in November 1997.

In early 1998, Hatcher met with BVFD fire chief Steven Betts regarding the appropriate discipline to be imposed upon three BVFD officers found to be generally responsible for the morphine recordkeeping discrepancies. Hatcher proposed placing letters of discipline in the personnel files of the three officers, and she independently drafted a letter in that regard. In March 1998, the disciplinary letters were given to the three officers at Hatcher's direction. The recipients of the letters were upset at receiving the discipline, and Betts believed that the letters were unnecessary.

On March 6, 1998, Betts notified Hatcher that she was terminated from her position as medical director of BVFD. Dale Tedder and Mike Almsteier, in their capacities as assistant fire chief and rescue chief of BVFD, respectively, also approved the

termination. According to Betts, the termination was based at least in part upon the issuance of the disciplinary letters.

Hatcher wrote a letter to the mayor of Bellevue on April 3, 1998, outlining the actions of BVFD with respect to the morphine incident, the disciplinary letters, and the termination of her relationship with BVFD. Hatcher averred that this letter was written in her capacity as former medical director of BVFD and as a member of the Bellevue City Council. Sometime between April 4 and 14, the Bellevue Leader, a local newspaper, obtained a copy of Hatcher's letter to the mayor and contacted both Hatcher and Betts. The newspaper published a story regarding Hatcher's termination in its Wednesday, April 15, edition, which first appeared on the evening of April 14. The article was entitled "Hatcher quits BVFD over morphine discipline spat" and was based upon statements Hatcher made to the newspaper and the contents of her letter to the mayor. The article and Hatcher's letter were generally critical of BVFD. Hatcher averred that on the evening the article was published, she received a telephone call from Betts informing her that he was upset about the article and that it was a "career ending move" for her. A former member of BVFD also averred that Betts had stated the incident was a career-ruining event for Hatcher. Betts testified he did not recall discussing the newspaper article with Hatcher.

Prior to the publication of this article, Westcott had contacted Betts to arrange a meeting for later in the month of April. Westcott requested the meeting because he felt there was some ill will between Midlands Hospital, NEC, and BVFD due to the circumstances surrounding the termination of Hatcher's relationship with BVFD. It was also the customary practice for Midlands Hospital personnel to meet with a new fire chief, and Betts had recently been appointed to that position. On April 15, 1998, the morning the article appeared in the Bellevue Leader, Betts telephoned Westcott and requested that the meeting be held "sooner instead of later." The meeting was then rescheduled for that same day.

The meeting took place in a conference room at Midlands Hospital. Those present included Westcott, Betts, Tedder, and Almsteier. Diana Smalley, the administrator of Midlands Hospital, and Toni Regni, Midlands Hospital's chief nurse, were

also in attendance. The individuals present at the meeting testified generally that there was some discussion during the meeting regarding the morphine incident and resulting disciplinary action, with BVFD personnel stating their "side" of these events. Smalley testified that she asked if BVFD was asking that Hatcher be terminated from her position on the Midlands Hospital staff and that Betts responded "absolutely not, that is not our role."

Westcott terminated Hatcher's employment agreement with NEC on the same day as the meeting. Westcott testified that he did not recall anyone at the meeting suggesting that Hatcher be terminated and that none of the information he received from the firefighters played any part in his decision to terminate Hatcher. He testified that he alone made the decision because of his concern about Hatcher's work habits and NEC's reputation.

Hatcher filed this action naming BVFD as the sole defendant. In her operative amended petition, Hatcher alleged that "by and through its Fire Chief, Assistant Fire Chief and Rescue Chief," BVFD tortiously interfered with her business relationship with NEC. In a separate claim for relief, she alleged that BVFD "conspired with its Fire Chief, Assistant Fire Chief and Rescue Chief, and others, to damage [Hatcher] by persuading NEC to terminate [her] employment." BVFD moved to strike the phrase "and others" in the conspiracy allegation or, in the alternative, to make the allegation more definite and certain by identifying the persons with whom it allegedly conspired. The court granted the motion to strike and ordered the phrase "and others" stricken from the amended petition. BVFD then filed an answer to the amended petition, asserting defenses that the petition failed to state a cause of action and that Hatcher's claim was barred by Nebraska's Political Subdivisions Tort Claims Act.

BVFD subsequently filed a motion for summary judgment. After a hearing at which various affidavits and depositions were received in evidence, the district court entered an order on January 25, 2000, granting the motion for summary judgment. The court concluded that there was no material issue of fact with regard to whether BVFD engaged in an " 'unjustified intentional act of interference' " and further noted its "concern" that the Political Subdivisions Tort Claims Act barred the suit. The order did not specifically address Hatcher's conspiracy claim.

Hatcher filed this timely appeal which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

Hatcher assigns, restated, that the district court erred (1) in determining as a matter of law that BVFD did not tortiously interfere with her contractual relationship with NEC, (2) in determining that BVFD is an agent or employee of the city of Bellevue and therefore immune from suit pursuant to the Political Subdivisions Tort Claims Act, (3) in striking the phrase "and others" from the conspiracy theory cause of action alleged in her amended petition, (4) in failing to allow her leave to amend her petition after the motion to strike was granted, and (5) in failing to address her conspiracy cause of action.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001). 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. *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 622 N.W.2d 684 (2001).

[3] 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. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

IV. ANALYSIS

1. Tortious Interference With Business Relationship

Hatcher's claim for intentional interference with a business relationship is based solely upon allegations that during the April 1998 meeting at Midlands Hospital, BVFD "by and

through" Betts, Tedder, and Almsteier induced Westcott to terminate her employment agreement with NEC. By way of affirmative defense, BVFD alleged that Betts, Tedder, and Almsteier have immunity under the Political Subdivisions Tort Claims Act because of their status as volunteer firefighters and that such immunity extends to BVFD.

[4] We begin our examination of this issue by reference to the pertinent provisions of the act. Section 13-902 provides that

> no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or *employees*, and that no suit shall be maintained against such political subdivision or its officers, agents, or *employees* on any tort claim except to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act.

(Emphasis supplied.) "Employee of a political subdivision" is defined by the act as

> any one or more officers or employees of the political subdivision or any agency of the subdivision and shall include members of the governing body, duly appointed members of boards or commissions when they are acting in their official capacity, *volunteer firefighters*, and volunteer rescue squad personnel. Employee shall not be construed to include any contractor with a political subdivision.

(Emphasis supplied.) § 13-903(3). We have stated that the act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision. *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994). BVFD's immunity claim rests upon the premise that the individual actors were "volunteer firefighters" and therefore "employees of a political subdivision" within the meaning of the act. Hatcher challenges both aspects of this premise.

(a) Are BVFD Members "Volunteer Firefighters"?

(i) Volunteer Status

Initially, Hatcher makes three arguments attacking the status of BVFD members as "volunteer firefighters." First, she contends BVFD members are not "volunteers" because they receive compensation for their services. This argument is based upon

evidence that BVFD charges citizens $100 per rescue call and uses the moneys collected to fund a deferred compensation program for members who reach a certain age and length of service. The record reflects that BVFD members who reach the age of 60 and who have served for 20 years receive $100 to $150 monthly pursuant to a length of service plan instituted by BVFD and funded by the $100-per-rescue-call charge.

[5] The term "volunteer" is not defined by the Political Subdivisions Tort Claims Act. Notably, however, 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. *Jones v. Paulson*, 261 Neb. 327, 622 N.W.2d 857 (2001). The Court of Appeals has generally defined the plain meaning of "volunteer" to be "someone who performs services without expecting to be paid." *Thomas v. Kearney Little League Baseball Assn.*, 5 Neb. App. 405, 407, 558 N.W.2d 842, 844 (1997).

A similar definition of "volunteer" is utilized in application of the federal Fair Labor Standards Act to employees of state and local governments. See 29 C.F.R. § 553.101(a) (2000). The federal regulations define "volunteer" as "[a]n individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered . . . ." *Id.* The regulations further provide that an individual's volunteer status is unaffected by the reimbursement of expenses, the receipt of reasonable benefits, the receipt of nominal fees, or a combination thereof. 29 C.F.R. §§ 553.104(a) and 553.106(a) (2000). Specifically, § 553.106(d) provides:

> Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or "length of service" awards, commonly or traditionally provided to volunteers of State and local government agencies . . . .

Regarding the payment of a nominal fee, § 553.106(e) provides in part:

> Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters.

The general test in determining whether an individual is entitled to volunteer status is contained in § 553.106(f):

> Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the [Fair Labor Standards Act] can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.

In *State ex rel. Retchless v. Cook*, 181 Neb. 863, 869, 152 N.W.2d 23, 27 (1967), we concluded that a volunteer firefighter who received $1 per hour for each drill, $1 for the first hour of each call, 50 cents for each subsequent hour on a call, and $25 per week for night duty was not a "fireman of a 'paid fire department' " who would qualify for pension benefits. Although our resolution of that case was based upon a distinction between a city's volunteer firefighters and those who received salaries, our reasoning that the nominal compensation paid did not affect volunteer status is equally applicable to the instant case. The mere fact that members of BVFD have the opportunity to receive a nominal pension amount after serving 20 years with BVFD and attaining age 60 does not affect their status as "volunteers" under § 13-903(3) based on the plain meaning of that term.

Hatcher's argument to the contrary is premised upon *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997), and *Chase v. Baltimore*, 126 Md. App. 427, 730 A.2d 239 (1999). These cases, however, are distinguishable from the instant case. In addition, we note that *Chase* was reversed on other grounds by *Baltimore v. Chase*, 360 Md. 121, 756 A.2d 987 (2000).

In *Southeast Rur. Vol. Fire Dept.*, the volunteer fire department raised money pursuant to charitable gambling licenses. The

money was used to institute a retirement plan in order to encourage firefighters to remain with the department. The issue presented was whether the department's expenditure of gaming funds to the retirement plan was a proper "lawful purpose" under Neb. Rev. Stat. §§ 9-211 and 9-309 (Reissue 1997). Such statutes generally allowed donations to charitable organizations, provided no donations "inure[d] to the benefit of any individual member" of the organization making the donation. §§ 9-211(3)(a) and 9-309(3)(a). Reasoning that any intended benefit to the general public from the retirement plan was merely incidental, we determined that the donations were improper under §§ 9-211 and 9-309 because they "inure[d] to the benefit of Southeast Volunteer's individual members." *Id.* at 862, 560 N.W.2d at 443.

Hatcher argues that this holding establishes that the length of service benefits at issue in the instant case "inured" to the benefit of BVFD members, thus precluding them from having the status of true volunteers. While it is true that the benefits do indeed inure to the benefit of those members qualifying for the pension plan, our holding in *Southeast Rur. Vol. Fire Dept.* in no manner dictates that such inurement affects a firefighter's volunteer status.

Hatcher's reliance upon *Chase v. Baltimore, supra*, is similarly misplaced. That case involved the application of a "Good Samaritan Act" which granted immunity for acts or omissions in giving medical care if the assistance was provided " 'without fee or other compensation.' " *Id.* at 437, 730 A.2d at 244. Although the paramedic at issue was a salaried employee of the city of Baltimore, application of that act as analyzed by the court presented the question of whether a $100 charge billed to the patient was a "fee or other compensation," thus removing the employee from the protection of the Good Samaritan Act. Finding that such charge constituted a fee or compensation, the court ruled that the Good Samaritan Act did not apply.

Although Hatcher alleges that the $100 fee charged by BVFD is similar to the $100 fee charged in *Chase v. Baltimore, supra*, we do not find *Chase* controlling or persuasive. The issue there was whether the patient was required to pay a "fee or other compensation," not whether the charge affected the paramedic's volunteer status. Based upon our holding in *State ex. rel. Retchless v. Cook*, 181 Neb. 863, 152 N.W.2d 23 (1967), and the federal regulations

cited above, we conclude that the nominal benefit provided to members of BVFD in the form of the length of service plan does not affect the volunteer status of the firefighter members.

(ii) Contractor Status

Next, Hatcher argues that BVFD and its members are contractors of a political subdivision and therefore not volunteer firefighters under the Political Subdivisions Tort Claims Act. Section 13-903(1) and (3) provide that a political subdivision or an employee of a political subdivision "shall not be construed to include any contractor with a political subdivision." The act does not define contractor. As noted earlier, 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. *Jones v. Paulson*, 261 Neb. 327, 622 N.W.2d 857 (2001).

It is undisputed that neither BVFD nor any of its members had a written contract with the city of Bellevue or any other political subdivision. Nevertheless, Hatcher contends that a contract was implied in fact between BVFD and the city of Bellevue. Citing Black's Law Dictionary, Hatcher contends that the plain meaning of "contractor" is " 'one who in pursuit of independent business undertakes to perform a job or piece of work, retaining in himself control of the means, method and manner of accomplishing the desired result.' " Brief for appellant at 26. She asserts that BVFD falls within this definition because it is an independent corporation that controls its own budget, acquisition of equipment, investments, discipline, and membership. She generally alleges that BVFD is an implied-in-fact contractor with the city of Bellevue or another political subdivision because the work it provides is fire protection services for the city.

This argument lacks merit. The fact that BVFD controls its operations and provides services to the city does not lead to the conclusion that it is a "contractor" with the city of Bellevue. Even the authority relied upon by Hatcher reveals that the plain meaning of "contractor" is one who enters into an agreement to provide goods or services *for a fixed price* and who does so in a manner that involves control of its own operations. (Emphasis

supplied.) See Black's Law Dictionary 326 (6th ed. 1990). Although the city of Bellevue provides certain financial benefits to BVFD, BVFD is a separate entity with a membership of volunteer firefighters. Such members provide fire protection services in a purely voluntary manner not based upon a fee schedule or compensation agreement with the city. Neither BVFD nor its members are within the plain meaning of a "contractor" of the city of Bellevue or any other political subdivision.

(iii) Volunteer Firefighter Capacity

Hatcher's final argument is that the individuals for whose actions she alleges BVFD to be vicariously liable were acting within the scope of their employment as officers of BVFD at the time of the April 15, 1998, meeting and were not acting as volunteer firefighters. Although Hatcher relies upon Neb. Rev. Stat. § 48-115(1) (Supp. 1997) to support her argument, this statute is part of the Nebraska Workers' Compensation Act and has no application to the present facts.

Hatcher generally contends that immunity for volunteer firefighters under § 13-903(3) extends to only actual rescue and firefighting activities. However, the plain language of the statute contains no such limitation. The record clearly demonstrates that Betts, Tedder, and Almsteier attended the meeting at Midlands Hospital in their capacities as officers of BVFD and that the meeting generally related to the business relationship between BVFD and its members and Midlands Hospital. BVFD members were clearly acting within the scope of their duties as officers of the volunteer fire department and, as such, were acting as "volunteer firefighters."

(b) Are Individuals Immune?

[6] Hatcher also argues that the three individual BVFD members, even if they are "volunteer firefighters," cannot be entitled to immunity under the Political Subdivisions Tort Claims Act because they are employees of a nonprofit corporation, not employees of a political subdivision. Section 13-903(3) defines an "Employee of a political subdivision" to include "volunteer firefighters." 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. *Jones v. Paulson*, 261 Neb. 327, 622 N.W.2d 857 (2001). A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute. *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001). The plain language of § 13-903(3) defines a volunteer firefighter as an employee of a political subdivision. Therefore, the individual members, as volunteer firefighters, are employees of a political subdivision for purposes of the act, and any claim against them individually is governed by the act. Section 13-910(7) specifically provides that the liability imposed by the act shall not apply to "[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights*." (Emphasis supplied.) It is clear from the record that Hatcher's claim falls within this exception to the general waiver of tort liability provided for in § 13-902. Thus, § 13-910(7) affords to the three individuals a complete defense to Hatcher's claim of intentional interference with her contractual relationship with NEC.

(c) Does Immunity of Volunteer Firefighters Extend to BVFD?

In *Wicker v. City of Ord*, 233 Neb. 705, 711, 447 N.W.2d 628, 633 (1989), we recognized the general rule that "when a public employee has been found to be immune from liability . . . such immunity extends to the political subdivision." See, *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984) (holding county health officer's discretionary immunity also immunized county from liability); *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977) (holding sheriff's quasi-judicial immunity for ministerial acts also immunized county from liability). Applying this general rule in *Wicker*, we held that the statutory immunity conferred upon certified ambulance attendants who responded to an emergency call shielded a volunteer fire department, as their principal, to the same extent it shielded the

individuals. More recently, in *Drake v. Drake*, 260 Neb. 530, 544, 618 N.W.2d 650, 661 (2000), we held that the immunity which Neb. Rev. Stat. § 71-5194 (Cum. Supp. 2000) confers upon ambulance attendants "also immunizes the city or other entity with whom those individuals might be in an agency relationship."

[7] The fact that BVFD is not itself a political subdivision does not alter the basic agency principles upon which its potential liability for the alleged actions of its members must be analyzed. Under the doctrine of respondeat superior, the principal's liability is derived solely from that of its agent. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996); *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997). Unless the agent is liable, there can be no liability on the part of the principal. *Kocsis v. Harrison, supra*. Applying this rule in the instant case, we conclude that the vicarious liability claim against BVFD is barred as a matter of law because of the immunity of Betts, Tedder, and Almsteier under the act.

2. Conspiracy

As noted above, the district court did not directly address Hatcher's separate claim that BVFD "conspired with its Fire Chief, Assistant Fire Chief and Rescue Chief, and others, to damage [Hatcher] by persuading NEC to terminate [her] employment." Hatcher argues that this omission requires a remand for further proceedings.

Hatcher's argument in this regard is based upon an assertion that Nebraska recognizes a separate tort of "conspiracy" that is not in combination with any underlying crime or illegal or wrongful act. She further argues that the Political Subdivisions Tort Claims Act does not bar the tort of "conspiracy" from being asserted against a political subdivision or its employees. See § 13-910. An essential premise of this argument is Hatcher's contention that her claim of conspiracy to interfere with her business relationship is not a claim arising out of interference with contract rights under § 13-910(7).

[8,9] In *Koster v. P & P Enters.*, 248 Neb. 759, 764, 539 N.W.2d 274, 278 (1995), we stated, "In proving conspiracy to tortiously interfere with a business relationship, a claim of civil

conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy." We then set forth the elements of tortious interference with a business relationship and examined whether the plaintiff had established those elements in deciding whether there was evidence of conspiracy to tortiously interfere with a business relationship. Similarly, in *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994), *disapproved on other grounds, Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998), we concluded that the statute of limitations applicable to a claim of civil conspiracy is that applicable to the underlying wrong. These cases clearly establish that a "conspiracy" is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. Without such underlying tort, there can be no cause of action for a conspiracy to commit the tort.

Hatcher cites this court to *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980), and *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 137 N.W.2d 701 (1965), for the proposition that "conspiracy" is a separate tort in the State of Nebraska. She does not present us with an argument as to how those cases support such a proposition, and we are unable to find such support in either case. *Dixon*, in fact, recognizes that the general rule in Nebraska is that civil conspiracy is not a separate tort and quotes William L. Prosser, Handbook of the Law of Torts § 47 (4th ed. 1971):

> "There has been a good deal of discussion as to whether conspiracy is to be regarded as a separate tort in itself. On the one hand, it is clear that the mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime; *and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort.* 'The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff.' "

(Emphasis supplied.) *Dixon*, 206 Neb. at 48, 291 N.W.2d at 232. We further stated in *Dixon* that "[t]o state a cause of action for conspiracy, it is necessary for the pleader to allege not only *the conspiracy and the doing of the wrongful acts*, but also facts showing that damage resulted therefrom." (Emphasis supplied.) 206 Neb. at 49, 291 N.W.2d at 233.

Our case law thus clearly reveals that one can be vicariously liable for one's role in a civil conspiracy only if there is liability for an underlying tort. The underlying tort alleged in the instant case is tortious interference with Hatcher's business relationship. Because BVFD members, and therefore BVFD itself, are immune from such a claim, BVFD is similarly immune from a civil conspiracy claim arising out of an alleged interference with Hatcher's contract rights.

V. CONCLUSION

For the foregoing reasons, we conclude that the individual members of BVFD are "volunteer firefighters" and therefore "[e]mployees of a political subdivision" pursuant to § 13-903(3). Such persons are immune under § 13-910(7) from a suit based upon claims arising out of the interference of contractual rights. Because Hatcher's claims against BVFD are based solely upon the actions of its individual members who themselves are immune from suit, such immunity extends to BVFD under recognized agency principles. This immunity on the underlying tort bars Hatcher's conspiracy claim as well. Because this holding is dispositive, we need not address Hatcher's other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL T. CADDY, APPELLANT.

628 N.W. 2d 251

Filed June 22, 2001. No. S-00-291.

1. **Actions: Judicial Notice: Records.** Where cases are interwoven and interdependent and the controversy involved has already been considered and decided by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
6. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
7. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
8. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
9. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
10. **Constitutional Law: Statutes.** The void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications.
11. **Criminal Law: Due Process.** The Due Process Clause prohibits the states from holding an individual criminally responsible for conduct which he or she could not reasonably understand to be proscribed.
12. **Constitutional Law: Statutes.** The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.
13. ____: ____. If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.
14. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.

15. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
16. **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.
17. ____: ____: ____. After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.
18. ____: ____: ____. The district court has jurisdiction to exercise the power to grant a new direct appeal 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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael T. Caddy, pro se.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

GERRARD, J.

Michael T. Caddy, the appellant, seeks postconviction relief relating to his convictions for the June 10, 1992, murder of Charles Burns. The primary issue presented in this appeal is whether Caddy is entitled to an evidentiary hearing on his claim that he was deprived of a direct appeal from his 1998 resentencing by ineffective assistance of counsel.

I. PROCEDURAL HISTORY

[1] The following facts are established by the record in the instant case and the transcripts from Caddy's prior appeals: Where cases are interwoven and interdependent and the controversy involved has already been considered and decided by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000).

Caddy was first charged in connection with Burns' murder on July 9, 1992. On July 29, Caddy entered pleas of no contest to murder in the second degree and use of a firearm to commit a felony. Caddy was convicted and sentenced to 25 to 40 years' imprisonment on the murder charge and 5 to 15 years' imprisonment on the weapons charge, to be served consecutively. Caddy's sole assignment of error on direct appeal was that the sentences were excessive, and the Nebraska Court of Appeals summarily affirmed the judgment of the district court. See *State v. Caddy*, 1 Neb. App. xlix (case No. S-92-878, March 18, 1993).

In 1995, Caddy filed a motion for postconviction relief, arguing, inter alia, that he was entitled to a new trial because the information filed against him had omitted the element of malice from the crime of murder in the second degree. See *State v. Barfoot*, 248 Neb. 335, 534 N.W.2d 572 (1995), *overruled, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). On July 20, 1995, based on *State v. Barfoot*, the district court set aside both of Caddy's convictions and granted Caddy a new trial. On the same day, the Buffalo County Attorney filed a new information charging Caddy with murder in the first degree and use of a firearm in the commission of a felony. Pursuant to a plea bargain, Caddy pled guilty to murder in the second degree and use of a firearm to commit a felony. Caddy was convicted of those charges, and the sentences imposed were identical to those resulting from his first conviction.

Caddy appealed to the Court of Appeals. Caddy's counsel on appeal was different from his counsel at his pleas, convictions, and sentencing. The Court of Appeals, in a memorandum opinion, affirmed Caddy's convictions, but vacated the sentences and remanded the cause to the district court for resentencing. See *State v. Caddy*, 5 Neb. App. xviii (case No. A-96-077, April 3, 1997). This court overruled Caddy's petition for further review. See *State v. Caddy*, 252 Neb. xxiii (case No. A-96-077, July 23, 1997).

After remand, on November 17, 1997, the district court sentenced Caddy to imprisonment for a period of 40 years on the charge of murder in the second degree and a period of 5 to 15 years on the weapons charge. Caddy appealed, but his appeal was dismissed by this court for failure to file the poverty

affidavit required for an in forma pauperis appeal. See *State v. Caddy*, 256 Neb. xxi (case No. S-98-335, Jan. 27, 1999).

On January 20, 2000, Caddy filed the postconviction motion that is the subject of the instant case, raising several claimed constitutional errors. The district court determined that Caddy's postconviction motion was without merit and denied the motion without an evidentiary hearing. Caddy timely appealed. We moved the appeal to our docket after Caddy filed a notice of a constitutional question, pursuant to Neb. Ct. R. of Prac. 9E (rev. 2000).

II. ASSIGNMENTS OF ERROR

Caddy has assigned several errors. Those errors have been consolidated and restated and are organized based upon whether they relate to Caddy's convictions, sentences, or direct appeal.

Conviction errors: Caddy assigns that the district court erred in failing to find that (1) it lacked subject matter jurisdiction due to defective informations; (2) Neb. Rev. Stat. § 28-304 (Reissue 1995), the statute defining murder in the second degree, is unconstitutionally vague; (3) there had been prosecutorial misconduct; (4) there had been judicial misconduct; (5) there was a statewide conspiracy against Caddy's rights; (6) Caddy's 1995 pleas were coerced; and (7) Caddy's right to be protected against double jeopardy was violated.

Sentencing error: Caddy assigns that the district court erred in not finding that Caddy had illegal and unauthorized sentences imposed in 1997, in violation of his due process and equal protection rights.

Direct appeal error: Caddy assigns that the district court erred in failing to find that Caddy was denied effective assistance of counsel on direct appeal after Caddy's counsel failed to file a required poverty affidavit, resulting in the dismissal of the direct appeal from Caddy's 1997 resentencing.

III. STANDARD OF REVIEW

[2,3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). Whether a claim raised in a postconviction proceeding is procedurally barred is a

question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

IV. ANALYSIS

[4,5] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Becerra, supra*; *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Hess, supra*.

[6] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000).

1. Errors Relating to Conviction

(a) Subject Matter Jurisdiction

Caddy presents three arguments to support his claim that the district court was without subject matter jurisdiction to originally convict and sentence him. One of these arguments is that § 28-304, the statute defining murder in the second degree, is unconstitutionally vague. This argument will be addressed below in our analysis of Caddy's more specific assignment of error on that issue.

[7] Caddy's second argument supporting this assignment of error is that the information charging him with murder in the second degree was defective and void because it included the element of malice, which is not contained in the statutory definition of the offense. Caddy did not raise this argument in his motion for postconviction relief. Because we do not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief, this argument fails. See *State v. Becerra, supra*.

[8] Moreover, Caddy raised the foregoing argument and it was rejected by the Court of Appeals in Caddy's 1996 appeal from his second convictions. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Hess, supra*.

Caddy's third argument is that the information against him was void because after his successful postconviction proceeding, the State initially charged him with murder in the first degree, thus it unlawfully "upped the charge" against him. Brief for appellant at 33. This argument was also raised in and rejected by the Court of Appeals in Caddy's 1996 appeal and cannot be reviewed in Caddy's motion for postconviction relief. See *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

(b) Constitutionality of § 28-304

Caddy argues that his convictions are void because the statute pursuant to which he was convicted, § 28-304, is unconstitutionally vague. We initially note that this argument is barred by virtue of the fact that Caddy could have raised it in his 1996 direct appeal. See, *State v. Hess, supra*; *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000). Moreover, normally, a voluntary guilty plea waives all defenses to a criminal charge. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Finally, as the State argues, Caddy has waived his facial challenges to the validity of the statute by not filing a timely motion to quash in the district court. See, *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996).

Caddy argues, however, that because the statute is void, his convictions are void ab initio, and that this presents a jurisdictional issue that may be raised at any time in any proceeding. See *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). Assuming for the sake of discussion that Caddy's convictions would be void and subject to collateral attack—a matter we do not address—Caddy's argument fails because § 28-304 is not unconstitutionally vague.

[9] The essence of Caddy's argument is that § 28-304 is not distinguishable from Neb. Rev. Stat. § 28-305 (Reissue 1995), which defines the crime of manslaughter. But see *State v.*

Burlison, 255 Neb. 190, 196, 583 N.W.2d 31, 36 (1998) (holding that "construction of § 28-304(1) to include only those elements which the Legislature specifically included in its text does not result in constitutional infirmity"). Caddy argues that this violates the void-for-vagueness doctrine, which requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000).

[10-12] The void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). The Due Process Clause prohibits the states from holding an individual criminally responsible for conduct which he or she could not reasonably understand to be proscribed. *Rose v. Locke*, 423 U.S. 48, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. *Id.* All the Due Process Clause requires is that the law give sufficient warning that people may conduct themselves so as to avoid that which is forbidden. *Id.* The touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *United States v. Lanier, supra*.

[13] Application of these principles in the case at bar clearly establishes that even if Caddy is correct in arguing that there is ambiguity between §§ 28-304 and 28-305, there is still little question whether § 28-304 provides with reasonable clarity that the intentional killing of another may be criminal. If the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954). This is particularly so where, as here, whatever debate there is would center around the appropriate sentence,

and not the criminality of the conduct. See *Chapman v. United States*, 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991).

The U.S. Court of Appeals for the Eighth Circuit addressed an argument similar to Caddy's in *Knutson v. Brewer*, 619 F.2d 747 (8th Cir. 1980). In that case, an Iowa prisoner sought habeas corpus relief from his conviction for the crime of kidnapping for ransom. The prisoner argued that the Iowa statutes were unconstitutionally vague in failing to distinguish the crime of kidnapping from the crime of kidnapping for ransom and that since the statutes had not clearly notified him that the greater charge of kidnapping for ransom could be brought against him, the statutes were void for vagueness. The Eighth Circuit rejected this argument, stating:

> [W]e think it significant that the issue of construction involved here is not the drawing of a line between legal conduct and illegal conduct. What Knutson did was unlawful under any interpretation of Iowa law, and he makes no contention to the contrary. His position, reduced to its simplest terms, is that he had a right to expect that he would be convicted for kidnapping only, rather than for kidnapping for ransom. This kind of reliance interest is not, in our view, entitled to a great deal of weight. When a person does an act that he well knows to be a violation of some law, and when a statute is later interpreted to cover his conduct in a way that does not do violence to the ordinary understanding of the English language, the Fourteenth Amendment is not offended.

Id. at 750. Accord, *McSherry v. Block*, 880 F.2d 1049 (9th Cir. 1989); *Welton v. Nix*, 719 F.2d 969 (8th Cir. 1983); *Sodergren v. State*, 715 P.2d 170 (Wyo. 1986).

Thus, provided that conduct is of a sort known among the lay public to be criminal, a person is not entitled to clear notice that the conduct violates a *particular* criminal statute. It is enough that he or she knows that what he or she is about to do is probably or certainly criminal. See, *U.S. v. White*, 882 F.2d 250 (7th Cir. 1989); *People v Lino*, 447 Mich. 567, 527 N.W.2d 434 (1994).

Even if we were to assume that § 28-304 is not clearly distinguishable from § 28-305, as Caddy alleges, that would not render either statute unconstitutionally vague, as the criminality

of the conduct described is nonetheless clearly established. Therefore, Caddy's postconviction motion does not allege facts that support a constitutional violation, and the district court did not err in denying an evidentiary hearing on this issue. As Caddy has not shown that his convictions are void or that the district court lacked subject matter jurisdiction to enter them, his first two assignments of error are without merit.

(c) Prosecutorial Misconduct, Judicial Misconduct, and Statewide Conspiracy Against Caddy's Rights

Caddy alleges that he was convicted due to the misconduct of the prosecution and the judges involved in his trial and also argues that this amounted to a "statewide conspiracy" against his rights. We first note that Caddy's appellate brief does not argue that any misconduct has tainted the instant postconviction proceeding; thus, these claims of misconduct are all collateral attacks on the prior proceedings against Caddy.

We also note that Caddy's claim of prosecutorial misconduct was raised and rejected in Caddy's 1996 appeal, and cannot be relitigated here. See *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). More significant, however, is the fact that Caddy has not assigned in this court that his counsel in the district court in 1996 was ineffective in failing to raise these issues on appeal.

[14] When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion. *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). Caddy has failed, in the instant case, to assign error regarding his appellate counsel in 1996 and has assigned error only regarding his appellate counsel in 1998 relating to failure to properly perfect the appeal. Consequently, Caddy's arguments are procedurally barred, as they either were or should have been raised in his 1996 and 1998 appeals. Caddy's assignments of error on these issues are without merit.

(d) Coercion of 1995 Pleas

As with Caddy's other assignments of error relating to his convictions, the voluntariness of his 1995 pleas was certainly known to him at the time of his 1996 appeal. This claim was available to Caddy and should have been raised in his 1996 appeal, and Caddy has not assigned that his direct appeal counsel was ineffective in failing to assign this as error. Consequently, this argument is procedurally barred. See *State v. Williams, supra*.

(e) Double Jeopardy

Caddy claims that his 1995 conviction was obtained in violation of his rights under the Double Jeopardy Clause. Caddy has likely waived this alleged error by pleading guilty to the offense. See, *United States v. Broce*, 488 U.S. 563, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Enriquez-Beltran*, 9 Neb. App. 459, 616 N.W.2d 14 (2000) (defendant waives double jeopardy claim on direct appeal and in postconviction proceedings when he or she voluntarily pleads guilty to criminal charges). We also note that this assignment of error was raised in and rejected by the Court of Appeals in Caddy's 1996 direct appeal.

[15] However, we do not address this assignment of error, as Caddy has not argued the alleged error in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

2. Error in Sentencing

Caddy assigns that the district court's 1997 sentences were not authorized by statute and violated his constitutional rights. However, Caddy did not raise this issue in his motion for postconviction relief. As noted previously, an appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001). Consequently, Caddy's assignment of error is without merit, as the district court could not err in failing to address an issue that was not presented to it.

We also note that this issue should have been presented for appellate review on direct appeal. Caddy argues that he was

deprived of his direct appeal by the ineffective assistance of counsel. If Caddy prevails on that argument, he could receive a new direct appeal in which to raise his arguments regarding the legality of his sentences. Consequently, this assignment of error is subsumed by Caddy's arguments relating to his 1998 direct appeal, to which we now turn.

3. Ineffective Assistance of Counsel on Direct Appeal

[16] Caddy argues that he was denied effective assistance of counsel when his attorney on direct appeal from his 1997 resentencing failed to perfect his appeal by filing a required poverty affidavit. See *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998) (abrogated in part by statute as recognized in *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000)). 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. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

Caddy alleges, and this court's record of the case reflects, that Caddy's attorney in his 1998 direct appeal filed a timely notice of appeal, but failed to perfect the appeal with a timely poverty affidavit. We addressed a similar situation in *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), in which a defendant was denied a direct appeal because his attorney failed to file a poverty affidavit. We concluded, as a matter of law, that the defendant was denied his constitutional right to effective assistance of counsel and was entitled to postconviction relief. See *id.* Based on *State v. Trotter*, there can be little doubt that Caddy's postconviction petition in the instant case alleges facts which, if proved, would constitute an infringement of his constitutional rights.

The district court in the instant proceeding resolved this issue by assuming that Caddy's counsel had been ineffective, but determining that Caddy had not been prejudiced because Caddy's appeal would have been found to be without merit. Generally, in order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. See, *State v. Becerra, supra*; *State v. Hess, supra*.

[17] However, this court rejected an almost identical argument in *State v. Trotter, supra*. We held that "after a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief." *Id.* at 222, 609 N.W.2d at 41. Based upon *State v. Trotter*, we conclude that the district court erred in determining that Caddy was not prejudiced by the alleged failure of his attorney to perfect his 1998 direct appeal. Caddy's final assignment of error has merit.

[18] The district court has jurisdiction to exercise the power to grant a new direct appeal 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. See *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000). However, in this case, the evidence has not yet established a denial or infringement of Caddy's right to effective assistance of counsel, because the district court did not hold an evidentiary hearing on Caddy's postconviction motion.

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000). Because Caddy has alleged facts which, if proved, would constitute an infringement of his right to effective assistance of counsel on direct appeal, Caddy is entitled to an evidentiary hearing to determine if he should be granted a new direct appeal with respect to the narrow issues related to his November 1997 resentencing. See *id.*

V. CONCLUSION

The district court erred in determining that Caddy was not entitled to an evidentiary hearing regarding his claim that he was denied effective assistance of counsel on direct appeal from his resentencing. The judgment of the district court is reversed to that extent, and the cause is remanded to the district court with directions to conduct an evidentiary hearing, which is to be limited to the question whether Caddy was denied effective assistance of counsel in that his attorney failed to perfect his direct

appeal from his resentencing by filing the required poverty affidavit. Caddy's other assignments of error are without merit, and the judgment of the district court is otherwise affirmed.

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

IN RE CONSERVATORSHIP OF ROBERT P. ANDERSON, A PROTECTED PERSON.
TRICIA LU ANDERSON AND LEE ANDERSON, APPELLEES, V. BARBARA J. LASEN AND PAUL S. LASEN, APPELLANTS.

628 N.W. 2d 233

Filed June 22, 2001. No. S-00-1158.

1. **Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Courts: Estates: Guardians and Conservators.** Under Neb. Rev. Stat. § 30-2630(2) (Reissue 1995), a court may appoint a conservator if the court is satisfied by clear and convincing evidence that the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness, or disability and that the person has property which will be wasted or dissipated unless proper management is provided.
4. **Principal and Agent: Guardians and Conservators.** A person's status as a principal's attorney in fact does not preclude the appointment of a conservator if a court finds that he or she has wasted or dissipated the principal's estate.
5. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
6. ____. Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal.
7. ____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
8. ____. An agent is prohibited from profiting from the agency relationship to the detriment of the principal.
9. **Principal and Agent: Gifts: Intent.** No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift.
10. **Courts: Estates: Principal and Agent: Guardians and Conservators.** When an attorney in fact makes unauthorized transfers to himself or herself from the principal's estate, a county court may properly find that the principal's assets would be

wasted or dissipated unless a conservator is appointed pursuant to Neb. Rev. Stat. § 30-2630(2)(ii) (Reissue 1995).

11. **Courts: Estates: Guardians and Conservators.** Neb. Rev. Stat. § 30-2639(c) (Cum. Supp. 2000) allows a court, acting in the best interests of the protected person, to pass over a person having priority and appoint as a conservator a person having lower priority or no priority.
12. **Estates: Guardians and Conservators.** Under Neb. Rev. Stat. § 30-2639 (Cum. Supp. 2000), the best interests of the protected person are the paramount consideration in making an appointment for a conservatorship, the purpose of which is to protect an estate for the owner's benefit, not the potential heirs or devisees.
13. **Courts: Estates: Principal and Agent: Guardians and Conservators.** When an attorney in fact may be accountable to a conservator of an estate for unauthorized transfers of property made to himself or herself, a county court may properly find it is in the principal's best interests to bypass the attorney in fact's priority for appointment as the principal's conservator and to appoint a disinterested third party as the conservator.

Appeal from the County Court for Scotts Bluff County: JAMES L. MACKEN, Judge. Affirmed.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellants.

John A. Selzer, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellees.

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

CONNOLLY, J.

Barbara J. Lasen and Paul S. Lasen appeal from the county court's appointment of Platte Valley National Bank as conservator for the estate of Robert P. Anderson, a protected person. Barbara and Paul complain that a conservatorship was not necessary because they were acting as Robert's attorneys in fact, but that if it was necessary, then they had priority for appointment under Neb. Rev. Stat. § 30-2639(b) (Cum. Supp. 2000). We affirm the appointment of Platte Valley National Bank as conservator because under § 30-2639(c), it was in Robert's best interests to have a disinterested third party appointed as his conservator.

ASSIGNMENTS OF ERROR

Barbara and Paul assign, restated and condensed, that the county court erred in (1) finding that a conservatorship was

necessary when Robert had already executed a durable power of attorney, (2) finding that it was in the best interests of Robert to appoint Platte Valley National Bank as conservator despite Barbara and Paul's statutory priority under § 30-2639, and (3) dismissing their cross-petition objecting to the appointment of Platte Valley National Bank as conservator and requesting the appointment of Barbara and Paul as coconservators.

BACKGROUND

The appellees, Tricia Lu Anderson and Lee Anderson, are the children of Robert's deceased son, Sam Anderson. Barbara is Robert's only living child, and Paul is her husband.

The evidence at the conservatorship hearing showed that Robert has been a resident at a health care facility since November 1998. He was 84 at that time and somewhat mentally confused upon his arrival. A medical assistant for the facility testified that he did not remember that his wife and Sam had died and that he thought that his reflection in a mirror was another person. She further stated that his condition has deteriorated over time.

Sam served as Robert's attorney in fact after Robert's wife died in 1995 until Sam's own death in 1998. In 1995, Robert, with Sam's participation, made $10,000 gifts as stock transfers from his estate to Barbara, Sam, Barbara's two children, and Tricia and Lee. Tricia and Lee testified that they were unsure of the amount of the gifts. Paul stated that in 1997, gifts were repeated, and that in 1998, a $10,000 gift was made to Sam. Paul stated that these transfers were agreed to by Robert and were part of a gifting program designed to reduce federal estate tax upon Robert's death.

On April 27, 1998, following Sam's death, Robert appointed Barbara and Paul as his attorneys in fact. Although the durable power of attorney granted Barbara and Paul broad authority to manage Robert's business affairs and property, it did not specifically give Barbara and Paul the authority to make gifts to themselves or to others. Barbara and Paul also took Robert to an attorney to have a new will prepared, which was executed on July 2, 1998. This will leaves all but $60,000 of Robert's estate to Barbara, and in the event she does not survive Robert, then the property is left to Paul. Tricia, Lee, and Barbara's two adult children were given $10,000 each.

Paul testified that although he and Barbara had power of attorney in April 1998, they only helped Robert sort through his mail and pay his bills until November of that year. At that time, Robert agreed to go to the health care facility. Up until this time, Paul stated that Robert was able to take care of himself and handle his personal matters. Barbara also testified that Robert handled his own financial affairs before November. After November, Paul stated that he and Barbara took over the management of Robert's property and affairs.

But Tricia and Lee testified that after Robert's wife died in 1995, his mental condition noticeably deteriorated and that he was much more forgetful. Lee also stated that his father, Sam, had taken Robert to see a neurologist several times beginning in 1995 because Robert was showing symptoms of Alzheimer's disease.

In 1999, Barbara and Paul made $10,000 gifts from Robert's estate to Barbara, Paul, their two children, and one of their children's spouse and son. In 2000, Barbara and Paul made four $10,000 gifts to themselves and their two children. No gifts were made to Tricia and Lee in either year. Contrary to Paul's testimony, the record also reflects that Barbara and Paul made four $10,000 gifts to themselves and their two children in 1998 after Sam died.

Paul stated that Robert's residence was used by Barbara and Paul on their frequent visits to Nebraska. He stated that he and Barbara did not intend to lease Robert's residence or vacation home and that the minor expenses for the houses were paid for out of Robert's funds. He also stated that Barbara would charge the aircraft fuel needed for their trips to Robert's charge account and pay for the bills out of Robert's checking account.

On February 25, 2000, Tricia and Lee filed a petition for the appointment of Platte Valley National Bank as conservator for Robert's estate. Barbara cross-petitioned that a conservator was not necessary because she and Paul had been given a durable power of attorney to manage Robert's property affairs. Alternatively, Barbara requested that she and Paul be appointed conservators if the court found that such an appointment was in the best interests of Robert. In the cross-petition, she alleged the value of Robert's personal and real property was approximately

$668,000. However, in their answers to interrogatories, Barbara and Paul valued Robert's property at approximately $1.1 million.

The county court found that there was clear and convincing evidence that the appointment of a conservator for Robert's estate was necessary because he suffered from mental and physical disabilities which left him unable to manage his property and personal affairs and because he had property which would be wasted or dissipated unless proper management was provided. The court also found it was in Robert's best interests to pass over persons having priority for appointment and to appoint Platte Valley National Bank as conservator of the estate.

STANDARD OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

POWER OF ATTORNEY

The county court found that there was clear and convincing evidence of a sufficient basis for the appointment of a conservator. The parties have stipulated that Robert is unable to manage his property and affairs effectively. Barbara and Paul, however, argue that a conservator is not necessary because they are managing Robert's assets as his attorneys in fact under a durable power of attorney. Tricia and Lee contend that a conservator was necessary because Barbara and Paul were improperly managing his property and making unauthorized gifts.

[3] Under Neb. Rev. Stat. § 30-2630 (Reissue 1995), a court may appoint a conservator:

> (2) . . . in relation to the estate and property affairs of a person if the court is satisfied by clear and convincing evidence that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or

> disability . . . and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person . . . .

[4] Barbara and Paul's appointment as Robert's attorneys in fact under a durable power of attorney authorized them to act as his agent even in the event he became disabled or incapacitated. See Neb. Rev. Stat. § 30-2665 (Reissue 1995) (defining durable power of attorney). But their status as Robert's attorneys in fact would not preclude the appointment of a conservator if the court found that they had wasted or dissipated his estate. See Neb. Rev. Stat. § 30-2667(1) (Reissue 1995) (requiring attorney in fact to make accounting to subsequently appointed fiduciary such as conservator).

[5-8] A power of attorney authorizes another to act as one's agent. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Id*. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. *Id*. An agent is prohibited from profiting from the agency relationship to the detriment of the principal. *Id*.

Barbara and Paul admit to making gifts to themselves and their family members from Robert's estate for a total of $100,000 during 1999 and 2000. They argue, however, that the gifts were the continuation of a gifting program Robert had agreed to while Sam was his attorney in fact, designed to reduce the size of his estate for tax purposes.

[9] This court has repeatedly held that "no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift." See, e.g., *Cheloha v. Cheloha*, 255 Neb. 32, 37, 582 N.W.2d 291, 297 (1998). See, also, *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). We adopted this rule in order to avoid fraud and abuse by attorneys in fact. See *Cheloha v. Cheloha, supra*.

The power of attorney did not authorize, either generally or specifically, gifting by Barbara or Paul to themselves or others

from Robert's funds. The gifts resulted in personal gain to Barbara and Paul and their family, and diminished the value of Robert's estate. Thus, the transfers made by Barbara and Paul were beyond the scope of the powers granted them by Robert's durable power of attorney and, as such, were unauthorized, unlawful, and dissipated Robert's estate. See *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995).

Nonetheless, Barbara and Paul argue that the gifts do not constitute waste or dissipation of Robert's estate as required under § 30-2630(2)(ii) before a conservator can be appointed. They argue that the gifts were in the best interests of the estate because they reduced the amount of federal estate taxes that would have to be paid upon Robert's death. Further, they argue that because Barbara is the primary beneficiary of Robert's will and Tricia and Lee have only minor interests, the federal estate tax will only affect Barbara's inheritance. We read their argument to be that the gifts cannot constitute waste or dissipation because they benefit Barbara and that she is the only person who stands to significantly benefit under Robert's will—a novel but misguided argument.

That argument is based on Barbara's self-interest in Robert's estate and is intrinsically contrary to the fiduciary relationship created by a durable power of attorney, which obligates an agent to act solely for the benefit of the principal. See *State ex rel. NSBA v. Flores, supra*. Further, the argument is presumptive. Even if Barbara should survive Robert, his will may be contested or found invalid.

Finally, Tricia and Lee correctly point out that gifts made beyond the scope of authority granted in a power of attorney under state law are included in the principal's gross estate for federal estate tax purposes under § 2038 of the Internal Revenue Code. See, I.R.C. § 2038(a)(1) (1994); *Estate of Swanson v. U.S.*, 46 Fed. Cl. 388 (2000). Because the gifts were unauthorized under Nebraska law, the estate would not have benefited from them for federal estate tax purposes in any event.

[10] Because Barbara and Paul had diminished Robert's estate to their own advantage without authorization, the county court correctly found by clear and convincing evidence that Robert's assets would be wasted or dissipated unless a conservator were appointed pursuant to § 30-2630(2).

Priority for Appointment

Barbara and Paul also contend that if a conservator was necessary, then the county court should have appointed Barbara and Paul because Barbara is Robert's daughter, the primary beneficiary of his will, and one of his attorneys in fact. Tricia and Lee argue that the county court correctly found that it was in the best interests of Robert to pass over Barbara and Paul. They contend that the bank is in a better position to manage Robert's property. They also contend that Robert is entitled to a full accounting from Barbara and Paul and a recovery of all property and funds which have been improperly gifted or otherwise taken by them.

Section 30-2639(b) provides in relevant part:

> (b) Persons who are not disqualified under subsection (a) of this section and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as conservator in the following order:
>
> (1) A person nominated most recently by one of the following methods:
>
> . . . .
>
> (ii) A person acting under a power of attorney or durable power of attorney; or
>
> . . . .
>
> (5) An adult child of the protected person.

[11] Because Barbara is Robert's only living adult child and because Barbara and Paul were Robert's attorneys in fact, they had priority for appointment as Robert's conservator under the statute. Platte Valley National Bank had no priority for appointment under § 30-2639(b). But subsection (c) of § 30-2639 allows a court, "acting in the best interest of the protected person, [to] pass over a person having priority and appoint a person having lower priority or no priority."

[12] Section 30-2639 instructs a court that the best interests of the protected person are the paramount consideration in making an appointment for a conservatorship, the purpose of which is to protect an estate for the owner's benefit, not the potential heirs or devisees. See, e.g., *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987); *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985).

Other jurisdictions have concluded that the appointment of a disinterested third party is in a ward's best interests when the applicant with priority has interests adverse to those of the protected person. See, e.g., *Schmidt v. Hebeisen*, 347 N.W.2d 62 (Minn. App. 1984) (affirming trial court's appointment of trust officer as guardian of adult person and her estate when court had reasonable basis to believe that applicant, who had informally managed estate for several years, had misappropriated large sums of money from estate and shared it among her siblings). See, also, *Couch v. Couch*, 824 S.W.2d 65 (Mo. App. 1991); *Wilhelm v. Wilhelm*, 441 Pa. Super. 230, 657 A.2d 34 (1995).

[13] The evidence in this case indicates that Barbara and Paul may be accountable to the conservator of Robert's estate for all of the property transferred to them or members of their family. See § 30-2667(1) (attorney in fact is accountable to subsequently appointed fiduciary). Thus, the county court had a reasonable basis for believing that Barbara's self-interest in her potential liability as an attorney in fact would conflict with a fiduciary's duty of absolute fidelity to Robert's welfare and the interests of his estate. See Neb. Rev. Stat. § 30-2653(24) (Reissue 1995) (giving conservators power to "prosecute . . . actions, claims or proceedings in any jurisdiction for the protection of estate assets"). Moreover, the court had little reason to believe that Barbara and Paul would protect the estate's assets as conservators when they had already made unauthorized transfers to themselves under their durable power of attorney.

When reviewing an order for errors appearing on the record, the appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001). Under these facts, the county court properly found it was in Robert's best interests to pass over Barbara and Paul despite their statutory priority. Accordingly, the county court did not err in dismissing the cross-petition filed by Barbara and Paul.

CONCLUSION

The county court properly determined that there was clear and convincing evidence that Robert was in need of a conservator

because he was unable to manage his property and personal affairs due to his mental and physical disabilities and because he had property which would be wasted or dissipated unless proper management was provided. The court also properly determined that it was in Robert's best interests to pass over Barbara and Paul's priority for appointment and to appoint Platte Valley National Bank as conservator of Robert's estate.

AFFIRMED.

IN RE INTEREST OF KIANA T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. MARY M. MORAN, GUARDIAN AD LITEM, ON BEHALF OF KIANA T., APPELLANT, STEVEN T., APPELLEE AND CROSS-APPELLEE, AND CHARLOTTE T., APPELLEE.

628 N.W. 2d 242

Filed June 22, 2001. No. S-00-1173.

1. **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 another.
2. **Interventions: Pleadings.** Pursuant to Neb. Rev. Stat. § 25-328 (Reissue 1995), any person who has or claims an interest in a matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.
3. ____: ____. Pursuant to Neb. Rev. Stat. § 25-330 (Reissue 1995), an intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same rules as apply in regard to other pleadings provided for by the Nebraska Code of Civil Procedure. If such petition is filed during term, the court shall direct the time in which answers thereto shall be filed.
4. **Paternity: Jurisdiction.** Neb. Rev. Stat. § 43-1411 (Reissue 1998) states that a civil proceeding to establish the paternity of a child may be instituted in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by (1) the mother or the alleged father of such child, either during pregnancy or within 4 years after the child's birth, or (2) the guardian or next friend of such child or the state, either during pregnancy or within 18 years after the child's birth.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Affirmed in part, and in part vacated.

Mary M. Moran, of Threem Law Office, guardian ad litem for appellant Kiana T.

James S. Jansen, Douglas County Attorney, and Kim B. Hawekotte for appellee State.

Betty L. Egan and George B. Achola, of Walentine, O'Toole, McQuillan & Gordon, for appellee Steve T.

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

MCCORMACK, J.

NATURE OF CASE

This case involves a dependency proceeding in the separate juvenile court of Douglas County involving the minor child, Kiana T., and her mother, Charlotte T., under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). The juvenile court ruled that Kiana was within § 43-247(3)(a), as Charlotte pled to the allegations of her use of controlled substances. The juvenile court also ruled that Kiana was to be detained in the temporary care of the Nebraska Department of Health and Human Services and granted supervised visits to Charlotte and also ordered visitation to the alleged father, Steven T. Charlotte has not appealed. Kiana, through Mary M. Moran, her guardian ad litem (GAL), appeals, and the Douglas County Attorney cross-appeals against Steven. This court removed this case from the Nebraska Court of Appeals under its power to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

Kiana tested positive for cocaine shortly after her birth, and the issue below was whether she fell within the meaning of § 43-247(3)(a). The juvenile court found that Kiana did fall within § 43-247(3)(a). However, a separate issue arose during these proceedings regarding the alleged natural father, Steven, and whether he should be allowed to intervene.

During the detention hearing, Charlotte's attorney pointed out to the juvenile court that the "natural father [was] also present" and that it was her understanding that "he would like to be a party to this petition." The juvenile court asked if the statements made by counsel were correct, and Steven answered, "Yes, Your Honor." The juvenile court proceeded to tell Steven to fill out a financial affidavit to determine if Steven qualified for a court-appointed attorney. The juvenile court assigned a public defender to Steven. During the adjudication hearing, an attorney appeared as counsel for Steven. During the disposition hearing, the same attorney appeared on behalf of Steven, stating that Steven was "an intervenor in this matter."

The GAL expressed concerns with regard to the paternity issue of the "intervening" alleged father. The GAL was recommending that termination be pursued with respect to Charlotte's parental rights. The GAL said that although Steven intervened in this action, he has not filed a paternity action nor has there been a determination of his paternity. The GAL requested there be some genetic testing to determine whether Steven was Kiana's father. Steven's name is not on the birth certificate, and although Charlotte has held out Steven to be the father, Charlotte's attorney believed that Charlotte had not completed an affidavit of identity. The GAL report to the court and the medical records and documentation at the University of Nebraska Medical Center's birth certification center indicate that Steven refused to sign any papers at the time of Kiana's birth. The report also states that there was no intent to claim paternity on file with the birth registry and that Steven has not produced any "clothes, money or similar materials" to the case manager for Kiana.

The juvenile court stated that "in terms of his [Steven's] participation at this stage of the proceedings, I've always taken the position that if both parents admit that they're — that the father is the father, the alleged father is the father, then I consider that a judicial admission and I allow participation." The juvenile court's October 12, 2000, order states that Steven shall (1) have reasonable rights of supervised visitation with the child as arranged by the Nebraska Department of Health and Human Services, (2) complete an affidavit of paternity through the Bureau of Vital Statistics within 1 month, (3) maintain safe and

adequate housing for himself, and (4) maintain a legal source of income. There is nothing in the record to indicate that Steven has completed an affidavit of paternity.

ASSIGNMENTS OF ERROR

The GAL assigns that the juvenile court erred in (1) denying Kiana due process in regard to Steven's assertion of paternity; (2) determining that Steven is the "father" of Kiana via "judicial admissions" because the assertions of Steven's attorney and the comments and speculations of the parties and counsel in the courtroom, within one hearing or as accumulated over a series of hearings, are insufficient as a judicial method or as evidence to establish paternity as permitted under statutes; (3) exercising jurisdiction over Steven as Steven had no legal standing as Kiana's parent, as Kiana's custodial parent, as a party to the original proceedings, or as an intervenor in the action; and (4) issuing an order which included an award of visitation to Steven absent his intervention into the case as permitted under statutes and/or fundamentally fair procedure, a method and sufficient evidence to support a paternity determination under the statutes.

The Douglas County Attorney cross-appeals, assigning that the juvenile court erred in (1) allowing Steven to intervene absent his proving to the court that he has a legal interest in Kiana, (2) allowing Steven to intervene without following the required statutory procedures necessary to intervene in a court proceeding, and (3) making the judicial determination that Steven was the natural father of Kiana. The Douglas County Attorney further assigns that the decision was contrary to the great weight of the evidence and was an abuse of discretion and that the decision was contrary to law.

STANDARD OF REVIEW

[1] 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 another. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000); *In re*

Interest of Clifford M. et al., 258 Neb. 800, 606 N.W.2d 743 (2000); *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999).

ANALYSIS

The GAL argues that the juvenile court denied Kiana her due process rights in regard to Steven's assertion of paternity because Kiana did not receive a full and fair hearing on the paternity question prior to the court's permitting Steven to have supervised visitation. The GAL contends there was no reason for anyone to anticipate that the issue of paternity was going to be considered or determined. The GAL maintains the juvenile court's paternity determination was based on nothing more than the unsworn statements of the parties and counsel. The GAL also argues the procedure for determining paternity set out in the paternity statutes Neb. Rev. Stat. §§ 43-1408.01 through 43-1418 (Reissue 1998 & Cum. Supp. 2000) was not followed. The GAL concludes that if paternity was not properly established, then the juvenile court was without authority to order visitation and Steven lacks standing as a parent, a party, and an intervenor.

Both the GAL and the Douglas County Attorney argue that the juvenile court erred in allowing Steven to intervene because Steven did not follow the proper procedures as set out in Neb. Rev. Stat. §§ 25-328 through 25-330 (Reissue 1995).

[2] Sections 25-328 through 25-330 encompass the procedures an individual must follow in order to intervene in a matter in litigation. Section 25-328 states:

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

[3] Section 25-330 states:

> The *intervention shall be by petition*, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same rules as obtain in regard to other pleadings provided for by this code. If such petition is filed during term, the court shall direct the time in which answers thereto shall be filed.

(Emphasis supplied.)

Steven's claimed interest in this matter is that he is the natural father of Kiana. Therefore, he wanted to be a party to the proceedings in juvenile court. The juvenile court, relying on the unsworn statements of Steven and one of the attorneys, allowed Steven to participate in these proceedings.

We determine the juvenile court erred in allowing Steven to participate in the proceedings without properly intervening in the matter in litigation. Section 25-330 requires that intervention shall be by petition. An individual, such as Steven, must follow the proper procedures in order to intervene in a matter in litigation in which he or she claims an interest. One of the purposes of requiring a petition to intervene is that the petition will frame the issues and interests regarding the intervening party. In this case, Steven could have pled sufficient facts to establish that he is the father of Kiana and then tried to prove them. However, Steven never framed the issues or his interest by filing a petition for intervention. As such, we determine that Steven was not and has never been a proper party to these proceedings.

[4] In addition, at oral argument, all of the parties and Steven agreed that a paternity petition and subsequent hearing were still required in this case. However, none of the parties had taken it upon themselves to file a petition for paternity in this case. Section 43-1411 states in pertinent part:

> *A civil proceeding to establish the paternity of a child may be instituted*, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, *by (1) the mother or the alleged father* of such child, either during pregnancy or within four years after the child's birth . . . *or (2) the guardian or next friend of such*

> *child or the state*, either during pregnancy or within eighteen years after the child's birth.

(Emphasis supplied.)

Having determined that Steven did not properly intervene in these proceedings, we do not need to address the GAL's or the Douglas County Attorney's remaining assignments of error.

CONCLUSION

We hold the juvenile court erred in allowing Steven to participate in these proceedings without properly intervening under § 25-330. Steven was never a party to this case because he did not properly intervene. Therefore, any references, directions to, or rights conferred to Steven, including visitation, in the October 12, 2000, order, are vacated. The remaining sections of the October 12 order concerning Charlotte are affirmed.

AFFIRMED IN PART, AND IN PART VACATED.

BRENT CERNY, APPELLANT, V. CEDAR BLUFFS JUNIOR/SENIOR PUBLIC SCHOOL, SAUNDERS COUNTY DISTRICT NO. 107, APPELLEE.

628 N.W. 2d 697

Filed June 29, 2001. No. S-99-1227.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
3. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages.
4. **Negligence.** The question of whether a duty exists at all is a question of law.
5. ____. Once a court determines that a duty is owed by one party to another, it becomes necessary to define the scope and extent of the duty. In other words, the necessary complement of duty—the standard of care—must be ascertained.
6. ____. Determining the standard of care to be applied in a particular case is a question of law.
7. ____. Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances.

8. ____. The ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for a new trial.

Larry C. Johnson, of Johnson & Vaughan, P.C., for appellant.

Stephen S. Gealy and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

Maren Lynn Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for amicus curiae Nebraska Association of Trial Attorneys.

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

STEPHAN, J.

This is a personal injury action brought pursuant to the Political Subdivisions Tort Claims Act. Brent Cerny alleged that while participating in athletics as a student at Cedar Bluffs Junior and Senior High School (the School), he sustained personal injuries as a result of negligence on the part of the School and its coaching staff. Following a bench trial, the district court for Saunders County found that the School's employees were not negligent and dismissed the petition. Cerny perfected this timely appeal, which we moved to our docket pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

In the fall of 1995, Cerny was a student at the School and a member of its football team. On the evening of Friday, September 15, 1995, he participated in a football game between Cedar Bluffs and Beemer high schools. Mitchell R. Egger was the head coach of the Cedar Bluffs team, and Robert M. Bowman was the assistant coach. Both held Nebraska teaching certificates with coaching endorsements.

Cerny fell while attempting to make a tackle during the second quarter of the Beemer game, striking his head on the ground. Although he felt dizzy and disoriented after the fall, Cerny initially remained in the game but took himself out after a few plays. He returned to the game during the third quarter. Subsequently, during football practice on Tuesday, September 19, Cerny was allegedly injured again when his helmet struck that of another player during a contact tackling drill.

There was conflicting evidence at trial regarding the symptoms experienced and communicated by Cerny during and after the Beemer game. Cerny testified that when he came out of the game, he told Egger and Bowman that he felt dizzy, disoriented, and extremely weak. Egger stated that Cerny complained of dizziness when he came off the field during the Beemer game. He also noted that Cerny was short of breath and had a tingling sensation in his neck. Egger stated that Bowman continued to monitor Cerny.

Bowman testified that Cerny did not complain of a headache when he left the game, but did state that he felt fuzzy or dizzy, that he had some burning in his shoulder, and that he could not catch his breath. Bowman attributed Cerny's dizziness to hyperventilation, not a head injury. Bowman stated that when Cerny came out of the game, Cerny made normal eye contact with Bowman and Cerny's speech and movement appeared normal. After catching his breath, Cerny appeared to Bowman to be in a normal emotional state. However, Bowman did recommend to Egger that Cerny should get medical attention, but to his knowledge, no medical personnel examined Cerny that evening.

When Cerny asked to re-enter the game during the third quarter, Bowman observed that he seemed completely normal, exhibiting neither confusion, disorientation, nor abnormal speech. Bowman also noted that Cerny did not complain of a headache. Egger allowed Cerny to re-enter the game after observing that his color looked good, his eyes looked clear, and his speech was normal.

Cerny testified that he had a headache continuously from Friday night until the practice on Tuesday. However, there is conflicting evidence as to whether he reported this to his coaches. Cerny testified he told Bowman he had a headache during the bus

ride home after the Beemer game. However, Bowman testified that during the bus ride, he asked Cerny how he felt, and Cerny replied "I feel good, Coach" and did not complain of a headache. Cerny's mother testified that she first became aware of Cerny's headache on Saturday morning and that it persisted throughout the weekend. Cerny's brother testified that he did not attend the Beemer game but remembered Cerny "laying [sic] on the couch at our house and became very sick and complained he had a really bad headache, and then had to go to the hospital for it." Cerny testified that he told his coaches before the Tuesday practice that he had a nagging headache all weekend, but on cross-examination, he admitted that he did not remember if he had told the coaches that he was feeling bad before practice. Egger testified that he did not talk to Cerny before the Tuesday practice and permitted him to participate because "I thought he was okay, just — he was okay Friday. At least in our eyes he was okay."

Dr. Thomas A. McKnight, a family practice physician who has treated Cerny since September 1995, and Dr. Richard Andrews, a neurologist to whom Cerny was referred by McKnight, both expressed opinions that Cerny suffered a concussion during the Friday night game; that he was still symptomatic at the practice on the following Tuesday; and that during the practice, he suffered a closed-head injury with second concussion syndrome. Andrews testified that the second blow to the head sustained during the practice was "the principal cause of [Cerny's] traumatic brain injury, and the sequelae as it exists now."

Several witnesses testified regarding the standard of care to be exercised by high school coaches in dealing with head injuries. Andrews testified that dizziness, disorientation, and headache are all recognized signs of a concussion. He stated that if a football player has one or more of these symptoms during a game, he should not be permitted to participate further in that game. In addition, three certified athletic trainers testified as expert witnesses on behalf of Cerny regarding the applicable standard of care. Christina Froiland is an assistant professor of physical education and a certified athletic trainer at Midland Lutheran College in Fremont, Nebraska, who teaches a class entitled "Prevention and Care of Athletic Injuries." This class is required by the State of Nebraska for teachers seeking a coaching

endorsement. Froiland testified the typical symptoms of a concussion include dizziness, headache, and disorientation, and are generally known in the coaching profession. She further testified that when an athlete exhibits such symptoms following an injury, the coach should not permit the athlete to return to competition until receiving clearance from a physician.

Michael McCuistion is a certified athletic trainer at Lincoln East High School who also teaches coaching certification courses in Nebraska. He testified regarding the recognition of symptoms of head injuries. McCuistion explained that dizziness, disorientation, and headache are all symptoms of a concussion. He testified that coaches must be aware of this and, when an athlete exhibits such symptoms, must take the athlete out of competition until a medical evaluation has been performed.

Rick D. Bettger, a certified athletic trainer who works in Colorado and teaches undergraduate and graduate courses on the identification and treatment of athletic injuries, similarly testified regarding the symptoms of and treatment for head injuries. He testified that a student athlete who exhibits any symptoms of a concussion, including dizziness, shortness of breath, disorientation, and a flushed face, should be removed from competition immediately.

John Stineman, the head football coach at Centennial Public Schools, testified as an expert witness on behalf of the School. Stineman opined that the coaches at Cedar Bluffs acted reasonably and that he would not have acted differently in 1995. However, on cross-examination, he testified that if a coach identifies that a student athlete has been injured, then that coach should make sure that the student receives proper medical treatment. On cross-examination, Stineman engaged in the following colloquy with Cerny's counsel:

> Q. [Coaches] don't have to be doctors, do they, but they just have to know enough first aid to know when a doctor's care is necessary, wouldn't you agree with that?
>
> A. I would agree with that, yes.
>
> Q. So a coach in that situation has to be prepared to recognize an injury and properly administer first aid to that injured athlete?
>
> A. I would — I think that is true.

> Q. And if it goes beyond the care he can give that student athlete, then referral to a physician is appropriate in your opinion?
>
> A. In my opinion, yes.

After a bench trial, the district court dismissed the petition based upon a finding that the School was not negligent. In its written findings, the district court noted that both Egger and Bowman had a teaching certificate with a coaching endorsement. It further found that "[a]s part of the endorsement process, each had completed the requisite first aid training required by the State as part of a college level course dealing with the prevention of athletic injuries." The district court also noted that neither was a certified athletic trainer.

In concluding that the School was not negligent in identifying and treating Cerny's alleged head injury, the district court discounted the expert testimony of Froiland, McCuistion, and Bettger, all of whom where certified athletic trainers. In so doing, the district court reasoned these experts did not

> coach in communities and schools similar to those employing the coaches here. Each of the experts offered by [Cerny] has a specialized level of expertise in the identification and treatment of athletic injury. Therefore, none of the experts proffered by [Cerny] meet the criteria [of] being a member of the same trade as Defendant coaches . . . .

The district court noted that "each of the experts are certified athletic trainers, having training and expertise beyond that possessed by the coaches with respect to the diagnosis of athletic injury." The district court thus discounted the testimony of the certified athletic trainers and declared that the testimony of Cedar Bluff's sole expert witness, Stineman, was authoritative on the standard of care to be exercised by football coaches. Regarding this standard of care, the district court refused to "hold a first aid trained coach to a standard of diagnostic infallibility."

Cerny perfected this timely appeal.

ASSIGNMENTS OF ERROR

Cerny asserts, restated, that the district court (1) was clearly wrong in failing to find that Bowman and Egger were negligent because of their failure to follow the School's policy requiring

that a player be held out of practice or competition if there is any question concerning an injury to that player; (2) erred as a matter of law in concluding that the applicable standard of care was a local standard rather than a statewide or national standard of care; (3) erred as a matter of law in failing to give due consideration to the testimony of Cerny's three expert witnesses based on the faulty reasoning that such experts were not practicing coaches; (4) erred as a matter of law in concluding that Stineman's testimony was authoritative because he did not articulate and reference an applicable standard of care that justified the coaches' actions; (5) erred as a matter of law in concluding that in order for Cerny to prevail, the trial court would have to hold Bowman and Egger to a standard of diagnostic infallibility which it reasoned was a higher standard than to which physicians are held; (6) was clearly wrong in concluding that the testimony of Stineman supported the actions of Bowman and Egger and that their actions in response to Cerny's injury in the Friday game were reasonable; (7) was clearly wrong in failing to find that Bowman and Egger were negligent because they failed to advise student athletes and their parents of the signs and dangers of head injury; and (8) was clearly wrong in reaching any conclusion that Cerny was contributorily negligent and, if it did so, was wrong as a matter of law in failing to apply the comparative fault provisions of Nebraska law.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *North Bend Senior Citizens Home v. Cook*, 261 Neb. 500, 623 N.W.2d 681 (2001); *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

[2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000); *Carroll v. Chase County*, 259 Neb. 780, 612 N.W.2d 231 (2000).

ANALYSIS

[3] A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of

duty, causation, and damages. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000). While we often state these elements in a formulaic manner, applying them to specific cases is frequently a complex endeavor.

[4] The question of what duty is owed and the scope of that duty is multifaceted. First, and foremost, the question of whether a duty exists at all is a question of law. *Desel v. City of Wood River, supra*; *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). A court must determine whether

> upon the facts in evidence, [does] such a relation [exist] between the parties that the community will impose a legal obligation upon one for the benefit of the other—or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 37 at 236 (5th ed. 1984). See *Desel v. City of Wood River, supra*.

[5] Once a court determines that a duty is owed by one party to another, it becomes necessary to define the scope and extent of the duty. In other words, the necessary complement of duty—the standard of care—must be ascertained. Keeton, *supra*. That standard is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; i.e., what a reasonable person of ordinary prudence would have done in the same or similar circumstances. See, *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998); Restatement (Second) of Torts § 283 (1965).

This basic standard, however, is not invariably applied in all negligence cases. For example, the standard is modified in circumstances in which the alleged tort-feasor possesses special knowledge, skill, training, or experience pertaining to the conduct in question that is superior to that of the ordinary person. Such a person is not held to the standard of a reasonably prudent person, but, rather, to a standard consistent with his or her specialized knowledge, skill, and other qualities. See, Restatement, *supra*, § 290, comment *f*. at 50 (stating that "[i]f the actor has special knowledge, he is required to utilize it, but he is not required to possess such knowledge, unless he holds himself out as possessing it or undertakes a course of conduct which a

reasonable man would recognize as requiring it"); *Id.*, § 299, comment *f.* at 72 (stating that "[i]f the actor possesses special competence, he must exercise it, not only in his profession, trade, or occupation, but also whenever a reasonable man in his position would realize that its exercise is necessary to the reasonable safety of others"); Dan B. Dobbs, The Law of Torts § 122 at 290 (2000) (explaining that "[a] reasonable person will act in the light of (a) knowledge shared by the community generally and also (b) information and knowledge that he himself has that is not generally known and that reasonable people would not ordinarily have"); Keeton, *supra*, § 32 at 185 (stating that "if a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it").

[6] Although we have never explicitly stated as much, determining the standard of care to be applied in a particular case is a question of law. See, Dobbs, *supra*, § 117 at 279 (noting that "[i]t cannot be too often repeated that the standard [of care] itself is a general duty prescribed by law"); Keeton, *supra*, § 37 (explaining that standard of care is legal rule and, thus, is matter of law); Restatement, *supra*, § 328 B at 151 (stating "[i]n an action for negligence the court determines . . . the standard of conduct required of the defendant by his legal duty").

[7,8] The legal standard of care is necessarily articulated in general terms, such as a duty "to conform to the legal standard of reasonable conduct in light of the apparent risk." *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 336, 622 N.W.2d 684, 687 (2001); *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000). "Since it is impossible to prescribe definite rules of conduct in advance for every combination of circumstances that may arise, and the fact situations are infinitely variable, the law resorts to formulae which state the standard in broad terms without attempt to fill it in in detail." Restatement, *supra*, § 328 C, comment *b.* at 155. We have recognized that negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances. *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998); *Collins v. Herman Nut & Supply Co.*, 195 Neb. 665, 240 N.W.2d 32 (1976). Therefore, while the existence of a duty

and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980). To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard. See Restatement (Second) of Torts § 328 C, comment *b.* (1965). When the conduct in question involves specialized knowledge, skill, or training, expert testimony may be helpful or even necessary to a determination of what the standard of care requires under particular circumstances. See, *Bargmann v. Soll Oil Co., supra*; *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). See, also, *Bates v. Design of the Times, Inc., supra*.

In the present case, it is clear that the School and the coaches it employed owed a duty to Cerny. But, as noted above, an inquiry into duty does not end with a determination that the defendant owed a legally recognizable duty to the plaintiff; it must also include a determination regarding the standard of care that a defendant must exercise in a given situation in order to fulfill the duty. The standard of care applied in this case by the district court is somewhat unclear and seems to depend upon two alternative rationales. The district court determined that the testimony of Stineman regarding the applicable standard of care was "authoritative." The district court made this statement after explaining that (1) Froiland, McCuistion, and Bettger were not members of the same trade as Egger and Bowman, as they were not coaches in communities and schools similar to Cedar Bluffs, but were certified athletic trainers and (2) that each had a specialized level of expertise in the identification and treatment of athletic injury that Egger and Bowman did not possess.

Although it stated that Stineman's testimony regarding the standard of care to be applied in this case was "authoritative," the district court did not articulate an affirmative statement of that standard, but only stated that it would not hold "a first aid trained coach to a standard of diagnostic infallibility." Furthermore, the district court variously stated that the standard was predicated

upon the care that was to be exercised by "football coaches in communities similar to Cedar Bluffs in Nebraska in 1995," but also upon the "reasonable degree of care and skill to be exercised by endorsed high school football coaches in 1995."

Egger and Bowman each possess a Nebraska teaching certificate with a coaching endorsement. Regarding these endorsements, Stineman testified as follows:

> Q. And in order to obtain a coaching endorsement, is a college course in first aid required?
>
> A. Yes, it is.
>
> Q. Is there anything else required in terms of courses which involve the diagnosis and treatment of athletic injuries besides that first-aid course?
>
> A. There is usually a course in care and prevention of athletic injuries. Aside from that, there are no other ones.

Both Froiland and McCuistion testified that they taught courses dealing with prevention and care of athletic injuries that a teacher must take in order to obtain a coaching endorsement in Nebraska. Bettger testified he teaches similar courses, albeit in Colorado.

Because Egger and Bowman have Nebraska teaching certificates with coaching endorsements, they necessarily possess certain specialized training and skill with respect to athletic injuries. They are not medical professionals and therefore cannot be expected or required to make medical diagnoses. However, the record reflects that the training required to obtain a coaching endorsement includes familiarization with the common symptoms of a concussion in order to enable a coach to make a reasoned determination of when to withhold a student athlete from competition until a medical professional evaluates the athlete and clearance is obtained. Thus, the appropriate standard of care to be applied to the actions of Egger and Bowman in this case is that of the reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement. The record affords no basis upon which to conclude that this standard varies from one Nebraska community to another, and the district court erred as a matter of law in so concluding.

The district court discounted the testimony of Froiland, McCuistion, and Bettger because it determined that they were "certified athletic trainers, having training and expertise beyond

that possessed by the coaches with respect to the diagnosis of athletic injury." While that may be true, it does not render them incompetent to testify regarding standard of care issues. As we have noted, the record reflects that Froiland and McCuistion personally taught courses which impart the specialized knowledge concerning athletic injuries that a person must have in order to receive a coaching endorsement in this state. As such, they possessed the requisite knowledge, skill, and experience to testify regarding both what conduct the standard of care would require under the particular factual circumstances at issue, and whether that standard of care was breached by the School's coaching staff. Therefore, we conclude that the district court erred in discounting the testimony of Froiland and McCuistion on these issues.

CONCLUSION

The errors of the district court in determining the applicable standard of care and discounting the testimony of Froiland and McCuistion were prejudicial to Cerny and necessitate a new trial. The applicable standard of care by which the conduct of the School's coaching staff should be judged is that of the reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement. On remand, in order to determine the existence of negligence, the district court must determine, as the finder of fact, what conduct was required by that standard under the circumstances of this case and whether Egger and Bowman acted in conformity therewith.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE SEARCH WARRANT FOR 3628 V STREET, OMAHA, DOUGLAS COUNTY, NEBRASKA.
STATE OF NEBRASKA, APPELLANT, V. JEFFREY RYBIN, APPELLEE.

628 N.W. 2d 272

Filed June 29, 2001. No. S-00-007.

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. **Constitutional Law: Criminal Law.** The First Amendment right of public access traditionally gives the press and the public the right to attend criminal trials, absent an overriding interest of higher value which necessitates closing the proceedings.
3. **Constitutional Law: Courts.** There are two complementary considerations for courts to use when determining whether a First Amendment right of public access exists. The first is considerations of experience; whether there is a tradition of accessibility in that the place and process have historically been open to the press and general public. The second is considerations of logic as to whether public access plays a significant positive role in the functioning of the particular process in question.
4. **Constitutional Law: Search Warrants.** Search warrant applications have not historically been open to the press and public.
5. ____: ____. Public access to search warrant applications does not play a significant positive role in the functioning of the warrant application process.
6. **Constitutional Law: Search Warrants: Affidavits.** No qualified First Amendment right of public access attaches to an affidavit in support of a search warrant.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded with directions to dismiss.

James S. Jansen, Douglas County Attorney, and Robert Francis Cryne for appellant.

Michael J. Tasset, of Johnson and Mock, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Jeffrey Rybin filed a motion to unseal an affidavit used in support of a search warrant issued for his home, asserting a right of public access under the First Amendment to the U.S. Constitution. The district court ordered that the affidavit be unsealed, and the State appealed.

FACTUAL BACKGROUND

On August 17, 1998, Special Agent Farrell Fisher, of the U.S. Drug Enforcement Administration (DEA), applied to the Douglas County Court for a warrant authorizing the search of a residence located at 3628 V Street in Omaha, Nebraska. This residence was owned and occupied by Rybin. In support of the

application, Fisher submitted an affidavit containing information provided by a confidential informant.

The search warrant was issued by the Douglas County Court on August 17, 1998, and executed on the same day. However, no evidence of criminal activity was discovered, and accordingly, no criminal proceedings were instituted against Rybin.

On August 24, 1998, Fisher's affidavit was sealed by order of the county court. On the same day, the search warrant, affidavit, and return were filed with the clerk of the district court pursuant to Neb. Rev. Stat. § 29-816 (Reissue 1995). Section 29-816 states in pertinent part:

> The judge or magistrate who has issued the search warrant shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk of the district court . . . . The clerk of the district court shall file and index such warrant, together with the return thereon, the inventory, and other papers in connection therewith as a separate criminal proceeding. No fee shall be charged or collected for such service.

On September 15, 1998, Rybin filed a "Motion to Unseal Affidavit" in the district court for Douglas County. Rybin asserted in his motion that sealing the affidavit violated his "qualified First Amendment right of access." A hearing on this motion was held on September 28. At this hearing, Rybin asserted that under *In re Search Warrant for Secretarial Area-Gunn*, 855 F.2d 569 (8th Cir. 1988), he possessed a qualified First Amendment right of public access to the affidavit. Rybin offered no other grounds for his request to unseal the affidavit.

At the hearing on the motion, the only evidence offered by Rybin was the sealed search warrant, affidavit, and return. The State then called Fisher to testify. Fisher testified that Rybin telephoned him the day after the search was conducted, wanting to know who provided the information which led to the search. Fisher refused to give Rybin the confidential informant's identity. Fisher further testified that Rybin submitted a claim to the DEA for damage to his property which had occurred during the search. According to Fisher, the claim had been approved by the

DEA and a check compensating Rybin for his property damage was forthcoming.

Regarding the identity of the confidential informant, Fisher testified that the information contained in the affidavit would assist Rybin in ascertaining the identity of the informant, even though the name of the informant was not stated in the affidavit. Fisher further testified that the affidavit should not be unsealed because "the identity would be — most likely be revealed of this confidential source, and it could be made public and — and his effectiveness — his or her effectiveness would not be useful to — to us." Fisher further testified that the confidential informant was currently involved in two ongoing DEA investigations.

On April 3, 2000, the district court ordered the affidavit unsealed "except for the identity of a confidential informant." The State appealed, contending that partially unsealing the affidavit would nevertheless allow Rybin to determine the identity of the informant. We moved this case to our docket pursuant to our authority to regulate the caseloads of Nebraska appellate courts. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The State asserts, restated and renumbered, that the district court erred in granting Rybin's motion because (1) the State's interest in protecting the informant's identity defeats any First Amendment qualified right of public access, (2) Rybin failed to demonstrate a material need for the information contained in the affidavit, and (3) the trial court abused its discretion in unsealing the affidavit.

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. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

ANALYSIS

The State argues that the trial court erred in unsealing any portion of the affidavit because the State's interest in protecting the identity of the confidential informant outweighs Rybin's asserted qualified First Amendment right of public access. This

issue presents a question of law regarding which we are obligated to reach a conclusion independent of the trial court. *State v. Bottolfson, supra*.

Rybin, in addition to his assertion of a qualified First Amendment right, also contends in his brief that the district court's decision should be affirmed based on a common-law right of judicial access, or the Fourth Amendment. However, because these issues were not raised by Rybin before the trial court, they will not be addressed on appeal. See *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999).

[2] The First Amendment right of public access traditionally gives the press and the public the right to attend criminal trials, absent an overriding interest of higher value which necessitates closing the proceedings. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). However, neither this court nor the U.S. Supreme Court has recognized the existence of a First Amendment right of public access to affidavits in support of search warrants. In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), the Supreme Court articulated the general principles to consider in determining when a qualified First Amendment right of public access exists. In *Press-Enterprise Co.*, the plaintiff's motion to unseal the transcript of a preliminary hearing in a criminal prosecution was denied. On appeal, the Supreme Court determined that a qualified First Amendment right of public access existed with regard to the transcript and granted the plaintiff access to the document. *Id.*

[3] In *Press-Enterprise Co.*, the Court identified "two complementary considerations" for courts to use when determining whether a First Amendment right of public access exists. 478 U.S. at 8. The first is "considerations of experience," 478 U.S. at 9, namely, whether there is a " ' "tradition of accessibility" ' " in that "the place and process have historically been open to the press and general public," 478 U.S. at 8. The second is "considerations of . . . logic," 478 U.S. at 9, as to "whether public access plays a significant positive role in the functioning of the particular process in question," 478 U.S. at 8.

Numerous jurisdictions have considered whether applications for search warrants have historically been open to the press and

public. See, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989); *Times Mirror Co. v. U.S.*, 873 F.2d 1210 (9th Cir. 1989); *In re Search Warrant for Secretarial Area-Gunn*, 855 F.2d 569 (8th Cir. 1988); *U.S. v. Certain Real Property Located in Romulus*, 977 F. Supp. 833 (E.D. Mich. 1997); *In re Macon Telegraph Publishing Co.*, 900 F. Supp. 489 (M.D. Ga. 1995); *Matter of Flower Aviation of Kansas, Inc.*, 789 F. Supp. 366 (D. Kan. 1992); *Matter of 2 Sealed Search Warrants*, 710 A.2d 202 (Del. Super. 1997); *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division of the District Court*, 403 Mass. 628, 531 N.E.2d 1261 (1988); *State v. Archuleta*, 857 P.2d 234 (Utah 1993); *Seattle Times Co. v. Eberharter*, 105 Wash. 2d 144, 713 P.2d 710 (1986); *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

[4] Aside from the Eighth Circuit in *In re Search Warrant for Secretarial Area-Gunn, supra*, federal courts which have considered the issue have concluded that applications for search warrants have not historically been open to the press and public. See, *Baltimore Sun Co. v. Goetz, supra*; *Times Mirror Co. v. U.S., supra*; *U.S. v. Certain Real Property Located in Romulus, supra*; *In re Macon Telegraph Publishing Co., supra*; *Matter of Flower Aviation of Kansas, Inc., supra*. The same is true of the majority of state courts which have considered this issue. See, *Matter of 2 Sealed Search Warrants, supra*; *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division of the District Court, supra*; *Seattle Times Co. v. Eberharter, supra*; *State v. Cummings, supra*. Only the State of Utah, relying on the reasoning of the Eighth Circuit in *In re Search Warrant for Secretarial Area-Gunn, supra*, has found a tradition of public access regarding warrant applications. *State v. Archuleta, supra.*

In *In re Search Warrant for Secretarial Area-Gunn, supra*, the Eighth Circuit reasoned that because warrants and supporting affidavits are traditionally filed with the courts as public records, such proceedings are generally accessible to the press and the public. Rybin relies upon *In re Search Warrant for Secretarial Area-Gunn* to support his claim of public access. However, the Eighth Circuit's decision is not binding authority upon this court. See *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring)

(state courts bound by Supreme Court's interpretation of federal law, but not bound by circuit court's interpretation). See, also, *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977) (state courts may express differing views on federal questions until guided by binding decision of Supreme Court).

The test adopted by the U.S. Supreme Court is whether the "place and process" of the criminal proceeding has traditionally been open to the press and public. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). Applications for search warrants, which compose the process from which the affidavits arise, are conducted ex parte, typically without the press and public present. See, e.g., *Baltimore Sun Co. v. Goetz, supra*; *Times Mirror Co. v. U.S., supra*. Compare, also, *Franks v. Delaware*, 438 U.S. 154, 169, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) (proceeding for issuing search warrant is "necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence"); *United States v. United States District Court*, 407 U.S. 297, 321, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972) ("a warrant application involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge"). We agree with the majority of courts which have concluded that search warrant applications have not historically been open to the press and public. As such, we determine that "considerations of experience" do not support a First Amendment right of access in this case. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. at 9.

We next turn to "considerations of . . . logic," 478 U.S. at 9, to determine "whether public access plays a significant positive role in the functioning of the particular process in question," 478 U.S. at 8. As noted by the Supreme Court, "there are some kinds of government operations that would be totally frustrated if conducted openly." 478 U.S. at 9. Search warrants, by their very nature, rely on the ex parte application proceeding in order to be effective in seizing evidence of criminal activity. The ultimate purpose of an application for a search warrant is to enable the government to lawfully seize evidence of criminal activity. This purpose would be totally frustrated if the public had access to such proceedings. Once the secrecy of the search affidavit

proceeding is eliminated, the element of surprise necessary to effectuate the warrant has been lost. See, e.g., *Franks v. Delaware, supra.*

[5] For the foregoing reasons, we determine that public access to search warrant applications would not play "a significant positive role" in the functioning of the warrant application process. See, also, *Times Mirror Co. v. U.S.*, 873 F.2d 1210 (9th Cir. 1989); *U.S. v. Certain Real Property Located in Romulus*, 977 F. Supp. 833 (E.D. Mich. 1997); *In re Macon Telegraph Publishing Co.*, 900 F. Supp. 489 (M.D. Ga. 1995); *Matter of Flower Aviation of Kansas, Inc.*, 789 F. Supp. 366 (D. Kan. 1992); *Matter of 2 Sealed Search Warrants*, 710 A.2d 202 (Del. Super. 1997); *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division of the District Court*, 403 Mass. 628, 531 N.E.2d 1261 (1988); *Seattle Times Co. v. Eberharter*, 105 Wash. 2d 144, 713 P.2d 710 (1986); *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996).

[6] Accordingly, we determine that no qualified First Amendment right of public access attaches to an affidavit in support of a search warrant. Rybin possesses no right of access under the First Amendment which would allow the district court to unseal any portion of the affidavit.

Having so determined, it is not necessary to reach the State's other assignments of error.

CONCLUSION

The district court's decision ordering the affidavit to be unsealed is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

In re Complaint Against Richard W. Krepela, County Court Judge of the Seventh Judicial District of the State of Nebraska. State of Nebraska ex rel. Commission on Judicial Qualifications, relator, v. Richard W. Krepela, respondent.

628 N.W. 2d 262

Filed June 29, 2001. No. S-35-000001.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the standard of review is de novo on the record of the proceedings before the special master.
2. **Judges: Disciplinary Proceedings.** In an action before the Commission on Judicial Qualifications, conduct which took place before the respondent became a judge can nevertheless be considered conduct prejudicial to the administration of justice which brings the judicial office into disrepute.
3. **Judges: Disciplinary Proceedings: Appeal and Error.** Upon its independent inquiry of a complaint from the Commission on Judicial Qualifications, the Nebraska Supreme Court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Nebraska Code of Judicial Conduct adopted by the court and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1995) have been violated.
4. ____: ____: ____. In a judicial discipline proceeding, if violations of the canons of the Nebraska Code of Judicial Conduct adopted by the Nebraska Supreme Court and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1995) are found, the Nebraska Supreme Court must then determine what discipline, if any, is appropriate under the circumstances.
5. **Constitutional Law: Judges: Disciplinary Proceedings: Proof.** Under Neb. Const. art. V, § 30(1), and Neb. Rev. Stat. § 24-721 (Reissue 1995), if the Commission on Judicial Qualifications finds the charges are established by clear and convincing evidence, it shall recommend appropriate disciplinary sanctions to the Nebraska Supreme Court.
6. **Judges: Disciplinary Proceedings: Appeal and Error.** In a judicial discipline proceeding, the Nebraska Supreme Court may concern itself only with the counts the Commission on Judicial Qualifications concluded were established by clear and convincing evidence.
7. **Judges: Disciplinary Proceedings.** Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
8. ____: ____. The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated.
9. ____: ____. In a judicial discipline proceeding, sanctions should be imposed where necessary to safeguard the bench from those who are unfit.

10. ____: ____. In a judicial discipline proceeding, the sanction must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future.
11. ____: ____. In a judicial discipline proceeding, the Nebraska Supreme Court weighs the nature of the offenses with the purpose of the sanctions and examines the totality of the evidence to determine the proper discipline.
12. ____: ____. In a judicial discipline proceeding, the respondent's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline.

Original action. Judgment of suspension without pay.

Clarence E. Mock III, of Johnson & Mock, for respondent.

Anne E. Winner, of Keating, O'Gara, Davis & Nedved, P.C., for relator.

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

PER CURIAM.

This is an original proceeding, following a complaint filed by the Nebraska Commission on Judicial Qualifications (Commission), against Richard W. Krepela, a judge of the county court for the Seventh Judicial District. The complaint alleges that actions taken by Krepela before he became a judge constitute conduct prejudicial to the administration of justice which brings the judicial office into disrepute in violation of Neb. Rev. Stat. § 24-722(6) (Reissue 1995). The complaint alleges that in 1984, while serving as the county attorney for Madison County, Krepela altered a copy of a police report in a criminal case, provided the altered report to defense counsel, and asked the officer who made the report to either alter his original report or alter his testimony to conform to the changes made by Krepela. The complaint further alleges that Krepela did not disclose his actions to officials or entities and that he violated criminal statutes.

A special master concluded that in light of Krepela's otherwise good record, his actions did not constitute conduct prejudicial to the administration of justice which brings the judicial office into disrepute. The Commission found by clear and convincing evidence that Krepela altered the police report and asked the officer who wrote the report to alter the original. The

Commission determined that Krepela's actions did constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute and recommended that Krepela be removed from office. We enter a judgment of suspension for 6 months without pay.

BACKGROUND

Krepela was admitted to the practice of law in 1976. In 1984, he was serving as county attorney for Madison County, Nebraska, and in 1989, he was appointed judge of the county court. The actions which form the basis of the complaint occurred in 1984, during the course of Krepela's investigation and prosecution of Robert Edward Hunt, Jr., for the murder of a Norfolk woman. See *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985). Ultimately, Krepela filed first degree murder charges against Hunt. When Hunt waived preliminary hearing on May 2, 1984, Krepela agreed to provide Thomas H. DeLay, Hunt's court-appointed defense counsel, with copies of the police reports which included Hunt's confessions to Capt. Leon C. Chapman of the Norfolk Police Department.

Alteration of Police Report

Krepela admits that before forwarding copies of the police reports to DeLay, he created a false report by altering a copy of an 18-page police report. This was accomplished by removing pages 17 and 18 from the true copy of the report and instructing his secretary to type a false page as a substitution for the final page of the copy that was provided to DeLay. The following information was removed from Chapman's report:

> Hunt then stated "I think that you and I had agreed that before I made any further statements [I] would have an attorney.["] This officer then looked at him and stated to him that I didn't recall [it] being that way, and that if he recalled that when we talked before that I had asked him about [a] written or taped statement and that he wanted an attorney before he made either one of those [an]d that he had even stated at that time other than that he was willing to cooperate with us . . . but wanted an attorney before giving a taped or written [st]atement.

Sometime before June 7, DeLay filed a motion to suppress, in part due to assertions by Hunt that he had asked for an attorney before giving a confession.

Krepela testified that he does not know exactly why he falsified the police report or what his thinking was at the time. In general, Krepela testified that he made a very bad error in judgment and that he did something that he would never normally do. Krepela testified that he felt a great deal of embarrassment and remorse over what he had done.

The record shows that Krepela had become personally and emotionally involved in the prosecution of the Hunt case. Krepela testified that he knew the victim's fiance and the fiance's family very well. There was also evidence that Hunt had stalked the neighborhood in which Krepela's own fiance lived. Krepela testified that his personal involvement with the case interfered with his decisionmaking and caused him to make mistakes.

Krepela testified that in 1984, he was short of help because a deputy county attorney had quit. He stated he was working 10 to 12 hours per day and was handling essentially all of the work at the county attorney's office, including the preparation of search warrants at any time of the day or night. Krepela testified that during this time, he was suffering from fatigue and was having difficulty making decisions. The record contains an affidavit from Stephen P. Finn, a county court judge, stating that around the time of the murder, Krepela was trying to manage a caseload that no county attorney could adequately handle. Judge Finn stated that out of concern for the proper management of the court docket and for Krepela's mental and physical health, he confronted Krepela about getting someone to help him in the county attorney's office. Judge Finn stated that not long after that conversation, Krepela did hire another deputy to assist him.

Krepela's Request That Chapman Alter Original Police Report

The complaint alleges that Krepela asked Chapman to alter his original police report or to make his testimony consistent with the alterations made by Krepela. Chapman testified that Krepela told him that part of the report had been reworded. Chapman stated that as far as he could recall, Krepela asked him to change

the original police report to reflect the changes. Chapman admitted, however, that he could not recall the exact words of his conversation with Krepela and indicated that his memory of the events was "foggy." Chapman stated that he could not recall if Krepela asked him to alter his testimony, but also stated that he told Krepela that he could not testify to something that was not in his original report. When questioned further by the special master, Chapman stated that his testimony was that he thought Krepela asked him to change the original report.

Krepela testified that he did not ask Chapman to alter his original report or testimony. Krepela testified that he spoke with Chapman in an attempt to explain what he had done and to explain that he was going to fix the problem. Krepela testified that he had difficulty explaining the situation and that what he ended up telling Chapman did not make much sense. According to Krepela, he told Chapman not to worry about it and left the office. James D. Smith, an attorney who later took over the prosecution of the case, testified that when he later spoke with Chapman about the altered report, Chapman appeared surprised and annoyed to learn that his report had been altered. Herbert Angell, a coworker of Chapman, testified that Chapman never told him that Krepela asked Chapman to alter the original report and indicated that Chapman would normally discuss such an occurrence if it had happened. Angell testified that he believed Krepela would remember what actually happened much better than Chapman would.

The Commission found by clear and convincing evidence that sometime between May 2 and June 8, 1984, Krepela asked Chapman to alter his original report in order to conform to and reflect Krepela's changes. The Commission stated that while Chapman could not recall, 15 years later, the exact words used by Krepela, Chapman's testimony was clear that Krepela had asked him to change the original report because only Krepela's copy had been turned over to Hunt's attorney. The Commission agreed with the finding of the special master that unless Chapman had altered the original report to conform to the one turned over to Hunt's attorney, Krepela would have encountered a serious problem. The problem would have arisen when the original report was produced in the motion to suppress hearing.

Disclosure to Judge

Krepela testified that during his conversation with Chapman, he realized that he was too emotionally involved in the case and that his actions were harming the case. Krepela's testimony indicates that he felt it was not a fear of getting caught that made him want to confess, but a realization that his actions would make Chapman appear to be a bad witness and a general feeling that he regretted what he had done. Krepela stated that he then called Smith and made arrangements for Smith to take over the case. Krepela testified that the next day, he and Smith went to court and met with DeLay and Judge Richard P. Garden. Krepela testified that he could not remember the exact words he used to explain the situation to Judge Garden, but stated that he had no doubt that Judge Garden knew exactly what had happened. DeLay testified that he did not have a full understanding of what happened until he actually received the correct police report sometime after the meeting with Judge Garden. DeLay also testified, however, that Krepela specifically told Judge Garden that he had changed the report and that he felt that Judge Garden had been fully informed of what had happened. DeLay testified that Krepela apologized to both DeLay and Judge Garden. DeLay testified that after the meeting, he believed that what Krepela had done was unethical and that he conducted research to determine whether he had a duty to further disclose the information. After conducting that research, DeLay concluded that disclosure to the court was sufficient. DeLay stated that he did some research and could not find anything to indicate that Krepela's actions were illegal.

The Commission concluded that Krepela, realizing the false report was likely to be discovered in view of the pending motion to suppress, made arrangements for the appointment of Smith as special prosecutor and disclosed the alteration of the report to Smith. In its findings, the Commission stated that there was disagreement over the extent to which disclosure of the falsified document was made to the trial court. The Commission noted Krepela's testimony that he could not remember the specifics as to how the matter was presented to Judge Garden and did not recall whether Judge Garden had been presented with the contrasting copies of the police report. The Commission also

emphasized DeLay's testimony that he did not have a full understanding of what had transpired until he saw and compared the two copies of the police report. The Commission did not, however, make a clear finding of fact regarding the extent to which Judge Garden was informed of what Krepela had done, nor did it conclude by clear and convincing evidence that Judge Garden was not informed of the alteration.

The events surrounding the falsified report came to light in a 1997 postconviction proceeding initiated by Hunt. In that proceeding, Judge Garden found that as soon as Krepela realized the impact of what he had done, he immediately took steps to remedy the situation. Judge Garden ultimately denied postconviction relief, and this court affirmed in *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998). In its finding of fact, the Commission emphasized that no evidence had come before it to suggest that Hunt was denied due process of law or did not receive a fair trial.

Conclusions of Special Master and Commission

The special master ultimately concluded that Krepela altered the report and that Krepela asked Chapman to alter the original report. The special master determined that due to Krepela's unblemished record as a lawyer, together with the uncontradicted and favorable evidence regarding his service as a judge, his actions constituted "uncharacteristic conduct" that occurred 16 years ago and did not constitute conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

The Commission found by clear and convincing evidence that Krepela altered the police report and that he asked Chapman to alter the original report. The Commission stated that Krepela's actions constituted, at least facially, violations of at least three criminal statutes: Neb. Rev. Stat. § 28-901 (Reissue 1995) (obstructing government operations); Neb. Rev. Stat. § 28-911 (Reissue 1995) (abuse of public records); and Neb. Rev. Stat. § 28-922 (Reissue 1995) (tampering with physical evidence). Krepela was not prosecuted for any such offenses, and the statute of limitations has run on them. The Commission unanimously concluded that Krepela's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

In its findings, the Commission noted that the record contains a "most impressive collection" of letters of support for Krepela and that he had an 87.2-percent retention recommendation from lawyers participating in a 2000 Nebraska State Bar Association evaluation. He was retained in office by the voters in the 2000 general election. The record also contains a petition in support of Krepela signed by numerous people and various affidavits in support of Krepela. In addition, nothing in the record suggests that Krepela has ever engaged in any other inappropriate conduct, and the record indicates that Krepela has an excellent reputation in the community for honesty and integrity. Krepela testified that he did not disclose the altered report when he applied to be a county judge because he did not believe he was required to do so. The record contains a copy of Krepela's application for the judicial vacancy. There are no parts of the application which specifically require disclosure of Krepela's actions, although one portion reads: "[S]tate any other information which you regard as pertinent."

A majority of the Commission recommended that Krepela be removed from his position as a county judge. Krepela filed a petition in error appealing the recommendation of the Commission. Krepela asks that if a sanction is to be imposed, that he be allowed to remain in office.

ASSIGNMENTS OF ERROR

Krepela appeals the Commission's findings of fact that he (1) was motivated to disclose that he altered the report because he realized the false report was likely to be discovered in view of the pending motion to suppress, as opposed to any genuine desire to rectify his error and comply with his ethical duties; (2) would encounter a serious problem when the original report was produced in the hearing on the motion to suppress when he disclosed the alteration before the hearing occurred; and (3) requested Chapman to alter his original report. Krepela appeals the Commission's conclusions of law that he (1) engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, (2) violated at least three Nebraska criminal statutes, and (3) should be removed from his position as a county judge.

STANDARD OF REVIEW

[1] In a review of the findings and recommendations of the Commission on Judicial Qualifications, the standard of review is de novo on the record of the proceedings before the special master. *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

ANALYSIS

[2-4] We note that conduct which took place before the respondent became a judge can nevertheless be considered conduct prejudicial to the administration of justice which brings the judicial office into disrepute. See *State ex rel. NSBA v. Krepela*, 259 Neb. 395, 610 N.W.2d 1 (2000). Upon our independent inquiry, this court must determine whether the charges against Krepela are supported by clear and convincing evidence and which, if any, canons of the Nebraska Code of Judicial Conduct adopted by this court and subsections of § 24-722 have been violated. If violations are found, this court must then determine what discipline, if any, is appropriate under the circumstances. See *In re Complaint Against Jones, supra*; *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). The complaint relies on § 24-722 which provides in relevant part:

> A Justice or judge of the Supreme Court or judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The complaint does not allege that Krepela violated any other subsection of § 24-722, nor does the complaint allege any violations of the Nebraska Code of Judicial Conduct.

[5,6] Neb. Const. art. V, § 30(1), and Neb. Rev. Stat. § 24-721 (Reissue 1995) provide that if the Commission finds the charges are established by clear and convincing evidence, it shall recommend appropriate disciplinary sanctions to this court. Therefore, we may concern ourselves only with the counts the Commission concluded were established by clear and convincing evidence. *In re Complaint Against Jones, supra*. See *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984).

The special master found by clear and convincing evidence that Krepela altered the police report and that he asked Chapman to alter his original report to reflect the changes made by Krepela. The Commission adopted the findings of the special master, thus reaching the same conclusion. Neither the special master nor the Commission found by clear and convincing evidence that Krepela failed to disclose his actions to any official person or entity. Although both the special master and the Commission made conclusions of law that Krepela violated at least three criminal statutes, it was recognized that Krepela was not charged with any criminal offense. Neither the special master nor the Commission found by clear and convincing evidence that any criminal statutes were violated. Additionally, neither the special master nor the Commission found by clear and convincing evidence that Krepela was motivated to disclose the altered report due to fear that he would be discovered or face difficulties at the hearing on the motion to suppress. We do not address those charges in the complaint that the Commission did not find were supported by clear and convincing evidence.

[7] We agree with the Commission that the evidence is clear and convincing that Krepela altered the police report. Krepela admits this fact. We further agree that the evidence is clear and convincing that Krepela asked Chapman to alter his original report to reflect the changes made by Krepela. Although Chapman was unable to remember details of his conversation with Krepela regarding the report, Chapman's testimony as a whole and in response to questions by the special master was clear that he believes Krepela wanted him to alter the original report. We next address whether the Commission correctly determined that Krepela's actions of altering the report and asking Chapman to alter the original report constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. We have defined such conduct as follows:

> Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . . It includes conduct which would justify a reasonable man in believing that a result achieved by a judge was achieved because of his

> position and prestige . . . and conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office . . . . It depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.

(Citations omitted.) *In re Complaint Against Kneifl*, 217 Neb. at 475, 351 N.W.2d at 695-96. See *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987).

We agree with the Commission that Krepela's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Krepela's actions were plainly dishonest, deceitful, and in violation of his duties as a prosecutor. As the Commission noted, Krepela's actions were designed to impede discovery of a possible Sixth Amendment violation.

Krepela's actions were clearly conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office. The fact that the conduct took place over 16 years ago does not alter the conclusion that his actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

[8-11] Having made this determination, we now address the more difficult task of determining an appropriate sanction. The circumstances are undeniably unique—a disciplinary proceeding brought against a sitting judge for misconduct that occurred more than 16 years ago when the judge was a prosecutor. The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998); *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). Sanctions should be imposed where necessary to safeguard the bench from those who are unfit. *In re Complaint Against Jones, supra*; *In re Complaint Against Kelly, supra*. The discipline imposed must be designed to announce publicly our recognition that there has been misconduct. It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future. *Id*. We weigh the

nature of the offenses with the purpose of the sanctions and examine the totality of the evidence to determine the proper discipline. See *In re Complaint Against Jones, supra*.

That Krepela's conduct was serious and deserving of a substantial degree of discipline is obvious. We agree with the statement of the Commission that "[c]reating an altered, falsified report and requesting the investigating officer to change the original to conform to the falsification are actions striking at the very heart of the justice system." When such actions are taken by a prosecutor, this is even more true.

[12] We do not ignore the fact, however, that the conduct was an isolated incident that occurred more than 16 years ago and was disclosed to Judge Garden and opposing counsel. We have stated that the respondent's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline. *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984).

Nothing in the record suggests that Krepela has ever engaged in any other inappropriate conduct or that he is currently unfit to serve as a county judge. To the contrary, the evidence in the record reflects that Krepela has a good reputation as a judge and that he is well respected. In the 16 years since the conduct at issue occurred, no other acts of misconduct have ever been attributed to him. The Commission found, and we agree, that the public has been served well by Krepela since the incident, both in his remaining term as county attorney and since 1989 as a county judge. As one court has noted, if the conduct at issue were truly evidence of a character flaw affecting fitness, it would be likely that some hint of the flaw would surface during the many intervening years that the respondent served as a judge. See *Inquiry Concerning Davey*, 645 So. 2d 398 (Fla. 1994).

We determine that the seriousness of Krepela's conduct must be balanced by the fact that we find the conduct to be an aberration. When considering the isolated nature of the conduct and Krepela's otherwise exemplary record, we do not believe that the integrity of the judicial system will be eroded if Krepela remains on the bench. Accordingly, we determine that removal from office is unwarranted. We must recognize, however, the very serious nature of the conduct at issue. Due to the nature of

Krepela's conduct, we believe that a heavy sanction is necessary. The Legislature has provided at § 24-722 that, short of removal, the maximum suspension shall not exceed 6 months. Accordingly, we determine that the appropriate sanction is a 6-month suspension from office without pay, effective on the issuance of the mandate.

JUDGMENT OF SUSPENSION WITHOUT PAY.

HENDRY, C.J., not participating.

MCCORMACK, J., dissenting.

I agree with all of the majority opinion except the sanction to be imposed. I would impose the sanction recommended by the Commission that Krepela should be removed from his position as a county judge.

Neb. Rev. Stat. § 24-722 (Reissue 1995) sets out the possible penalties to be imposed on a Nebraska judge. Unfortunately, this statute does not allow any penalty between 6 months' suspension without pay and removal from office. If, in Krepela's case, there was a possible sanction of perhaps 2 years' suspension without pay, I would, in all probability, vote for that sanction.

While it is true, as noted in the majority opinion, that Krepela's actions were uncharacteristic, that Krepela's long record as a lawyer and then as a judge was unblemished except for the offense under consideration, and that Krepela promptly reported the alteration of this report, I feel that the altering of a police report and then requesting the investigating officer to change the original to conform to the false report is so egregious as to warrant removal. This type of conduct by any lawyer, much less by a county attorney prosecuting a first degree murder case, goes to the very heart of our judicial system because it involves the integrity of the system. As such, given our choice of 6 months' suspension or removal, this requires, in my opinion, removal from office.

The seriousness of the offense, in my opinion, overcomes and trumps the age of this transgression, Krepela's unblemished record, and Krepela's prompt report of this alteration.

ROBERT HOLMES, APPELLANT AND CROSS-APPELLEE, V. CROSSROADS JOINT VENTURE, AN INDIANA PARTNERSHIP, ET AL., APPELLEES AND CROSS-APPELLANTS.

629 N.W. 2d 511

Filed July 6, 2001. No. S-99-438.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Directed Verdict: Proof: Appeal and Error.** In considering an appeal from an order granting a motion for directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence.
5. **Judgments: Verdicts.** On a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
6. **Juries: Damages: New Trial: Case Disapproved: Appeal and Error.** In determining whether the trial court abused its discretion in awarding a new trial based on excessive damages, the reviewing court views the evidence favorably to the trial court's actions rather than to the original jury's verdict. To the extent that *Kehm v. Dumpert*, 183 Neb. 568, 162 N.W.2d 520 (1968), and *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964), hold otherwise, they are disapproved.
7. **Judges: Witnesses: New Trial: Appeal and Error.** Deference to a trial court's grant of a new trial stems in part from the recognition that the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial.
8. **Judges: Evidence: Verdicts: New Trial: Appeal and Error.** The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record; for this reason, the trial judge is accorded significant discretion in granting a new trial.
9. **Judges: Evidence: Verdicts: Damages: New Trial.** Due to his or her unique position, the trial judge becomes the primary buffer against verdicts not supported by the evidence. This is particularly true when the elements of damage are intangibles and the appraisal depends a great deal on an observation of the plaintiff and the evaluation of his or her testimony.

10. **New Trial: Juries.** The order of a new trial does not terminate a case; instead, it simply grants a new trial, and its purpose is to prevent miscarriages of justice, which, on occasion, occur at the hands of juries, by presenting the same matter to a new jury.
11. **New Trial: Damages.** When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages.
12. **Actions: Proof.** In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to the plaintiff.
13. **Police Officers and Sheriffs: Evidence.** Where an informant knowingly gives false or misleading information or otherwise directs or counsels officials in such a way so as to actively persuade and induce the officer's decision, then the informant may still be held liable for malicious prosecution.
14. **False Imprisonment: Words and Phrases.** False imprisonment consists in the unlawful restraint against his or her will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he or she cannot exercise his or her will in going where he or she may lawfully go may constitute false imprisonment.
15. **Arrests.** A security guard may legally arrest and detain any person violating any law of this state or any legal ordinance of any city or incorporated village of this state.
16. **Arrests: False Imprisonment.** One who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another may be liable for false imprisonment.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part as modified, and in part reversed and remanded for a new trial.

Frank E. Robak, Sr., for appellant.

Patrick B. Griffin and Marcia A. Rezac, of Kutak Rock, for appellees.

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

GERRARD, J.

NATURE OF CASE

Robert Holmes, the plaintiff, was taken into custody by security officers of Crossroads Mall (Mall) in Omaha, Nebraska, following an altercation outside the Mall with two students from the high school where Holmes was employed. Holmes was

banned from the Mall for a period of 1 year and was again detained when he returned to the Mall less than a year after the first incident. Holmes sued, alleging causes of action for assault and battery, false imprisonment, and malicious prosecution. Holmes won jury verdicts on the assault and battery and one of the false imprisonment claims, but the district court granted the defendants' motion for new trial as to those causes of action. The primary questions presented in this appeal are whether the district court (1) abused its discretion in granting the motion for new trial or (2) erred in directing verdicts against Holmes on his malicious prosecution causes of action.

FACTUAL BACKGROUND

On July 9, 1994, Holmes went by himself to the Mall to pay a department store bill. Holmes is a former U.S. Marine and was employed at the time as a security guard for the Omaha Public Schools at Benson High School. While at the Mall, Holmes saw two female Benson students, O.J. and K.C. Holmes testified that O.J. approached Holmes and asked Holmes why he had her "kicked out" of school. Holmes said that O.J. asked Holmes to go outside with her and talk about it, and Holmes agreed. K.C., however, testified that Holmes approached her and O.J. and initiated an argument inside the Mall.

Holmes testified that as he walked out of the Mall with O.J. and K.C., K.C. asked O.J., "[A]re you going to kick Mr. Holmes' ass now?" Holmes testified that O.J. came at him and that he heard a click, which he thought was a gun or switchblade. K.C., however, testified that Holmes started the physical confrontation by pulling O.J.'s hair. Holmes testified that he grabbed O.J.'s arm and spun her around and released her when he saw that she did not have a weapon. Holmes testified that K.C. then attacked him, and Holmes struck her on the arms to defend himself. Holmes said that when K.C. backed away, O.J. attacked Holmes and tore his shirt, then Holmes picked up O.J. and "threw her out of the way." Holmes testified that at that point, the fight stopped.

Holmes said that Ted Rummel, a Mall security officer, then came out of the Mall and asked what was happening, and K.C. told Rummel that Holmes had hit her. Holmes testified that

Rummel ran up to Holmes, pushed him, and said, "You like to fight little girls? Fight me!" Holmes stated that Rummel pushed Holmes again and repeated himself. Joe Leggett, another Mall security officer, testified that he was inside the Mall with Rummel when the fight outside caught Rummel's attention. Leggett testified that when he went outside, he saw Rummel push and strike Holmes. Rummel testified that when he and Leggett were inside the Mall, Rummel saw Holmes and O.J. and K.C. wrestling and punching one another. Leggett testified that he did not hear Rummel challenge Holmes to fight.

Holmes testified that he kept his hands to his sides, tried to remain calm, and then turned his back on Rummel. Holmes stated that Rummel then attacked Holmes from behind, using his right arm to put pressure on Holmes' jugular vein, while yelling at Holmes to get down. Rummel, on the other hand, testified that Rummel first had to separate the combatants and that Holmes kept trying to get past Rummel to get to O.J. and K.C. despite repeated commands to stay back. Rummel and Leggett testified that Rummel attempted to place Holmes in a vascular neck restraint, a maneuver intended to cut off blood to the brain and induce unconsciousness. Holmes said that he saw flashing lights and felt like he was "getting ready to go," so he used his left arm, which was free, to remove Rummel's arm.

Holmes testified that at that point, Rummel was joined by Leggett, who approached and asked Rummel what Holmes had done. Leggett denied making this statement. Holmes testified that Rummel asked Leggett for assistance and that Leggett helped Rummel get Holmes to the ground. Holmes testified that he never made any offensive movements directed at the security officers. Rummel, however, testified that when Holmes refused to stop trying to get to O.J. and K.C., Rummel and Leggett tried to subdue Holmes and take Holmes to the ground. Leggett testified that Holmes had been coming forward toward Rummel, O.J., and K.C. prior to Rummel's attempted vascular neck restraint. K.C. testified that when the Mall security officers seized Holmes, Holmes resisted and attempted to get away from the officers. Rummel testified that Holmes was finally taken down by a knee strike.

Holmes testified that Rummel and Leggett dragged Holmes along the ground to the curb, kicking him along the way. Holmes stated that the officers bent Holmes' head over the curb, placing pressure on the back of Holmes' neck, and that Holmes was kicked in the back. Rummel and Leggett denied this. Holmes testified he thought that his head was going to be struck by an approaching vehicle. Holmes said that the officers then handcuffed him and lifted him up. Rummel and Leggett, to the contrary, testified that Holmes continued to resist while on the ground. Jeff Noble, another Mall security officer, also testified that Holmes resisted the officers. Holmes testified that a large number of people were in the vicinity and had observed the incident.

Holmes was placed into a Mall security vehicle and taken to the Mall office. Holmes was detained in the Mall office and questioned by several security personnel. Holmes was bleeding from his injuries the entire time he was in the office, and he was photographed by one of the officers. Holmes testified that he remained in handcuffs, although Mark Sundermeier, an off-duty Omaha police officer who was working at the Mall, testified that the handcuffs were removed after 10 to 20 minutes when Holmes calmed down. Holmes testified that he was in the office for 45 minutes to 1 hour, and perhaps longer. Holmes stated that one of the officers brought Holmes a form and said that Holmes would not be permitted to leave until Holmes signed the form. Holmes later testified he was told that "if you don't sign the papers, you will go downtown." Rummel and Leggett denied these allegations. Holmes signed the document, which was a form that banned Holmes from the Mall for 1 year.

Holmes testified that he was bleeding from abrasions on his knees, shin, and chest. Rummel testified that these injuries resulted from Holmes' struggling while outside. Holmes testified that when he was released, he was in a great deal of pain and went straight home, where he instructed his family to photograph his injuries to document them. After that, Holmes went to the emergency room. The photographs taken by Holmes' family and by Mall security were admitted into evidence and show bloody abrasions on Holmes' knees and the front of Holmes' left shoulder. Emergency department records from Immanuel

Medical Center showed that Holmes visited the emergency room on July 9, 1994, and had multiple abrasions and contusions. Holmes was treated with Polysporin, Tylenol, and ice.

Holmes testified that he did not return to the doctor after that because he could not afford it. Holmes testified that at the time of trial, he still had scars on his shoulders, chest, and knees that caused him discomfort. Holmes also testified that the incident exacerbated a preexisting problem with his back that had first developed during Marine Corps boot camp. Holmes stated that he bought a whirlpool device for his bathtub to help relieve his recurring pain and that he spent about 3 or 4 days lying on cushions on his waterbed as a result of his injuries. Holmes admitted that he was still playing softball during this period, but stated that he was sitting on the bench.

Holmes also testified that he was issued a citation by an off-duty Omaha police officer, later identified as Sundermeier. This citation was for disturbing the peace. Holmes testified that Sundermeier issued the citation after discussing the incident with Mall employees. Rummel denied being involved in the decision to issue a citation, although Sundermeier testified that the citation was issued based upon Sundermeier's interviews of Rummel and Leggett. Holmes testified that he was concerned about the criminal prosecution because, to work for the Omaha Public Schools, he had to make sure that his record remained clean. The criminal case was later dismissed by the Douglas County Attorney.

Holmes returned to the Mall on January 28, 1995, after the criminal charge had been dropped. Holmes testified that based on what he had been told at the time of the ban, he thought he was no longer banned from the Mall because the criminal complaint had been dismissed. Holmes was accompanied at the time by his 10-year-old daughter. Holmes was confronted by Leggett, who approached Holmes and confirmed Holmes' identity. Leggett then spoke to Dan Clark, an off-duty Omaha police officer who was working at the Mall. Clark testified that he confirmed with Mall employees that Holmes had been banned from the Mall, so he approached Holmes and informed Holmes that Holmes was under arrest for trespassing. Holmes testified that he was taken to the Mall office, searched, questioned, held for 1 to 1½ hours, and cited for trespassing by Clark.

Holmes also testified that while he was held, he was subjected to harassment and racial slurs. Holmes is African-American. Holmes' daughter essentially corroborated Holmes' version of the events. Rummel, Leggett, and Clark denied that any derogatory or threatening conversation took place. Clark testified that Holmes was angry and verbally confrontational during the incident.

Holmes stated that he appeared in court with his attorney on the trespassing charge and was found not guilty after a bench trial due to a lack of evidence against him. However, county court records entered into evidence show that the charge was dismissed on the motion of the court and do not show a determination regarding guilt or innocence.

PROCEDURAL HISTORY

Holmes filed suit in the district court against Crossroads Joint Venture, the owner of the Mall, and MS Management Associates, Inc., the managing company for the Mall. Holmes also sued several Mall security officers, including Rummel, Leggett, Clark, and Scott Beran. Holmes alleged five causes of action: (1) assault and battery during the July 9, 1994, incident, (2) false imprisonment on July 9, (3) malicious prosecution for the citation issued as a result of the July 9 incident, (4) false imprisonment on January 28, 1995, and (5) malicious prosecution for the citation issued as a result of the January 28 incident.

The case proceeded to a jury trial, at which the evidence set forth above was adduced. The district court denied the defendants' motions for directed verdict on the false imprisonment causes of action, both at the conclusion of Holmes' case and at the close of all the evidence. The district court sustained the defendants' motions for directed verdict on the malicious prosecution claims at the close of Holmes' case, however, finding that there was no evidence presented of any damages resulting from the prosecutions. The district court also specifically dismissed the malicious prosecution causes of action against one of the defendants, Beran, because there was no evidence of "anything at all in the record that would show any liability on the part of Beran."

The case was submitted to the jury on the remaining causes of action. The jury returned verdicts for Holmes in the amount

of $250,000 on the assault and battery cause of action and in the amount of $50,000 on the July 9, 1994, false imprisonment cause of action. The jury found in favor of the defendants on the January 28, 1995, false imprisonment cause of action. Judgment was rendered in accordance with the verdicts.

The defendants filed motions for judgment notwithstanding the verdict and motions for new trial. The motions for judgment notwithstanding the verdict were denied, but the motions for new trial were granted on the grounds that the $250,000 and $50,000 verdicts were excessive and were not supported by the evidence. It is from the district court's order for new trial that Holmes appeals.

ASSIGNMENTS OF ERROR

[1] Holmes assigns, consolidated and restated, that the district court erred in (1) granting the defendants' motions for new trial, (2) not limiting the new trial to the issue of damages, and (3) granting directed verdicts on the malicious prosecution causes of action. Holmes assigned other errors, but did not argue those errors in his appellate brief; hence, we do not consider them. Errors that are assigned but not argued will not be addressed by an appellate court. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001).

On cross-appeal, as restated, the defendants assign that the district court erred in failing to enter a judgment notwithstanding the verdict on the July 9, 1994, false imprisonment cause of action.

STANDARD OF REVIEW

[2,3] 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. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001).

[4] In considering an appeal from an order granting a motion for directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was

proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence. *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001); *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000).

[5] On a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

New Trial on Damages

The district court sustained the defendants' motion for new trial based upon Neb. Rev. Stat. § 25-1142 (Reissue 1995), which provides, in relevant part, that a verdict "shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: . . . (4) excessive damages, appearing to have been given under the influence of passion or prejudice." In determining that a new trial was warranted, the district court set forth a detailed discussion of the evidence presented at trial to support the damages awarded. The district court stated:

> In connection with the assault and battery claim of July 9, 1994, the photographs in evidence showed a bruise on the plaintiff's left shoulder and bruises and bleeding in the area of both of his knees.
>
> The plaintiff went to Immanuel Medical on July 9, 19[9]4, and the diagnosis was multiple contusions and multiple abrasions.
>
> . . . .
>
> The plaintiff also testified, as regards the July 9, 1994, assault and battery claim, that his arm was twisted; that he was kneed in the back; that he was hit on the side; that he was thrown on the ground and hurt his back; that he was

dragged on the ground; that a foot was put on his neck; and that he was handcuffed.

The plaintiff testified that he still has scars on his chest, shoulders and knees. He said that his injuries were not life threatening.

The plaintiff further testified that he left the Crossroads Mall about 4:30 p.m. on July 9, 1994, and went to the Immanuel Medical Center about 7:00 p.m. that same day. The plaintiff said he was in pain throughout his body, but told the hospital he had no neck, back or chest pain. . . . The plaintiff also played softball after the July 9, 1994, incident, although he apparently sat on the bench.

There was also testimony by defendant Ted Rummell [sic] that a vascular restraint was placed on the plaintiff by Rummell [sic]. Officer Mark Sundermeier said the plaintiff was flushed, upset and angered.

No medical bills were offered or received in evidence, nor was there a stipulation regarding medical bills. The plaintiff did testify, however, as to certain medical expenses.

There was no medical testimony by a doctor or any other health professional.

There is absolutely no evidence of any permanent injury; of any permanent disability; of any future medical expenses; of any inability to work; or of any loss of earning capacity. In fact, the plaintiff received no medical attention after he went to Immanuel Medical Center on the day of the incident.

. . . In connection with the false imprisonment claim on July 9, 1994, the evidence was that the plaintiff was in the security office for 45 to 60 minutes, and he stated that he was bleeding the whole time.

. . . The jury verdicts of $250,000.00 and $50,000.00 are both clearly exorbitant as to indicate that they were the result of passion, prejudice, mistake or some means not apparent on the record. The verdicts are not supported by the evidence, and they do not bear a reasonable relationship to the elements of the damages proved.

[6] In evaluating the district court's determination, it is important to recognize that we are not reviewing a jury verdict to determine if it is supported by sufficient evidence. Rather, we are reviewing the district court's order granting a new trial, and for good reason, our analytical framework is much different. The issue presented in the instant appeal is not whether the jury could reasonably conclude that Holmes suffered pain, humiliation, and mental distress entitling him to compensatory damages. The issue presented is whether the district court abused its discretion in determining that the damages awarded were excessive. In resolving that issue, this court views the evidence favorably to the trial court's actions rather than to the original jury's verdict.

[7] The standards of review set forth above are not mere shibboleths, reiterated out of habit, but instead reflect considerations imperative to appellate review. Deference to a trial court's grant of a new trial stems in part from the recognition that the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial. *Malone v. Courtyard by Marriott*, 74 Ohio St. 3d 440, 659 N.E.2d 1242 (1996).

[8,9] The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record. *Reeves v. Markle*, 119 Ariz. 159, 579 P.2d 1382 (1978) (en banc). For this reason, the trial judge is accorded significant discretion in granting a new trial. Due to his or her unique position, the trial judge becomes the primary buffer against verdicts not supported by the evidence. This is particularly true when the elements of damage are intangibles and the appraisal depends a great deal on an observation of the plaintiff and the evaluation of his or her testimony. See *Daniel v. Sharpe Const. Co., Inc.*, 270 S.C. 687, 244 S.E.2d 312 (1978).

In considering the judicial examination of jury awards in the federal system, the U.S. Supreme Court has noted that primary responsibility for application of an excessiveness standard is lodged in the district court, not the court of appeals, because trial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record. *Gasperini v. Center for Humanities, Inc.*,

518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996), citing *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Cir. 1969). " 'If we reverse, it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. . . . We must give the benefit of every doubt to the judgment of the trial judge.' " 518 U.S. at 438-39.

The necessity of this unique power to grant a new trial is a long-established principle. The exercise of the trial court's power to set aside the jury's verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. *Gasperini v. Center for Humanities, Inc., supra*. If it appears that the jury has committed a gross error, or has given damages excessive in relation to the person or the injury, the U.S. Supreme Court stated it is as much the duty of the court to interfere, to prevent the wrong, as in any other case. See *id*., citing *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1,578). As stated by Lord Mansfield over two centuries ago:

> Trials by jury, in civil causes, could not subsist now, without a power, somewhere, to grant new trials.
>
> . . . .
>
> Most general verdicts include legal consequences, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law.
>
> . . . .
>
> If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should . . . be opportunities of reconsidering the cause by a new trial.

Bright v. Eynon, 1 Burr. 390, 393, 97 Eng. Rep. 365, 366 (1757).

[10] It is important to note that the order of a new trial does not terminate a case, instead, it simply grants a new trial, and its purpose is to prevent miscarriages of justice, which, on occasion, occur at the hands of juries, by presenting the same matter to a new jury. See *Malone v. Courtyard by Marriott*, 74 Ohio St. 3d 440, 659 N.E.2d 1242 (1996).

We are aware that there are decisions of this court indicating that in reviewing an order granting a motion for new trial, an appellate court should test the sufficiency of the evidence in the light most favorable to the jury verdict. See, *Kehm v. Dumpert*, 183 Neb. 568, 162 N.W.2d 520 (1968); *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964). The dissent also cites *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), and *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985), for the same proposition. The court in *McCune v. Neitzel, supra*, however, relied on *Hutchens v. Kuker*, 168 Neb. 451, 96 N.W.2d 228 (1959). *Hutchens* was an appeal from a bench trial, and the *McCune* court did not explain why or how the court's traditional deference to the trial court's findings of fact in a bench trial should be applied where a jury trial had been held and a motion for new trial granted. Similarly, the *Vacek* court relied upon *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979), in which the issue was the trial court's refusal to direct a verdict in favor of the plaintiff, and the *Vacek* court did not explain why the standard of review from the *Kniesche* case was to be applied in this different procedural context. In short, these cases, without adequate analysis or explanation, are inconsistent with our long-established holding that an appellate court "will not ordinarily disturb a trial court's order granting a new trial, and will not disturb it at all unless *it clearly appears that no tenable grounds existed therefor*." (Emphasis supplied.) *Shreves v. D. R. Anderson Constructors, Inc.*, 206 Neb. 433, 438-39, 293 N.W.2d 106, 109 (1980). Accord, e.g., *Juniata Feedyards v. Nuss*, 216 Neb. 29, 342 N.W.2d 1 (1983); *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983); *County of Hall ex rel. Wisely v. McDermott*, 204 Neb. 589, 284 N.W.2d 287 (1979); *Johnson v. Enfield*, 192 Neb. 191, 219 N.W.2d 451 (1974); *Lechliter v. State*, 185 Neb. 527, 176 N.W.2d 917 (1970); *Webster v. Halbridge*, 185 Neb. 409, 176 N.W.2d 8 (1970); *Blobaum v. State*, 179 Neb. 304, 137 N.W.2d 855 (1965); *Nesmith v. Clarke*, 135 Neb. 117, 280 N.W. 429 (1938); *Bonacci v. Cerra*, 134 Neb. 588, 279 N.W. 314 (1938); *Clausen v. Omaha Loan & Bldg. Ass'n*, 131 Neb. 666, 269 N.W. 517 (1936); *De Matteo v. Lapidus*, 116 Neb. 549, 218 N.W. 379 (1928).

For instance, in *McMillan Co. v. Nebraska E. G. & T. Coop., Inc.*, 192 Neb. 744, 224 N.W.2d 184 (1974), the trial court deter-

mined that the damages awarded by the jury to the plaintiff were excessive and entered an order requiring the plaintiff to file a remittitur or the defendant's motion for new trial would be sustained. We stated that "[u]nless we can say that there is no legal cause or reason for ordering the conditional remittitur or granting a new trial, the action of the trial court must be sustained." *Id.* at 748, 224 N.W.2d at 187. We affirmed the trial court's decision, concluding:

> It is only necessary that we find tenable grounds to support the conclusion that the jury verdict . . . is excessive. Such grounds are clearly present.
>
> The trial court was acting within the proper bounds of its discretion in entering the order granting a new trial upon the refusal of the plaintiff to file the remittitur.

Id. at 750, 224 N.W.2d at 188. See, also, e.g., *Scherz v. Platte Valley Public Power and Irrigation District*, 151 Neb. 415, 37 N.W.2d 721 (1949) (holding that where there is evidence sufficient to sustain finding of trial court that prejudicial error was contained in record, there is no basis for stating that trial court abused discretion in granting new trial).

The dissent to this case concedes that this court should uphold a grant of a new trial if any tenable grounds support the trial court's decision. Nonetheless, the dissent concludes that this court should review the evidence regarding damages in the light most favorable to the jury's verdict. It bears repeating at this point that the issue on appeal is not whether the jury could reasonably conclude that Holmes suffered pain, humiliation, and mental distress entitling him to damages; rather, the issue presented is whether the district court abused its discretion in determining that the damages awarded were excessive. Not adequately explained in the dissent is how, precisely, an appellate court under an abuse of discretion standard of review is to exercise deference to both the trial court's decision and the award of the jury where the trial court (after having seen and heard the same evidence as the jury) has determined, pursuant to § 25-1142(4), that the damages awarded were excessive, appearing to have been given under the influence of passion or prejudice.

The dissent relies on several federal cases for the proposition that an appellate court should, in reviewing a trial court's

determination of a motion for new trial, review the evidence in the light most favorable to the jury's verdict. In each of the cases cited by the dissent for that proposition, however, the trial court had *denied* the motion for new trial, placing the appellate court in the procedural posture of directly reviewing the jury verdict and deferring to the trial court's refusal to set aside that verdict. See, *McNabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425 (1st Cir. 1993); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680 (2d Cir. 1993).

In fact, a review of cases in which the district court granted a remittitur or new trial shows that federal practice does not support the position taken by the dissent. The issue was discussed in depth in *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Cir. 1969). The Court of Appeals for the District of Columbia stated:

> A more difficult question [than whether an order granting a new trial may be appealed] is the scope of appellate review of an order granting a new trial. It is by now standard doctrine that such orders may be reviewed for abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence. There has been much discussion of the content which should be given to the elusive phrase "abuse of discretion," with the weight of learning against appellate reversal except in relatively rare cases.
>
> This learning has largely arisen from consideration of cases in which motions for new trial—especially on the ground of excessive verdict—have been *denied*. Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.

> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indicates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living courtroom context must be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently.
>
> In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated that a new trial motion will not be granted unless the "verdict is so unreasonably high as to result in a miscarriage of justice," or, most recently, unless the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."
>
> At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. *The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within the "maximum limit of a reasonable range."*

(Emphasis in original.) (Emphasis supplied.) *Id.* at 147-49. Accord, *Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992); *Earl v. Bouchard Transp. Co., Inc.*, 917 F.2d 1320 (2d Cir. 1990); *Matter of Innovative Const. Systems, Inc.*, 793 F.2d 875 (7th Cir. 1986); *Smith v. John Swafford Furn. Co., Inc.*, 614 F.2d 552 (6th Cir. 1980); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977). See, also, *Cygnar v. City of Chicago*, 865 F.2d 827, 847-48 (7th Cir. 1989) (stating that while " 'a somewhat more exacting standard of appellate review should apply' "

where trial court grants, rather than denies, new trial on damages, "the trial judge's determination of the propriety of a jury's damage award warrants substantial deference").

The U.S. Court of Appeals for the Fifth Circuit has specifically held that "[t]he trial court in passing on a motion for a new trial need not take the view of the evidence most favorable to the verdict winner, but may weigh the evidence." *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982). See, also, *Silver Sage Partners v. City of Desert Hot Spring*, 251 F.3d 814 (9th Cir. 2001); *Dominium Management v. Nationwide Housing Group*, 195 F.3d 358 (8th Cir. 1999); *Defender Industries v. Northwestern Mut. Life Ins.*, 938 F.2d 502 (4th Cir. 1991). But see *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391 (6th Cir. 1990).

The U.S. Court of Appeals for the Third Circuit has noted that the use of a remittitur "clearly falls within the discretion of the trial judge, whose decision cannot be disturbed . . . absent a manifest abuse of discretion." *Spence v. Bd. of Educ. of Christina School Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986). "The district judge is in the best position to evaluate the evidence presented and determine whether or not the jury has come to a rationally based conclusion." *Id.* Accord *Delli Santi v. CNA Ins. Companies*, 88 F.3d 192 (3d Cir. 1996). See, also, *Sanford v. Crittenden Memorial Hosp.*, 141 F.3d 882 (8th Cir. 1998); *Worsham v. City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989).

Thus, the clear weight of authority, from this jurisdiction and others, holds that a trial court's ruling on a motion for new trial will not be disturbed absent an abuse of discretion, i.e., where the record reveals no tenable grounds for the ruling. To the extent that *Kehm v. Dumpert*, 183 Neb. 568, 162 N.W.2d 520 (1968), and *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964), hold otherwise, they are disapproved. Based on the well-established principles and reasoning set forth above, we continue to adhere to the rule that a motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. See, *Genetti v.*

Caterpillar, Inc., 261 Neb. 98, 621 N.W.2d 529 (2001); *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001).

That having been said, we note that on the trial record made in this case, even on direct appellate review, these verdicts would teeter on the edge of being excessive as a matter of law. But, under an abuse of discretion standard of review, we certainly cannot say that the district court's decision was untenable or indefensible. This is not to imply that a trial judge has unbridled discretion to grant a new trial on a verdict with which he or she disagrees; the judge does not. However, in this case, an experienced trial judge saw and heard the witnesses and determined that the damages awarded were so excessive as to indicate that they were the result of passion or prejudice. The district court clearly explained its reasoning for that conclusion, and that reasoning demonstrates that this should not be classified as a case of a trial judge's mere disagreement with the verdict.

The trial judge found, and the record supports, that Holmes suffered multiple contusions and multiple abrasions as a result of the July 9, 1994, incident, but that Holmes suffered no permanent disability, no future medical expenses, and no inability to work or loss of earning capacity and that Holmes received no medical attention after he went to Immanuel Medical Center on the day of the incident. We do not belittle the harm that Holmes suffered. The record reflects that he experienced a demeaning, humiliating, and anxiety-inducing incident and aftermath. However, there was no medical testimony by a physician or any other health professional regarding Holmes' asserted mental distress. Holmes, in fact, did not miss his scheduled softball game after the July 9 incident.

Thus, after thoroughly reviewing the record (including the evidence of humiliation and mental anguish suffered by Holmes), we cannot say that the district court abused its discretion when the court concluded that the verdicts of $250,000 and $50,000 were not supported by the evidence and did not bear a reasonable relationship to the elements of the damages proved. The trial judge, having seen and heard the witnesses, is in a better position to assess the relationship of the verdicts to the intangible type of damages suffered by Holmes than is this court from a printed record. Holmes' first assignment of error is without merit.

Limitation of New Trial to Issue of Damages

In the district court's order granting a new trial, the only basis identified for the order is excessive damages. The order identifies no error in the jury's determination of liability. Holmes argues that if a new trial is to be had, it should be limited to the issue of damages.

[11] When the issue of liability has been determined and there has been error in the determination of damages such that the verdict must be set aside, a new trial may be limited to the issue of damages. *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987). See, also, *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986) (affirming award of new trial but modifying order by limiting new trial to issue of damages).

The district court's order simply states that "the defendants are granted a new trial" on the assault and battery and July 9, 1994, false imprisonment cause of action; the order does not specify whether the new trial is to be limited to the issue of damages. The district court, however, did not find any error in the jury's verdict insofar as the jury found that Holmes had proved liability on the part of the defendants. This court's own review of the record reveals no such error. Consequently, we conclude that the district court abused its discretion in not explicitly limiting the new trial to the issue of damages. Holmes' second assignment of error has merit.

Based on our resolution of Holmes' first assignment of error, we affirm the district court's order of a new trial on Holmes' first two causes of action. However, based on our analysis of Holmes' second assignment of error, we modify the order of the district court and direct that the new trial on these causes of action be limited to the issue of damages. See *Erftmier v. Eickhoff, supra*.

Malicious Prosecution Causes of Action

[12] Holmes assigns that the district court erred in directing a verdict against him on his malicious prosecution causes of action. In a malicious prosecution case, the necessary elements for the plaintiff to establish are (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the

present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to the plaintiff. *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998), *cert. denied* 528 U.S. 814, 120 S. Ct. 50, 145 L. Ed. 2d 44 (1999).

[13] Although the "prosecutions" at issue in this case were initiated by Omaha police officers, where an informant knowingly gives false or misleading information or otherwise directs or counsels officials in such a way so as to actively persuade and induce the officer's decision, then the informant may still be held liable for malicious prosecution. See *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974). It need not be shown that a defendant actively participated in getting the complaint filed or, for that matter, signed the complaint; if the defendant gave information or made complaint to the officers of law in such a manner as that, in the regular and ordinary course of events, a complaint must issue, then this is sufficient to warrant finding the defendant to be the real prosecutor. See *id.*

The district court determined that there had been no evidence presented that Holmes suffered any damages as a result of either the disturbing the peace charge brought as a result of the July 9, 1994, incident or the trespassing charge brought as a result of the January 28, 1995, incident. However, this court rejected a similar argument in *Schmidt v. Richman Gordman, Inc., supra*. In that case, shoplifting charges were brought against two retail customers as a result of the complaint of the retailer. The customers sued the retailer and won a jury verdict, and the retailer on appeal challenged the finding of damages. This court stated:

> When one is unlawfully restrained of his personal liberty, arrested and paraded through a store under guard of a police officer, confined in the local jail for 3½ to 4 hours, fingerprinted and "mugged" for permanent FBI records, charged with a criminal offense, and compelled to retain counsel for their defense, damage is obvious and serious. Mental anguish and distress, humiliation and disgrace are virtually presumed.

Id. at 354, 215 N.W.2d at 111.

The evidence of damages resulting from the criminal charges is not as substantial in the instant case. Nonetheless, taking the evidence in the light most favorable to Holmes, as we are required to do, we conclude that there is sufficient evidence of damages contained in the record to submit to a finder of fact. The record supports a reasonable inference that Holmes suffered anxiety from the pending criminal charges in both instances because of the potential effect of a criminal record on his employment. The record also reflects that Holmes was subjected to the inconvenience and possible expense of retaining an attorney and appearing in court on the trespassing charge, although the nature of the disposition of that case is not entirely clear. Based on this evidence, a reasonable jury could conclude that Holmes had suffered damages.

Because the evidence was sufficient to support a finding of damages, the district court erred in directing a verdict on Holmes' malicious prosecution causes of action. The judgment of the district court is reversed in this regard, and the cause is remanded for a new trial on the malicious prosecution causes of action. We do note, however, that the dismissal with respect to Beran is affirmed, and he should not be a party to the new trial as no error relating to his dismissal was properly preserved for appellate review.

Cross-Appeal on July 9, 1994, False Imprisonment

The defendants assign on cross-appeal that the district court erred in not granting them a judgment notwithstanding the verdict on the July 9, 1994, false imprisonment. The defendants argue that even in the light most favorable to Holmes, the evidence shows that Rummel and Leggett had probable cause to detain Holmes following the altercation with O.J. and K.C.

[14,15] False imprisonment consists in the unlawful restraint against his or her will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he or she cannot exercise his or her will in going where he or she may lawfully go may constitute false imprisonment. *Dangberg v. Sears, Roebuck & Co.*, 198 Neb. 234, 252 N.W.2d 168 (1977); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974). A security guard, however,

may lawfully arrest and detain any person violating any law of this state or any legal ordinance of any city or incorporated village of this state. See Neb. Rev. Stat. § 29-401 (Reissue 1995).

Taken in the light most favorable to Holmes, the evidence would show that Holmes was assaulted by O.J. and K.C. and acted only to reasonably defend himself. If events occurred as Holmes described them, then Holmes did not violate any law or legal ordinance, and his arrest was unlawful. Assuming Holmes' testimony to be true, as we must, it would be reasonable to infer from the evidence that Rummel and Leggett knew that Holmes had not committed any offense, and nonetheless took him into custody. Moreover, even assuming Holmes' initial detention was lawful, the evidence taken in the light most favorable to Holmes would support the inference that the detention was continued for an unreasonable time, thus giving rise to a cause of action for false imprisonment even if the initial detention was justified. See *Latek v. K Mart Corp.*, 224 Neb. 807, 401 N.W.2d 503 (1987).

[16] The defendants also argue that Holmes was not detained by Rummel and Leggett, but by Sundermeier and Noble, who are not parties to this action. However, the evidence is undisputed that Holmes was first taken into custody and handcuffed by Rummel and Leggett. Further, the evidence establishes that even while other Mall employees may have been involved in the detention, the detention was initiated and maintained based upon the request and statements of Rummel and Leggett, who were the only Mall employees to observe the majority of the incident. One who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another may be liable for false imprisonment. See *Huskinson v. Vanderheiden*, 197 Neb. 739, 251 N.W.2d 144 (1977).

Taken in the light most favorable to Holmes, the evidence would support a finding of false imprisonment on July 9, 1994. The district court did not err in refusing to enter a judgment notwithstanding the jury's verdict. The defendants' assignment of error on cross-appeal is without merit.

CONCLUSION

The district court did not abuse its discretion in granting the defendants' motions for new trial on Holmes' first two causes of

action, but did abuse its discretion in not limiting that new trial to the issue of damages. The district court erred in directing verdicts on Holmes' malicious prosecution causes of action, but did not err in refusing to enter a judgment notwithstanding the verdict on Holmes' July 9, 1994, false imprisonment claim. The order of the district court granting a new trial on Holmes' first two causes of action is affirmed, but modified to reflect that the new trial on the first two causes of action shall be limited to the issue of damages. The judgment of the district court is reversed with respect to the malicious prosecution causes of action as set forth in the opinion, but in all other respects, the judgment is affirmed as modified. The cause is remanded for a new trial consistent with this opinion.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

HENDRY, C.J., dissenting.

Because I disagree with the majority's conclusion that a new trial on damages is warranted in this case, I respectfully dissent.

STANDARD OF REVIEW

I agree with the majority that an abuse of discretion standard is the proper standard regarding a motion for new trial. However, I disagree with the majority's application of the abuse of discretion standard insofar as the majority asserts that this court must view the facts on appeal in the light most favorable to the trial court's decision. I believe this court's established precedent requires that we view the facts in the light most favorable to the jury's verdict.

Most recently in *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), a case involving a claim for defamation, the trial court granted a new trial on the issue of damages. We stated, "In reviewing the evidence on damages, an appellate court views the evidence in the light most favorable to the prevailing party [at trial], and all controverted facts are resolved in favor of that party." *Id.* at 765, 457 N.W.2d at 811. After construing the evidence of damages in the light most favorable to the jury's verdict, we concluded the trial court abused its discretion in granting a new trial on damages. Compare, *Kehm v.*

Dumpert, 183 Neb. 568, 162 N.W.2d 520 (1968); *Chaloupka v. State*, 176 Neb. 746, 127 N.W.2d 291 (1964); *Thomas v. Owens*, 169 Neb. 364, 99 N.W.2d 611 (1959). These cases reflect this court's well-established policy that a jury verdict is not rendered meaningless on appeal by the fact that the trial judge has granted a new trial.

The majority, in asserting this court should view the facts in the light most favorable to the trial court's decision, stresses that the trial court is in a better position than an appellate court to assess the issues related to granting a new trial. This, however, begs the principal question at issue, namely, whether the trial court is in a better position to assess the amount of damages than is the jury. This court has often stated that assessing damages is a function of the jury. See, e.g., *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000). Furthermore, damages awarded by a jury are accorded particular deference when " '[t]he law does not prescribe a definite rule for the ascertainment of the exact amount recoverable . . . .' " *Jensen v. Barnett*, 178 Neb. 429, 433, 134 N.W.2d 53, 55 (1965). In *Greenberg v. Fireman's Fund Ins. Co.*, 150 Neb. 695, 35 N.W.2d 772 (1949), this court set out the importance of the role of the jury as fact finder. We stated:

> It further is argued that the actions, demeanor, and statements of counsel and witnesses for the defendants were heard and observed by the trial court, and that the trial court had the right to consider those matters in determining the granting or denying of a new trial. The fault with that reasoning is that it is for the *trial jury* to weigh those matters in reaching a verdict. Those considerations are not for the court in exercising its judgment on the motion for a new trial.

(Emphasis supplied.) *Id.* at 705, 35 N.W.2d at 779.

Under the rule set forth by the majority, a motion for new trial becomes a potent method for the losing party to convert, for purposes of appeal, a jury verdict against him or her into a bench trial verdict in his or her favor. The decision to request a jury trial, and the jury's verdict in the prevailing party's favor, would have no effect on our review of the trial court's grant of a new trial. At least two of the jurisdictions relied upon by the majority embrace such a rule. See, *Hutcherson v. City of Phoenix*, 192

Ariz. 51, 961 P.2d 449 (1998); *Wall v. Suits*, 318 S.C. 377, 458 S.E.2d 43 (S.C. App. 1995).

As further support for its position, the majority relies on *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). The issue before the Supreme Court in *Gasperini* was whether the Reexamination Clause of the Seventh Amendment to the U.S. Constitution, which is applicable only to federal courts, prohibits appellate review of a district court's judgment denying a motion to set aside a verdict as excessive. *Id.* The Court held in *Gasperini* that appellate courts may review such an order, consistent with the Seventh Amendment, so long as an abuse of discretion standard is applied, giving considerable deference to the trial court's decision. However, the U.S. Supreme Court has not addressed a case such as the present one where the court and the jury reach differing conclusions regarding the amount of damages.

In accord with the jury's role as fact finder, several federal courts have agreed that in reviewing a trial court's decision to grant or deny a new trial on excessive damages, the facts must be considered in the light most favorable to the jury's verdict. See, *McNabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425 (1st Cir. 1993); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680 (2d Cir. 1993).

The rationale for such a rule is set out in *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1047 (6th Cir. 1996), where the court stated:

> [I]n reviewing a trial court's decision [granting a new trial] we must closely scrutinize the trial court's justifications in order to protect the litigant's right to a jury trial. . . .
>
> ". . . [T]he trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts."

In addition, as noted by this court, "The public does not maintain the courts and the expense of jury trials for experimental

investigations, but rather to determine controversies." *Greenberg*, 150 Neb. at 702, 35 N.W.2d at 777.

Giving deference to the trial court's decision to grant a new trial under an abuse of discretion standard is not "inconsistent" with viewing the facts on appeal in the light most favorable to the jury's verdict. Under *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), I believe the proper inquiry concerning an appeal from a motion for new trial based on excessive damages is a three-step process which both recognizes the unique place of the jury as fact finder and affirms the trial court's decision unless it is supported by "no tenable grounds."

In the first step of the process, we review the evidence presented at trial regarding damages in the light most favorable to the jury's verdict. See *McCune, supra.* Second, we consider the grounds set forth by the trial court in its order supporting the conclusion that the damages were excessive, recognizing that the trial court was present and heard the witnesses and testimony. See *id*. In the final step of the process, we consider whether given the evidence, the amount of damages awarded, and the grounds upon which the trial court granted a new trial, the trial court abused its discretion in granting a new trial. *Id.* During this final consideration, we will affirm the trial court's decision unless no tenable grounds exist to support its decision. See *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990). Accordingly, in my opinion, the *McCune* standard of review accommodates both the jury's role as fact finder and the deference due to the trial court's decision granting a new trial.

I do not believe the rule set out by the majority is in accord with this court's established jurisprudence regarding a motion granting or denying a new trial based on excessive damages. See, e.g., *McCune, supra*; *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985); *Paddack v. Patrick*, 163 Neb. 355, 79 N.W.2d 701 (1956); *Shiers v. Cowgill*, 157 Neb. 265, 59 N.W.2d 407 (1953). I am of the view that *McCune* properly stated this court's standard of review and should be followed in this case.

GRANT OF NEW TRIAL

Under *McCune, supra*, I believe the trial court abused its discretion in granting a new trial on Holmes' assault and battery and false imprisonment claims.

Regarding Holmes' assault and battery claim, the measure of recovery in such a case encompasses " 'the nature of the injuries, and pain and suffering,' " see *Nelson-Holst v. Iverson*, 239 Neb. 911, 915, 479 N.W.2d 759, 762 (1992), including "the emotional distress and anguish caused by a humiliating assault and battery," see *Duncza v. Gottschalk*, 218 Neb. 879, 881, 359 N.W.2d 813, 815 (1984). Furthermore, damages for pain and suffering are "intangible and quite subjective elements" which are not "a mere matter of computation." *Duncza*, 218 Neb. at 880, 359 N.W.2d at 814.

The evidence in the present case, viewed in the light most favorable to the jury's verdict, shows that during the assault and battery, Holmes suffered significant mental and emotional distress in addition to his physical injuries. After Holmes' altercation with O.J. and K.C., he described the incident with the security guards:

> Officer Ted Reynolds runs to the door, pushed the door open. He runs up and says, what is going on? What is going on? [K.C.] said to him, he hit me. . . . Officer Reynolds didn't give me a chance to say anything. He runs over to me, from that chair to there, 15 feet, runs to me and pushed me dead in my chest, boom! You like to fight with little girls? Fight me. I said, hey, hold it. I'm telling you what is going on. Boom! he pushed me again, and he repeated the exact same thing.
>
> . . . I put my hands to my side - to my waist just like this (indicating). I kept my hands to my side . . . I figured he's still out of control. I turned my back on him. I turned around on him. That's when he attacked me, when my back was turned. What he did was he went up there and took his right arm and threw it up to my neck, pulled me back and we bumped heads, pushed my jugular vein down my throat almost and screaming, get down, get down, get down. . . . He really put the pressure on and I couldn't get myself together.
>
> When I saw lights, I saw flashing lights, I was getting ready to go. So what I did, I took my left hand, which was free, and grabbed his wrist, pulled it off my Adam's apple . . . .

> . . . .
>
> Then [Leggett] comes out there . . . and they were trying to get me down. And I was telling them, Man, you are making a mistake. And he goes whop! right in my side, right there (indicating) and knocked the wind right out of me. I said, oh, man. Then he said, get down, get down. I thought I better get down or these guys are going to kill me . . . .

Holmes also gave the following description of the events which occurred after he was on the ground:

> The next thing I look up and my head is over the curb, over the curb. I'm trying to tell these Security [officers] that they made a big mistake. I'm the one that got attacked. I'm the one that got attacked, and they didn't want to hear it. . . . He grabbed my head - he grabbed my head and put his knee on my head . . . . When I said, you made a mistake, he applied more pressure.
>
> Then I looked up the street and here come the [security] Jeep coming down there. My head is laying out in the street and the Jeep come flying down there and they said, get him up, get him up. I thought the Jeep was going to hit my head. I mean, they just lost complete control. . . .
>
> . . . Especially when he had his wrist or part of his hand on my Adam's apple because of the way I had him to keep him off, it was like a — I don't know what he was trying to put me into, but it didn't work. I had to get myself out of it. If I didn't do what I did, I don't think I would be here talking to you today. That's how close it is.
>
> You know, when somebody pushes your Adam's apple in, believe me, that is an experience you don't want to go through.

Holmes also testified he knew that O.J. and K.C., as well as a large crowd of people coming and going from the Mall, watched as the security officers subdued and handcuffed him, placed him in a security car, and drove him to the security office. Holmes testified, "There was a lot of people there and saw what was going on. A lot of people was there."

Applying the first step of the standard in *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), I would construe the facts as follows: (1) Holmes was attacked, subdued, and handcuffed

by the security officers; (2) Holmes suffered injuries to his knees and shoulder which left scars; (3) the incident occurred in front of a large crowd; (4) Holmes was placed in fear of his life during the incident; (5) Holmes suffered shame and humiliation during the incident; and (6) Holmes was seen later that day by emergency room personnel.

Next, under the second step in the process, I would consider the trial court's grounds for concluding the verdict was excessive. The trial court here found the damages awarded on the assault and battery claim were "clearly exorbitant" in that the damages "do not bear a reasonable relationship to the elements of damages proved." In support of this conclusion, the court specifically found that Holmes' "injuries were not life threatening" and that Holmes "played softball after the July 9, 1994, incident, although he apparently sat on the bench." The court also found "[n]o medical bills were offered or received in evidence, nor was there a stipulation regarding medical bills." Furthermore, "[t]here was no medical testimony by a doctor or any other health professional" regarding Holmes' injuries. The court found "[t]here is absolutely no evidence of any permanent injury," "permanent disability," "future medical expenses," "inability to work," or "loss of earning capacity." Finally, the court noted that Holmes received "no medical attention after he went to Immanuel Medical Center."

The court in its order focuses on the fact that Holmes' injuries were relatively minor and that the incident did not physically incapacitate Holmes to any significant degree. However, as discussed previously, Holmes is also entitled to recover for the mental and emotional distress, shame, humiliation, and fright that he suffered during the incident. The fact that Holmes' injuries were relatively minor, standing alone, does not provide tenable grounds for concluding that the verdict on the assault and battery claim was excessive.

We have noted previously that a court should be very reluctant to substitute its judgment for that of a jury " '[w]here recovery is to be had for such subjective elements as the mental anguish caused by a humiliating beating, and the pain and suffering resulting therefrom . . . .' " *Crouter v. Rogers*, 193 Neb. 497, 498, 227 N.W.2d 845, 847 (1975). See, also, *Stewart v. Ritz Cab Co.*, 185 Neb. 692, 178 N.W.2d 577 (1970). Even in a situation in

which the reviewing court might " 'determine that a lesser amount would constitute adequate compensation for the injuries sustained,' " the court " 'may not substitute its judgment for that of the jury' " so long as the jury could properly arrive at the amount determined. *Husak v. Omaha National Bank*, 165 Neb. 537, 544, 86 N.W.2d 604, 608 (1957).

When considered as a whole, the evidence shows that Holmes suffered humiliation in front of a large crowd. Holmes also suffered emotional and mental distress as a result of being subdued, dragged, and handcuffed. Holmes believed the officers were out of control. The officers did not listen to Holmes' explanations. Holmes feared for his life at two different points during the incident. Given the evidence in the record, I find no tenable grounds for the trial court's conclusion that the jury's award of $250,000 for Holmes' assault and battery claim was motivated by passion or prejudice. Therefore, I believe the trial court abused its discretion in granting a new trial on the assault and battery claim.

Regarding Holmes' false imprisonment claim, he is entitled to recover damages for the physical discomfort and mental distress caused by the unlawful act. *Huskinson v. Vanderheiden*, 197 Neb. 739, 251 N.W.2d 144 (1977). "In awarding damages for physical discomfort and mental anguish a jury must rely on the totality of the circumstances surrounding the incident, the credibility of the evidence and witnesses, and the weight to be given to all these factors rests in the sound discretion of the jury." *Id.* at 745, 251 N.W.2d 148. See, also, *Herbrick v. Samardick & Co.*, 169 Neb. 833, 101 N.W.2d 488 (1960).

Construing the facts in the light most favorable to the jury's verdict, the evidence shows that Holmes was unlawfully detained for approximately 45 to 60 minutes and that for most of that time, he remained handcuffed and was bleeding from his injuries. He was offered no care for his injuries, except a tissue to wipe the blood. Holmes also testified that during his detention:

> They gave me two - two choices. They said while I was in handcuffs and everything, we want you to sign the paper [banning him from the mall for 1 year because of fighting], and I said, no, I'm not going to sign any papers. And they said, well, if you don't sign the papers, you will stay here or you will go downtown. And that was my ultimatum.

> . . . .
>
> . . . [H]e presented this paper to me and said you have to sign this. I said, for what? He said, for fighting. I said, no, huh-uh, you're wrong. So we was going back and forth, back and forth, back and forth for a long time. And then he said, okay, you've got a choice. I said, what is the choice? I'm still in handcuffs at the same time. I'm still handcuffed. He said, you got a choice. Either sign this paper or you go downtown for criminal charges.

Holmes further testified that he refused to sign the form for about 35 minutes, but finally agreed to sign it. Holmes stated, "I had no choice. I didn't want to go downtown." Holmes was concerned about possible criminal prosecution because his job with the Omaha Public Schools required him to keep his record "clean."

Regarding the false imprisonment claim, the trial court found in its order that "the plaintiff was in the security office for 45 to 60 minutes, and . . . was bleeding the whole time." The trial court made no other findings in its order as to why the award of $50,000 was not reasonably related to the evidence of damages.

Our remarks in *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 617-18, 260 N.W.2d 488, 491 (1977), regarding a claim for false imprisonment, are applicable in the present case:

> There is evidence of embarrassment and mental anguish in this case, and there is no accurate method or formula by which such damage can be measured and determined. In awarding damages for physical discomfort and mental anguish, the fact finder must rely on the totality of the circumstances surrounding the incident, [and] the credibility of the evidence and witnesses . . . .

I believe the evidence, when viewed in the light most favorable to the jury's verdict, provides no tenable grounds for the trial court to conclude that the jury's award of $50,000 for Holmes' false imprisonment claim was motivated by passion or prejudice. Accordingly, in my opinion, the trial court further abused its discretion in granting a new trial on Holmes' false imprisonment claim.

For the reasons set forth above, I respectfully dissent.

McCormack, J., joins in this dissent.

FONTENELLE EQUIPMENT, INC., A NEBRASKA CORPORATION, APPELLANT, V. PATTLEN ENTERPRISES, INC., DOING BUSINESS AS MIDWEST TURF & IRRIGATION, APPELLEE.

629 N.W. 2d 534

Filed July 6, 2001. No. S-99-1408.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom 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.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, 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 further proceedings as it deems just.
4. **Statutes: Appeal and Error.** The interpretation of a statute 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: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **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.
7. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
8. **Statutes: Appeal and Error.** As an aid to statutory interpretation, appellate courts 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.
9. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
10. ____: ____: ____. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

11. ____: ____: ____. When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.
12. **Contracts.** The Equipment Business Regulation Act, Neb. Rev. Stat. ch. 87, art. 7 (Reissue 1994), does not apply to business agreements between retail dealers of lawn and garden equipment and their suppliers.
13. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

James T. Gleason, P.C., of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellant.

Paul R. Elofson, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellee.

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

PER CURIAM.

This appeal presents the question whether the Equipment Business Regulation Act, Neb. Rev. Stat. ch. 87, art. 7 (Reissue 1994), applies to the relationship between Fontenelle Equipment, Inc. (Fontenelle), a dealer of outdoor power equipment, and Pattlen Enterprises, Inc., doing business as Midwest Turf & Irrigation (Pattlen), a distributor of Toro power lawn and garden equipment.

BACKGROUND

Fontenelle is engaged in the sale and repair of outdoor power equipment in Bellevue, Nebraska. In 1984, Fontenelle, then a sole proprietorship owned by Daniel Fischer, began carrying the Toro line of outdoor power equipment which was, at that point, distributed by Midwest Toro, Inc. Upon commencing the distribution relationship, Fontenelle and Midwest Toro entered into a sales account agreement and a service dealer agreement. Under the sales account agreement, Midwest Toro agreed to sell Toro parts and equipment to Fontenelle.

Under the service dealer agreement, Fischer agreed to maintain a service shop with adequate equipment, tools, and parts stock consistent with the recommendations of Toro. Midwest

Toro agreed to maintain an adequate inventory of Toro parts to effectively support the efforts of Fontenelle.

At some point after Fischer and Midwest Toro began their business relationship, Fischer incorporated his business to form Fontenelle Equipment, Inc., in which Fischer, his wife, and another individual were shareholders. Also, Midwest Toro, Inc., at some point became Pattlen Enterprises, Inc., doing business as Midwest Turf & Irrigation. The business relationship between Fontenelle and Pattlen continued after the changes in the businesses' entity structures.

Over the course of Fontenelle businesses' relationship with Pattlen and Midwest Toro, Fontenelle had carried such Toro power equipment as commercial- and homeowner-grade lawnmowers; snow blowers; garden hoses; string trimmers; and garden tillers, used to disturb the soil. Fischer testified that over the course of the relationship and through Fontenelle's normal course of business, Fontenelle had accumulated a large number of spare parts for Toro equipment.

In August 1997, the distribution relationship between the parties ended and Fontenelle ceased carrying the Toro product line. After the relationship ended, Fontenelle requested that Pattlen repurchase the unused, resalable Toro parts, which Fontenelle had accumulated over the years, at 85 percent of the retail price. Fontenelle attempted to return the parts to Pattlen, but Pattlen refused to accept them. Fontenelle then filed this action under the Equipment Business Regulation Act in an attempt to compel Pattlen to repurchase the unused, resalable spare parts at 85 percent of the retail price.

In its operative petition, Fontenelle asserted that it was a dealer of equipment used for horticultural purposes pursuant to the act and that such equipment was supplied by Pattlen. Fontenelle alleged that Pattlen gave Fontenelle oral notice that the commercial relationship between them was terminated and did not enumerate any of the reasons listed in § 87-705(1) for such termination. Further, Fontenelle alleged that it sent Pattlen a letter requesting that Pattlen repurchase parts and equipment from Fontenelle pursuant to the provisions of the act and that Pattlen refused to repurchase the parts. Pattlen denied the allegations and filed a counterclaim alleging that Fontenelle had

purchased parts and equipment from Pattlen after the end of their relationship and that Fontenelle owed Pattlen $350.23 for such parts and equipment.

Fontenelle and Pattlen each filed motions for summary judgment. In granting Pattlen's motion for summary judgment and denying Fontenelle's motion for summary judgment, the court addressed the issues as follows: First, the district court addressed the termination of the agreement between Fontenelle and Pattlen. The court determined that "[a]lthough the matter [sic] in which it was terminated is in dispute, it is my finding, at this juncture, the greater weight of the evidence shows the termination to be one reached by mutual agreement of the parties." The court then turned to the application of the act and determined that the act was not applicable in the case at bar.

The district court determined that there was no oral or written agreement between Fontenelle and Pattlen whereby Fontenelle agreed to maintain an inventory of equipment, attachments, or repair parts. Second, the court determined that because the agreement ended by mutual agreement as opposed to the supplier terminating the agreement, the act does not apply. Next, the court stated that

> although it appears to be a dispute between the parties, it is my finding and conclusion, by a greater weight of the evidence, that [Fontenelle] has failed to establish that the agreement and business relationship between the parties constituted a "dealer agreement" as defined under the Equipment Business Regulation Act.

Finally, after considering the legislative findings set forth in § 87-702, the district court determined that the act does not apply to this case because under the act's definition of "equipment," equipment used for horticultural purposes must involve an agricultural or industrial use and because the equipment at issue in this case was not for an agricultural or industrial use.

Fontenelle appealed the order of the district court that denied Fontenelle's motion for summary judgment and granted Pattlen's motion for summary judgment. We moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

Fontenelle assigns, restated, that the district court erred in determining that (1) the Equipment Business Regulation Act did not apply, (2) § 87-703(5) was ambiguous and in need of construction, (3) there was no dealer agreement between the parties, and (4) the termination of the agreement between the parties was done by mutual agreement.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). 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. *Adams v. State*, 261 Neb. 680, 625 N.W.2d 190 (2001).

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, 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 further proceedings as it deems just. *Kirwan v. Chicago Title Ins. Co.*, 261 Neb. 609, 624 N.W.2d 644 (2001).

[4] The interpretation of a statute 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. *In re Estate of Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001).

ANALYSIS

In the instant case, Fontenelle attempts to compel Pattlen to repurchase the spare Toro parts Fontenelle had accumulated

over the course of its business relationship with Pattlen. Specifically, Fontenelle attempts to invoke § 87-707, which states, in relevant part, the following:

> (1) Whenever any dealer enters into a dealer agreement with a supplier in which the dealer agrees to maintain an inventory of equipment, attachments, or repair parts and the dealer agreement is subsequently terminated, the supplier shall:
>
> (a) Repurchase the inventory by:
>
> . . . .
>
> (ii) Paying eighty-five percent of the current price of all new, unused, and undamaged attachments and repair parts, including superseded repair parts, which are listed in the price lists or catalogs in use by the supplier on the date of termination[.]

We must first consider the issue whether the Equipment Business Regulation Act applies to the relationship between Fontenelle and Pattlen. The district court determined that the act does not apply in this case because Fontenelle is not a dealer of equipment as the term "equipment" is defined in the act.

In order for the act to apply, a dealer must be primarily engaged in the retail sale and service of equipment as defined in § 87-703. Section 87-703(5) states the following: "Equipment shall mean any machine designed for or adapted and used for agricultural, horticultural, livestock, grazing, forestry, or industrial purposes[.]" Fontenelle asserts that the line of Toro equipment involved in its business relationship with Pattlen falls within the definition of equipment under the plain meaning of § 87-703(5) because lawnmowers, garden tillers, and string trimmers are machines designed or adapted and used for horticultural purposes. Pattlen disagrees and asserts that the Legislature intended the horticultural purpose to be one involving agricultural or industrial use, not personal use equipment such as lawnmowers and garden tillers.

[5-7] 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 Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001). 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. *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001). However, a statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999).

We determine that the meaning of "horticultural," when read in the context of the language in § 87-703(5), is ambiguous. For instance, Webster's Third New International Dictionary, Unabridged 1093 (1993), provides that horticulture is "the science and art of growing fruits, vegetables, flowers, or ornamental plants," and yet, horticulture is also defined as "the cultivation of an orchard, garden, or nursery on a *small or large* scale." (Emphasis supplied.) Thus, the meaning of the statutory term "horticultural purpose" could include equipment suitable for private home use or equipment suitable for larger scale, agricultural or industrial use. The other purposes included in the meaning of "equipment" as listed in § 87-703(5)—agricultural, livestock, grazing, forestry, and industrial—are all purposes that relate to a commercial use of equipment. Whether the term "horticultural" relates to the personal use of equipment, such as mowing lawns or tending to backyard gardens, or to the commercial use of equipment for some other horticultural purpose is not entirely clear when the language of the statute is read as a whole. Therefore, the ambiguity in the statute requires us to resort to our rules of statutory interpretation to ascertain the meaning of the term "horticultural" as it is used in the context of § 87-703(5).

[8-10] As an aid to statutory interpretation, appellate courts 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. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the

Legislature, so that different provisions of the act are consistent and sensible. *Id*. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *Wortman v. Unger*, 254 Neb. 544, 578 N.W.2d 413 (1998).

The Legislature's express statement of intent with respect to the act, set forth in § 87-702, states the following:

> The Legislature finds that the retail distribution and sales of *agricultural and industrial equipment* utilizing independent retail businesses operating under agreements with manufacturers, wholesalers, and distributors of such equipment vitally affect the general economy, public interests, and public welfare of the state and that it is necessary to regulate the business relationships between the independent dealers and the equipment manufacturers, wholesalers, and distributors.

(Emphasis supplied.)

Reading §§ 87-702 and 87-703(5) in pari materia indicates that the Legislature intended to include in the definition of equipment only the type of horticultural machines that are used for agricultural or industrial purposes, not for personal uses such as backyard gardening and lawn mowing.

[11] Further, when a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature. See *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). The stated aim of the Equipment Business Regulation Act was to give "Nebraska farm and industrial equipment dealers certain rights in their relationships with suppliers." See Statement of Intent, L.B. 123, Committee on Banking, Commerce, and Insurance, 92d Leg., 1st Sess. (Feb. 11, 1991). It is also noteworthy that before the enactment of the Equipment Business Regulation Act in 1991, an almost identical bill was introduced and failed to pass in 1990. That bill would have specifically included "outdoor power equipment" dealers in its regulatory scheme, and the definition of equipment would have included "any machine designed for . . . lawn and garden purposes." See Banking, Commerce, and Insurance Hearing, L.B. 1000, 91st Leg., 2d Sess. 2-3 (Jan. 4, 1990).

At the 1990 committee hearing, however, it was proposed that these sections be amended to exclude the references to outdoor power equipment and lawn and garden equipment. See *id.*, exhibit A (Jan. 22, 1990). The concern was that the reference to such equipment would include large retailers such as K mart and J.C. Penney and, thus, make the act broader in its protection than intended. See *id.* Although L.B. 1000 was indefinitely postponed in 1990, the 1991 version of the bill, which was passed into law, noticeably omits any reference to outdoor power equipment and lawn and garden equipment. See 1991 Neb. Laws, L.B. 123.

Finally, we note that the terms "agricultural" and "horticultural" are used connectively with great frequency in Nebraska statutes to connote land, activities, or products associated with farming and are used for purposes ranging from soil conservation to tax exemptions. See, e.g., Neb. Rev. Stat. § 2-4608 (Reissue 1997) (authorizing municipalities and counties to inspect complaints of excessive soil erosion which is result of agricultural, horticultural, or silvicultural activities); Neb. Rev. Stat. § 48-604(6)(a)(i) (Reissue 1998) (excluding agricultural labor, including those who cultivate soil "in connection with raising or harvesting any agricultural or horticultural commodity" from definition of employment for purpose of Employment Security Law); Neb. Rev. Stat. § 77-201(2) (Reissue 1996) (providing that agricultural land and horticultural land shall constitute separate and distinct class of property for purposes of property taxation). Compare Neb. Rev. Stat. § 76-1509 (Reissue 1996) (defining farming for trust purposes as "the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, and grazing or the production of livestock").

[12] Given the legislative findings in § 87-702 and the nature of the other purposes listed in § 87-702, the use of the term "horticultural" in § 87-703(5) is most reasonably construed as a reference to an agricultural or industrial use of equipment as opposed to a personal use. Therefore, we conclude that the Legislature did not intend for the Equipment Business Regulation Act to apply to business agreements between retail dealers of lawn and garden equipment and their suppliers.

[13] Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001). Because it is undisputed that Fontenelle is a dealer of lawn and garden equipment, the district court properly granted summary judgment for Pattlen because the act does not apply to the relationship between Pattlen and Fontenelle. Therefore, we affirm the district court's judgment in this case.

Because the act does not apply to the relationship between Pattlen and Fontenelle, it is unnecessary for us to address Fontenelle's other assignments of error.

CONCLUSION

We conclude that Fontenelle, a lawn and garden equipment dealer, is not a dealer of equipment for purposes of the Equipment Business Regulation Act. Therefore, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RICKEY R. THOMAS, APPELLANT.

629 N.W. 2d 503

Filed July 6, 2001. No. S-99-1412.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. **Convictions: Effectiveness of Counsel: Pleas: Waiver: Proof.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, when a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.

6. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
7. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
8. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
9. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
10. **Constitutional Law: Double Jeopardy.** The Nebraska Supreme Court has not construed Nebraska's double jeopardy clause to provide any greater protections than those guaranteed by the U.S. Constitution.
11. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
12. ____. The Double Jeopardy Clause does not potentially come into play until the defendant has first been put into jeopardy. And even then, it is only the second proceeding that is constitutionally endangered.
13. **Double Jeopardy: Pleas.** Generally, jeopardy attaches in a criminal case at the time the district court accepts the defendant's guilty plea.
14. **Double Jeopardy.** Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant.
15. **Constitutional Law: Double Jeopardy.** The constitutional prohibition against double jeopardy not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense.
16. **Double Jeopardy.** Jeopardy, in the context of successive punishments, attaches at the time the defendant is convicted, not at the time of punishment.
17. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

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

Rickey R. Thomas, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GERRARD, J.

NATURE OF CASE

Rickey R. Thomas pled guilty to and was convicted of possession with intent to deliver a controlled substance under Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1992). Additionally, a forfeiture action was commenced, pursuant to Neb. Rev. Stat. § 28-431 (Reissue 1995), against $4,892 found in Thomas' possession at the time of Thomas' arrest and was resolved subsequent to Thomas' possession with intent to deliver conviction. Thomas did not file a plea in bar to the possession with intent to deliver charge and did not appeal either the conviction for possession with intent to deliver or the judgment in the forfeiture action. Thomas filed this motion for postconviction relief to challenge his criminal conviction. Thomas relies on our decision in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), to assert that he was placed in double jeopardy when charged with possession with intent to deliver and that, therefore, his trial counsel provided ineffective assistance by failing to file a plea in bar to the possession charge.

BACKGROUND

On July 6, 1992, a no-knock search warrant was executed on Thomas' residence. The police found 22 individually wrapped hits of heroin, scales, and $4,892 in cash. Thomas was charged with possession with intent to deliver a controlled substance. On August 14, Thomas pled guilty to the possession with intent to deliver charge and on October 5, was sentenced to 10 to 20 years' imprisonment.

On July 14, 1992, the State brought a separate forfeiture action against the $4,892 found in Thomas' possession at the time of his arrest. The forfeiture action was resolved on August 25 when the district court found that the money was forfeited to the State. In the district court's decree on the forfeiture action, it noted that Thomas had been served as an interested party to the action, but had failed to respond to the service and had not challenged the forfeiture action.

Thomas filed a motion for postconviction relief pursuant to the Nebraska Postconviction Act, challenging his possession

with intent to deliver conviction. Thomas claimed that on the criminal charge, his trial counsel provided ineffective assistance because such counsel failed to file a plea in bar to the possession with intent to deliver charge. Thomas claimed that his right to be free from double jeopardy had been violated because jeopardy had attached to the forfeiture proceedings and that, therefore, the charge of possession with intent to deliver was barred by the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution or Neb. Const. art. I, § 12. Thomas asserted that had his counsel filed a plea in bar to the criminal charge, the result of the proceedings would have been different because the possession with intent to deliver charge would have been dismissed. Therefore, Thomas alleged that his trial counsel provided ineffective assistance because his performance was deficient and that such deficient performance prejudiced Thomas.

The district court denied Thomas' request for postconviction counsel. Thereafter, the district court denied Thomas' motion for postconviction relief without an evidentiary hearing. The district court determined that Thomas' possession with intent to deliver charge was not barred by the Double Jeopardy Clause because jeopardy did not attach to the forfeiture action until evidence was taken on August 25, 1992—after Thomas' August 14 possession conviction. Thomas appealed, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

On appeal, Thomas assigns that the district court erred in (1) denying Thomas' request for postconviction counsel, (2) refusing to grant Thomas an evidentiary hearing on his postconviction action, and (3) denying Thomas' motion for postconviction relief.

STANDARD OF REVIEW

[1] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

[3] Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Soukharith, supra*.

ANALYSIS

[4-6] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Becerra, supra.* Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). However, when a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Buckman, supra.* A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000). Thus, in order for Thomas to have properly challenged his possession with intent to deliver conviction in this postconviction action, he must have alleged that his guilty plea and his failure to raise the argument on direct appeal were the result of ineffective assistance of counsel.

Although Thomas did not specifically argue that he would not have pled guilty had his counsel provided effective assistance, the effect of Thomas' argument appears to be the same. Thomas asserted that had his counsel caused the possession with intent to deliver charge to be dismissed, the result of the proceeding would have been different. The facts alleged in Thomas' petition are sufficient for a court to infer that Thomas would not have pled guilty to the possession charge had his attorney filed a plea in bar to such charge because the charge would have been dismissed as barred by double jeopardy and that as a result, Thomas would not have been faced with pleading guilty as the charge would have previously been dismissed. Because we conclude that Thomas' postconviction claim is without merit on other grounds, we will generously assume, without deciding,

that Thomas properly alleged that his guilty plea and his subsequent failure to pursue the issue in a direct appeal were the result of ineffective assistance of counsel.

[7-9] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *State v. Silvers, supra*.

Thomas' petition alleged that had his counsel filed a plea in bar to the possession with intent to deliver charge, such charge would have been dismissed because the charge violated Thomas' right to be free from double jeopardy. Thomas' argument was that the prosecution of the criminal charge was barred by double jeopardy after the State filed the forfeiture action. Thomas relies on our ruling in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), for support. In *Franco*, we addressed a situation in which the defendant had been arrested and charged with possession of a controlled substance with intent to deliver under § 28-416(1)(a). At the time of the defendant's arrest in *Franco*, $2,190 in cash was seized from the defendant and the State filed a forfeiture action against the money pursuant to § 28-431. Evidence was adduced in the forfeiture proceeding prior to any action on the possession with intent to deliver charge. *State v. Franco, supra*. The day after evidence was adduced in the forfeiture proceeding, the defendant in *Franco* filed a plea in bar, requesting the information on the possession with intent to deliver charge be dismissed because it was barred by the Double Jeopardy Clause.

In analyzing whether double jeopardy had attached to the forfeiture action, we determined in *Franco* that forfeiture actions under § 28-431 provide a criminal sanction and that such action is criminal in nature for purposes of double jeopardy. See, also, *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999). In *Franco*, we determined that because jeopardy attaches when a judge begins to hear evidence as to the guilt of a defendant and because evidence had been adduced in the forfeiture action prior to the defendant's prosecution on the criminal charge, prosecution of the possession with intent to deliver charge in *Franco* was barred by the Double Jeopardy Clause. Therefore, we determined that the district court in *Franco* erred in denying the defendant's plea in bar to the possession with intent to deliver charge because jeopardy had attached to the forfeiture action.

In this case, Thomas was charged with possession with intent to deliver under the same statute as the defendant in *Franco* and the forfeiture action against the money found in Thomas' possession at the time of his arrest was pursued under the same statute as against the defendant in *Franco*. Thus, Thomas argues that *Franco* applies in this case, that his double jeopardy rights were violated by the criminal prosecution, and that his counsel provided ineffective assistance by failing to file a plea in bar to the possession with intent to deliver charge.

[10-12] This court has not construed Nebraska's double jeopardy clause to provide any greater protections than those guaranteed by the U.S. Constitution. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Franco, supra*. The Double Jeopardy Clause does not potentially come into play, however, until the defendant has first been put into jeopardy. *Crist v. Bretz*, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978). And even then, it is only the second proceeding that is constitutionally endangered. See *State v. Franco, supra*.

[13,14] Therefore, we must determine whether Thomas was first subjected to jeopardy for the conduct underlying the possession with intent to deliver charge prior to jeopardy attaching in

the possession prosecution. See *U.S. v. Pierce*, 60 F.3d 886 (1st Cir. 1995). As a general rule, jeopardy attaches in a criminal case at the time the district court accepts the defendant's guilty plea. *U.S. v. Aliotta*, 199 F.3d 78 (2d Cir. 1999). See, *U.S. v. Faber*, 57 F.3d 873 (9th Cir. 1995); *Fransaw v. Lynaugh*, 810 F.2d 518 (5th Cir. 1987). See, also, *Bally v. Kemna*, 65 F.3d 104 (8th Cir. 1995). It has also been established that jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. Neb. Const. art. I, § 12. See, *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000); *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999).

In the case at bar, Thomas pled guilty and was convicted of possession with intent to deliver a controlled substance on August 14, 1992. Evidence was not presented to the trier of fact in the forfeiture action until August 25. Any double jeopardy issue arising out of the institution of the forfeiture proceeding can only be seen as imperiling that proceeding. See *U.S. v. Pierce, supra*. Therefore, the prosecution for possession with intent to deliver could not be barred by double jeopardy as a second prosecution for the same offense after conviction.

[15] The constitutional prohibition against double jeopardy, however, not only protects against a second prosecution for the same offense after acquittal or conviction, but also protects against multiple punishments for the same offense. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). In this case, evidence was presented to the trier of fact in the forfeiture proceeding and the forfeiture action was concluded after Thomas' conviction on the possession with intent to deliver charge but before Thomas' sentencing on that conviction. Thomas' argument in this case implies that for purposes of the prohibition against multiple punishment, jeopardy attached at the time Thomas suffered an initial punishment, after which he may not be punished a second time. Thus, Thomas' argument is that despite the fact that jeopardy had attached in the criminal case upon the entering of his guilty plea, "punishment jeopardy" did not attach to his possession with intent to deliver charge until Thomas was sentenced. Because the sentencing did not occur until after completion of the forfeiture action, Thomas' argument is that the sentencing was a second jeopardy.

In *U.S. v. Pierce*, 60 F.3d 886 (1st Cir. 1995), the circuit court addressed an argument identical to Thomas' multiple punishment argument. The *Pierce* court stated that this argument

> implies that a criminal defendant should have the right to withhold objection to a forbidden successive prosecution and raise a double jeopardy argument only in the event that the second prosecution leads to a prior and less severe punishment than that meted out in the original case. Put another way, a defendant ought to have the option to endure an unconstitutional second trial in the hope that it will both conclude first and lead to a more lenient punishment than that eventually imposed in the first trial, and then to object to the punishment imposed in the first trial on double jeopardy grounds. We cannot locate any authority to support this proposition, and we reject it out of hand.
>
> The Double Jeopardy Clause is a shield against the oppression inherent in a duplicative, punitive proceeding; it is not a tool by which a defendant can avoid the consequences of the proceeding in which jeopardy first attached. . . . This simply is not a situation where the price to society of allowing a defendant to parlay the government's miscalculation into a "get out of jail free" card is worth the deterrent effect such a regime might have.

60 F.3d at 890.

[16] Likewise, in *U.S. v. Idowu*, 74 F.3d 387 (2d Cir. 1996), the court found the *Pierce* court's reasoning persuasive. The *Idowu* court rejected "out of hand the theory that jeopardy in the context of successive punishments does not attach until the time of punishment." 74 F.3d at 397. We agree with the reasoning in *Pierce* and *Idowu* and also reject the theory that jeopardy did not attach to Thomas' possession with intent to deliver conviction until the time of punishment.

Because there was no double jeopardy violation, Thomas was not prejudiced by his counsel's failure to file a plea in bar to the possession with intent to deliver charge because such filing would not have caused the charge to be dismissed. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). We conclude that Thomas' ineffective assistance of counsel argument fails on the prejudice prong of the ineffective assistance of counsel test.

[17] Thomas, however, in his brief on appeal, argues for the first time that his trial counsel provided ineffective assistance by failing to have Thomas file a response to the forfeiture action and plead "not guilty" to the possession with intent to deliver charge. As an apparent backup plan, Thomas also argues for the first time on appeal that the result of the forfeiture action should be overturned because it was barred by double jeopardy. Thomas did not make either of the above arguments to the district court. For good reason, this court will not consider an issue on appeal that was not presented to or passed upon by the trial court; therefore, we do not consider either of these arguments on appeal. See *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000). Consequently, we determine that Thomas' entire assignment of error relating to ineffective assistance of counsel is without merit.

Finally, we have reviewed Thomas' remaining assignments of error regarding the trial court's failure to appoint postconviction counsel and refusal to grant an evidentiary hearing and determine they have no merit based on the allegations and arguments Thomas presented on appeal.

CONCLUSION

We, therefore, affirm the judgment of the district court.

AFFIRMED.

CONTINENTAL WESTERN INSURANCE COMPANY, APPELLEE, V. BARRY CONN AND MARILYN CONN, INDIVIDUALLY AND AS HUSBAND AND WIFE, APPELLANTS.

629 N.W. 2d 494

Filed July 6, 2001. No. S-00-129.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
2. **Insurance: Motor Vehicles.** In order to be entitled to underinsured motorist coverage under the Uninsured and Underinsured Motorist Insurance Coverage Act, Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Cum. Supp. 1994), an insured must be legally entitled to recover compensatory damages from the owner or operator of an "underinsured motor vehicle."

3. ____: ____. Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act specifically excludes government-owned vehicles from the definition of "underinsured motor vehicle" and thus permits exclusion of government-owned vehicles from the definition of "underinsured motor vehicle" in an automobile insurance policy.
4. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.
5. **Constitutional Law: Appeal and Error.** A constitutional question not properly raised in the trial court will not generally be considered on appeal.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, District Judge, Retired. Affirmed.

Richard L. Swenson for appellants.

Stephen S. Gealy and Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this declaratory judgment action, Barry Conn and Marilyn Conn appeal the decision of the district court for Douglas County which determined that the schoolbus which struck Marilyn Conn was not an "underinsured vehicle" and, therefore, declared that Continental Western Insurance Company (Continental Western) was not required to make payment to the Conns pursuant to the underinsured motorist coverage provision in the policy Continental Western had issued to the Conns. We affirm.

STATEMENT OF FACTS

The controlling facts are not in dispute. On April 24, 1995, Marilyn Conn was struck and injured by a bus owned and operated by an agent or employee of Douglas County School District 001, Omaha Public Schools (OPS), a political subdivision, and owned by OPS. In settlement of the Conns' claim, OPS, through its insurer, paid the Conns the total sum of $1 million. Under Nebraska law, the total amount recoverable against a political subdivision under the Political Subdivisions Tort Claims Act for claims arising out of an occurrence after November 16, 1985, is limited to $1 million for any person for any number of claims aris-

ing out of a single occurrence. Neb. Rev. Stat. § 13-926 (Reissue 1991). In addition to the settlement with OPS, the Conns sought coverage from Continental Western for their damages in excess of $1 million pursuant to the underinsured motorist coverage provision of an automobile liability policy that Continental Western had issued to the Conns on November 5, 1994. Under Nebraska law, pursuant to Neb. Rev. Stat. § 44-6407 (Cum. Supp. 1994) of the Uninsured and Underinsured Motorist Insurance Coverage Act, an "uninsured or underinsured motor vehicle shall not include a motor vehicle . . . (4) [w]hich is owned by any government, political subdivision, or agency thereof . . . ." Throughout this opinion, we generally use the word "government" to mean the state and its political subdivisions. Coverage was declined.

On October 9, 1997, Continental Western filed the present declaratory judgment action against the Conns. Continental Western prayed for a declaration and judgment that any claim of the Conns against Continental Western pursuant to the underinsured motorist coverage of the policy was barred by the Political Subdivisions Tort Claims Act. The Conns answered and prayed for a declaration that their claim against Continental Western was not barred by the Political Subdivisions Tort Claims Act and that Continental Western was indebted to them in an amount equal to the full underinsured motorist coverage provided in the policy.

A hearing was held October 1, 1999, at which the parties entered into evidence a stipulation in which they agreed that the only issue was as follows:

> "Where the defendants' damages exceed $1,000,000.00 as a result of Marilyn Conn's having been struck by a bus owned by the Omaha Public Schools and driven by its duly authorized agent, is the Omaha Public Schools an underinsured motorist within the meaning of the statutes of the State of Nebraska and the Continental Western Insurance Company policy issued to the defendants and in full force and effect at the time of the accident which gave rise to the defendants' original claim?"

The parties also stipulated and agreed to the following:

> 1. This Court has jurisdiction over the parties to and the subject matter of this action.

2. On November 5, 1994, Continental Western issued to Defendants Conn a policy of automobile liability insurance numbered AP68100 with effective dates of November 5, 1994 through November 5, 1995 and was in full force and effect on or about April 24, 1995. Said policy provided to Defendants Conn $100,000.00 in underinsured motorist coverage per person and $300,000.00 in underinsured motorist coverage per accident a copy of which is attached hereto, marked Exhibit A, and made a part hereof.

3. On April 24, 1995, Defendant Marilyn Conn was a pedestrian at or near the intersection of 28th and Dodge Streets in Omaha, Douglas County, Nebraska and was struck and injured by a bus owned by Douglas County School District 001 (OPS) and operated by its agent or employee.

4. As a result of the accident described in paragraph 3, above, OPS, through its insurer, paid the Defendants Conn, individually and as husband and wife, the total sum of one million dollars ($1,000,000.00) which amount is the maximum payable by or on behalf of OPS.

5. As defined in Neb. Rev. Stat. § 13-903(1), OPS is a political subdivision. The claim of De[f]endants Conn against OPS was, therefore, governed by the Nebraska Political Subdivisions Tort Claims Act set forth at Neb. Rev. Stat[.] §§ 13-902 et. seq.

6. Defendants Conn are, for purposes of resolution of the issue stated above, a single person with a single claim which arose as a result of the accident of April 24, 1995.

7. Continental Western has been called upon to provide coverage to Defendants Conn under the underinsured motorist coverage contained in their insurance policy to satisfy the claim of Defendants Conn in excess of the one million dollar amount previously paid to them by the insurer of OPS.

8. The applicable underinsured motorist coverage limit of the Continental Western Insurance policy issued to Defendants Conn is $100,000.00.

9. As a direct and proximate result of the accident described in paragraph 3 above, Defendants Conn have

incurred damages in excess of one million, one hundred thousand dollars ($1,100,000.00).

A copy of the Continental Western automobile liability policy issued to the Conns was received into evidence. The underinsured motorist coverage section of the policy included, inter alia, the following provisions:

> We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury":
>
> 1. Sustained by an "insured"; and
> 2. Caused by an accident.
>
> . . . .
>
> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is either:
>
> 1. Not enough to pay the full amount the "insured" is legally entitled to recover as damages; or
> 2. Reduced by payments to others injured in the accident to an amount which is not enough to pay the full amount the "insured" is legally entitled to recover as damages.
>
> However, "underinsured motor vehicle" does not include any vehicle or equipment:
>
> . . . .
>
> 2. Owned by any governmental unit or agency.

On January 7, 2000, the district court entered an order containing its findings which was favorable to Continental Western. Specifically, the district court found:

> 1. Omaha Public Schools (OPS) is immune from liability over one million dollars.
> 2. OPS has a one million dollar liability insurance policy.
> 3. The one million dollars of liability insurance on OPS was paid to the Defendants in settlement of their claim.
> 4. The underinsured motorist provision in the Continental Western policy issued to the Defendants applies only when there is a lack of liability insurance on the involved vehicle.
> 5. Since OPS has liability insurance in an amount equal to its maximum liability, its vehicle is not underinsured.

The district court declared that Continental Western was "not required to make payment to the [Conns] pursuant to the underinsured motorists coverage provision in its policy" and entered judgment accordingly. The Conns appealed.

ASSIGNMENTS OF ERROR

The Conns assert that the district court erred (1) in finding that the underinsured motorist provision of the policy only applied when there was a lack of liability insurance, (2) in finding that the OPS vehicle was not underinsured because it had liability insurance in the amount required by law, (3) in failing to find that § 44-6407(4) was either unconstitutional or void as against public policy, and (4) in failing to find that the provision of the insurance policy excluding government-owned vehicles from the definition of underinsured vehicle was void as against public policy.

STANDARD OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001).

ANALYSIS

The Conns argue on appeal that although the $1 million limitation of the Political Subdivisions Tort Claims Act limits the amount OPS must pay, it does not limit the total recovery which they may obtain. The Conns contend they are entitled to further recovery under the terms of the underinsured provisions of the policy with Continental Western. Finally, the Conns argue that both the policy and statute which provide that underinsured motor vehicles do not include vehicles owned by a governmental unit are void and unenforceable as unconstitutional and as against public policy.

In response, Continental Western contends that the underinsured motorist carrier's obligation is identical to, but not broader than, the tort-feasor's and that because OPS can have no legal responsibility beyond $1 million pursuant to law, neither can Continental Western. Continental Western also argues that the OPS bus was not an underinsured motor vehicle. Continental

Western advances several arguments as to why the government-owned exclusion provisions of the policy and statute are not against public policy. We agree with Continental Western that the OPS bus was not an underinsured motor vehicle in this case.

The underinsured motorist coverage provision of the automobile liability policy Continental Western issued to the Conns provides that "[w]e will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an '*underinsured motor vehicle*' because of 'bodily injury': 1. Sustained by an 'insured'; and 2. Caused by an accident." (Emphasis supplied.)

The Uninsured and Underinsured Motorist Insurance Coverage Act as a general matter requires that automobile liability insurance policies provide for protection against uninsured and underinsured motor vehicles. Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Cum. Supp. 1994). The act provides at § 44-6408(1) as follows:

> No policy insuring against liability imposed by law for bodily injury, sickness, disease, or death suffered by a natural person arising out of the ownership, operation, maintenance, or use of a motor vehicle within the United States, its territories or possessions, or Canada shall be delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in this state unless coverage is provided for the protection of persons insured who are legally entitled to recover compensatory damages for bodily injury, sickness, disease, or death from . . . (b) the owner or operator of an *underinsured motor vehicle* . . . .

(Emphasis supplied.)

Elsewhere, § 44-6407 of the act provides that "an underinsured motor vehicle shall not include a motor vehicle . . . (4) [w]hich is owned by any government, political subdivision or agency thereof . . . ."

[2] In order to be entitled to underinsured motorist coverage under the terms of both the policy and the Uninsured and Underinsured Motorist Insurance Coverage Act, an insured must be legally entitled to recover compensatory damages from the owner or operator of an "underinsured motor vehicle." In the present case, in order for the Conns to be entitled to underinsured

motorist coverage with respect to the April 24, 1995, accident, they must satisfy the following conjunctive requirements: (1) they must be legally entitled to recover damages in excess of $1 million from OPS and (2) the bus owned by OPS must be an "underinsured motor vehicle." For the reasons set forth below, we conclude under both the policy issued by Continental Western and the Uninsured and Underinsured Motorist Insurance Coverage Act that the bus owned by OPS was not an "underinsured motor vehicle" and that, therefore, the Conns cannot recover under the underinsured provisions of the policy. Accordingly, we need not comment on the parties' arguments regarding the "legally entitled to recover" language in the policy and § 44-6408(1).

As noted above, in order to recover under the underinsured motorist coverage policy provision, the Conns needed to establish that the bus owned by OPS was an "underinsured motor vehicle." The policy in the present case specifically excludes from the definition of "underinsured motor vehicle" any vehicle "[o]wned by any governmental unit or agency." The parties in this case stipulated that the bus which struck Marilyn Conn was owned by OPS. The parties also stipulated that OPS is a political subdivision. Based on the evidence, the bus was a vehicle owned by a governmental unit or agency and therefore was excluded from the definition of "underinsured motor vehicle" under the terms of the policy.

Similarly, the Uninsured and Underinsured Motorist Insurance Coverage Act provides that an "underinsured motor vehicle shall not include a motor vehicle . . . (4) [w]hich is owned by any government, political subdivision or agency thereof . . . ." § 44-6407(4). Thus, the OPS bus which struck Marilyn Conn was excluded from the definition of "underinsured motor vehicle" for purposes of the insurance requirements of the Uninsured and Underinsured Motorist Insurance Coverage Act.

The Conns argue that notwithstanding the fact that the OPS bus was clearly excluded from the definition of "underinsured motor vehicle" under the policy, the provision of the policy excluding vehicles owned by a governmental unit or agency is void as against public policy. The Conns cite to various cases from other jurisdictions wherein the courts have held that various

provisions in automobile insurance policies excluding vehicles owned by governmental units from the definition of "uninsured motor vehicles" or "underinsured motor vehicles" are unenforceable contract restrictions because they are at odds with mandatory uninsured or underinsured motorist coverage required by statute, the purpose of which statute is to protect citizens from damages caused by uninsured or underinsured motorists. See, *Vaught v. State Farm Fire & Casualty Company*, 413 F.2d 539 (8th Cir. 1969); *Ronning v. Citizens Sec. Mut. Ins. Co.*, 557 N.W.2d 363 (Minn. App. 1996); *Cropper v. State Farm Mut. Auto. Ins. Co.*, 671 A.2d 423 (Del. Super. 1995); *Gabriel v. Minnesota Mut. Fire and Cas.*, 506 N.W.2d 73 (N.D. 1993); *McClellan v. Sentry Indem. Co.*, 140 Ariz. 558, 683 P.2d 757 (Ariz. App. 1984); *Higgins v. Nationwide Mutual Insurance Company*, 291 Ala. 462, 282 So. 2d 301 (1973). Each of these decisions is distinguished from the instant case which must be decided with reference to Nebraska's statutes.

Unlike Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act which excludes government-owned vehicles from the definition of "underinsured motor vehicle," § 44-6407(4), the state statutes requiring uninsured or underinsured motorist coverage involved in the cases relied on by the Conns made no exclusion for government-owned vehicles. The absence of a government-owned exclusion from such statutes was fundamental to the decisions finding that the government-owned exclusion in the policies was unenforceable. In this regard, we note that the Court of Appeals for the Eighth Circuit stated that "[t]he [Arkansas] Uninsured Motorist Act does not specifically exclude governmentally-owned vehicles." *Vaught*, 413 F.2d at 541. The North Dakota Supreme Court stated that "[w]here statute does not provide for an exemption for governmental vehicles, a court will not rewrite uninsured or underinsured motorist coverage to provide for such an exemption." *Gabriel*, 506 N.W.2d at 76 (quoted in *Ronning v. Citizens Sec. Mut. Ins. Co., supra*). The Delaware Superior Court stated that "Delaware's statutory determination of what is included under the term 'uninsured vehicle' does not specifically exclude any class of vehicles." *Cropper*, 671 A.2d at 427. The Arizona Court of Appeals stated that "we must presume that if the legislature had intended to authorize additional

exclusions, such as the removal of certain types of vehicles from the classification 'uninsured motor vehicle,' it would have done so." *McClellan*, 140 Ariz. at 561, 683 P.2d at 760. The Alabama Supreme Court stated that "in the absence of any language in the act authorizing the exclusion, no exclusion of governmentally owned motor vehicles may be created in the policy." *Higgins*, 291 Ala. at 466, 282 So. 2d at 305.

[3] Unlike the cases cited by the Conns involving statutes which do not exclude government-owned vehicles from the definition of "uninsured motor vehicle" or "underinsured motor vehicle," the instant case is more comparable to the statutory analysis employed in *Jones v. Southern Farm Bureau Cas. Co.*, 251 S.C. 446, 163 S.E.2d 306 (1968), and *Francis v. Intern. Serv. Ins. Co.*, 546 S.W.2d 57 (Tex. 1976), each of which involves statutes, albeit pertaining to uninsured motorists, that are more similar to the Nebraska statutory structure. In *Jones*, the South Carolina Supreme Court held that a government-owned exclusion in an insurance policy's uninsured motorist coverage was valid because South Carolina's Motor Vehicle Safety Responsibility Act, which generally required that motor vehicles be insured, excluded government-owned vehicles from the scope of the act, and the uninsured motorist insurance statutory provisions were a component of this act. The South Carolina Supreme Court held that such exclusion also excluded government-owned vehicles from the definition of " 'uninsured motor vehicle.' " 251 S.C. at 455, 163 S.E.2d at 310. In *Francis*, the Texas Supreme Court held that a government-owned vehicle exclusion in a standard insurance form approved by the Texas State Board of Insurance was valid because the Texas uninsured motorist statutes authorized the board to exclude certain motor vehicles from the definition of " 'uninsured motor vehicle.' " 546 S.W.2d at 61. Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act specifically excludes government-owned vehicles from the definition of "underinsured motor vehicle" and thus clearly permits exclusion of government-owned vehicles from the definition of "underinsured motor vehicle" in an automobile insurance policy. Nebraska's act excludes government-owned vehicles, as does the insurance policy in this case; the exclusion in the policy therefore is not at odds with the act.

[4] We have stated that "[i]t is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state." *Clemens v. Harvey*, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (1994). The exclusion in the insurance policy cannot be void as against public policy when it mirrors the statutory exclusion and when the statute, which has not been found wanting, is the Legislature's expression of the public policy of this state. The Conns' argument that the exclusion in the insurance policy is void as against public policy is unavailing.

In the instant case, the motor vehicle involved was owned and operated by a political subdivision. The Motor Vehicle Safety Responsibility Act, which generally requires that motor vehicles be insured, specifically provides that the "Motor Vehicle Safety Responsibility Act shall not apply with respect to any motor vehicle owned by the United States, the State of Nebraska, any political subdivision of this state, or any municipality therein." Neb. Rev. Stat. § 60-561 (Reissue 1998). Reading this provision in § 60-561 in pari materia with the government-owned exclusion in § 44-6407(4), see *In re Estate of Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001), the exclusion of government-owned vehicles from the definition of "underinsured motor vehicle" in § 44-6407(4) of the Uninsured and Underinsured Motorist Insurance Coverage Act is consistent and harmonious with the provisions in the Motor Vehicle Safety Responsibility Act which exempts vehicles owned by the state from the insurance requirements of the Motor Vehicle Safety Responsibility Act.

Although the purposes of uninsured and underinsured coverage do not entirely coincide, see 3 Alan I. Widiss & Josephine R. Witte, Uninsured and Underinsured Motorist Insurance §§ 39.1 to 39.3 (rev. 2d ed. 2001), we have observed that both "[l]aws requiring uninsured or underinsured motorist coverage were enacted for the benefit of innocent victims of financially irresponsible motorists." *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 68, 607 N.W.2d 814, 818 (2000). See, also, *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). We have stated in an underinsured motorist case that the purpose of the act is to place a person injured by an underinsured motorist in the same position he or she would have been in had that individual been in an accident involving a person with

adequate coverage. *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 560 N.W.2d 130 (1997). The Washington Supreme Court has stated in an underinsured case that the purpose of underinsured motorist coverage is "to protect victims from financially irresponsible motorists by allowing them to recover the damages they would have received had the responsible party maintained liability insurance." *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wash. 2d 409, 419, 899 P.2d 787, 792 (1995).

In the instant case, Marilyn Conn was struck by a bus owned and operated by a political subdivision. Historically, due to sovereign immunity, such tort-feasor was immune from suit. *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). Insurance is not required of the political subdivision under the Motor Vehicle Safety Responsibility Act, § 60-561, and government-owned vehicles are excluded from the definition of "underinsured motor vehicle" under § 44-6407(4) of the Uninsured and Underinsured Motorist Insurance Act. The State has waived sovereign immunity as to tort actions brought against a political subdivision under § 13-926, but the recoverable amount is limited to $1 million.

The Supreme Court of Texas observed that "[t]he purpose of the [uninsured motorist] Act is to protect insureds against negligent, financially irresponsible motorists. It was not designed as a system for giving relief to people who cannot recover from a tort-feasor because of sovereign immunity." *Francis v. Intern. Serv. Ins. Co.*, 546 S.W.2d 57, 61 (Tex. 1976). In the instant case, to permit the Conns who have received $1 million from OPS to recover an additional $100,000 under the underinsured policy provision would exceed the $1 million limit which the Legislature has set as a maximum recovery where the tort-feasor is a political subdivision. See § 13-926. The Nebraska statutory scheme limits the amount recoverable against a political subdivision to $1 million directly, § 13-926, and precludes a potential additional recovery indirectly by excluding government-owned vehicles from the definition of uninsured and underinsured vehicles in § 44-6407(4). In this case, neither § 44-6407(4) nor the underinsured policy at issue are against public policy.

[5] The Conns further argue to this court that the exclusion for government-owned vehicles contained in § 44-6407(4) is

unconstitutional. On the record before us, the Conns failed to properly raise the asserted challenge to the constitutionality of § 44-6407(4) before the district court. A constitutional question not properly raised in the trial court will not generally be considered on appeal. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000). We therefore do not consider the Conns' argument that § 44-6407(4) is unconstitutional.

CONCLUSION

Marilyn Conn was struck by an OPS bus on April 24, 1995. By virtue of a limited waiver of sovereign immunity, the Conns recovered a $1 million settlement from OPS. One million dollars is the maximum recovery allowed under § 13-926 of the Political Subdivisions Tort Claims Act. The Conns, claiming damages of greater than $1 million, sought an additional $100,000 under the underinsured motorist provisions in the Continental Western policy held by the Conns. The district court concluded that Continental Western was not liable to the Conns because the OPS bus was not an "underinsured motor vehicle."

The insurance policy at issue excluded underinsured motorist coverage on a vehicle owned by any governmental unit or agency. Such exclusion is consistent with § 44-6407(4) of the Uninsured and Underinsured Motorist Insurance Coverage Act, which states that an "underinsured motor vehicle" shall not include a motor vehicle which is owned by any government, political subdivision, or agency thereof. The exclusion in this case is not against public policy, and the Conns' recovery is limited to $1 million. The district court was correct when it declared that Continental Western was not required to make payment to the Conns pursuant to the underinsured motorist coverage provision in its policy. We, therefore, affirm.

AFFIRMED.

JENNIFER J. MAXWELL, APPELLEE AND CROSS-APPELLEE, V. KRISTY J. MONTEY AND MARVIN L. MONTEY, APPELLEES AND CROSS-APPELLANTS, ZEBADIAH KAIN STEBBINS, APPELLANT, AND DIANA LYNN STEBBINS, NATURAL PARENT OF ZEBADIAH KAIN STEBBINS, APPELLEE.

631 N.W. 2d 455

Filed July 13, 2001. No. S-99-708.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
3. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
4. **Jury Instructions: Pleadings: Evidence.** Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
5. **Jury Instructions: Appeal and Error.** A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues.
6. **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.
7. **Negligence: Parties: Liability.** Under the plain language of Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995), there must be multiple defendants in a case before the allocation provisions of § 25-21,185.10 will operate.
8. **Negligence: Parties: Liability: Time.** Because the provisions of Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) affect only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact.
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 will not consider an issue on appeal that was not presented to or passed upon by the trial court.
11. ____. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
12. **Judgments: Debtors and Creditors.** A judgment debtor may pursue an action of contribution against those whom a plaintiff has successfully obtained a judgment against as well as those whose liability remains to be fixed.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal

thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals affirmed.

Stephen S. Gealy and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Stephen L. Ahl and Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellees Kristy J. Montey and Marvin L. Montey.

Herbert J. Friedman and Gregory R. Coffey, of Friedman Law Offices, for appellee Jennifer J. Maxwell.

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

GERRARD, J.

NATURE OF CASE

Jennifer J. Maxwell filed a lawsuit against Kristy J. Montey (Montey) and her father, Marvin L. Montey, and Zebadiah Kain Stebbins (Stebbins) and his mother, Diana Lynn Stebbins, for injuries she sustained in an automobile accident. Maxwell alleged that Montey and Stebbins, who were minors at the time of the accident, were engaged in a speed contest when Montey's vehicle struck Maxwell's, thereby causing Maxwell injury. Maxwell's suit named Marvin Montey and Diana Stebbins as defendants under the family purpose doctrine. The district court granted Stebbins' motion for directed verdict at the close of Maxwell's case in chief, and the jury returned a verdict in favor of Maxwell and against the Monteys in the amount of $250,000. After trial, the district court granted Maxwell's motion for a new trial against Stebbins but denied the Monteys' motion for a new trial. Stebbins appealed, and the Monteys cross-appealed. Stebbins and Maxwell subsequently settled their dispute prior to oral argument in the Nebraska Court of Appeals. The Court of Appeals affirmed the judgment of the district court, and we granted the Monteys' petition for further review. We are left to decide the Monteys' appeal and the issues whether the district court erred in giving jury instructions on a speed contest and whether a new trial should have been granted with both the

Monteys and Stebbins as defendants so that the jury could allocate damages between them.

BACKGROUND

Maxwell's operative petition alleged that Montey and Stebbins were racing in the eastbound lanes of O Street in Lincoln, Nebraska, on June 30, 1993, and that Montey's vehicle collided with Maxwell's vehicle while Stebbins' vehicle veered into the median of the street. Maxwell further asserted that the joint and several negligence of the defendants caused the accident which resulted in injuries to Maxwell's neck, shoulder, arm, and thoracic system. The Monteys and Stebbins answered and acknowledged that the accident occurred but denied that they were negligent and further alleged that Maxwell was contributorily negligent.

At the jury trial, Maxwell testified that she turned left from 48th Street into the eastbound lane of O Street in Lincoln. Maxwell stated that once she was eastbound on O Street, she noticed in her rearview mirror two cars in the eastbound lanes driving side by side and quickly approaching her. Maxwell testified that she was driving at a speed of about 35 miles per hour at the time and that she tapped her brakes so the drivers would see her in front of them. Maxwell then continued on her way, and when she looked in her mirror again, she noticed the vehicles were almost upon her, so she sped up to about 38 or 39 miles per hour. Maxwell testified that she realized the vehicles were approaching too rapidly, that they were side by side, and that the vehicle directly behind her could not move into the other lane in time. The vehicle which was traveling behind Maxwell, later identified as the Montey vehicle, struck Maxwell's vehicle. At this time, Maxwell says she turned her head to see the other vehicle, later identified as the Stebbins vehicle, go "whoosh" past her. Maxwell lost control of her vehicle and sustained injuries to her neck, shoulder, arm, and thoracic system.

During Maxwell's testimony, the district court repeatedly sustained foundational objections to questions asked by Maxwell's attorney as to the distance between Maxwell's vehicle and the Montey and Stebbins vehicles prior to the accident, as well as how fast Maxwell thought Stebbins' vehicle was traveling at the

time it passed her. However, Maxwell was allowed to testify that she thought Stebbins' vehicle was exceeding the speed limit when he passed her and that Stebbins "whooshed" past her.

Montey and Stebbins both testified that Maxwell had pulled out in front of them. Montey claimed that Maxwell turned onto O Street and, as a result, Montey did not have enough time to slow down before colliding with Maxwell's vehicle. Further, Montey testified that there was a car in the lane next to her which prevented her from moving into that lane and that she struck the rear of Maxwell's vehicle as a result. Stebbins' deposition testimony, which was read at trial, also indicated that Maxwell pulled in front of Montey and that he saw the accident in his rearview mirror. However, during Stebbins' live testimony at trial, he indicated that he did not pass Maxwell's car and did not see Maxwell's car at all until after he had passed Montey and after the accident happened.

At the close of Maxwell's case in chief, the district court granted Stebbins' motion for a directed verdict and excused him from the case. The Monteys did not object to Stebbins' motion or his dismissal. Additionally, the court admonished the jury to not speculate as to why Stebbins was no longer in the courtroom.

The Monteys presented their defense, and prior to submitting the case to the jury, the court conducted a formal jury instruction conference. Included in the jury instructions were instructions relating to a speed contest and verdict forms which included only Maxwell and the Monteys as parties to whom negligence could be allocated. Stebbins was neither mentioned in any of the jury instructions nor on any of the verdict forms. Additionally, in response to the district court's inquiry as to whether the Monteys had objections to any of the jury instructions, the Monteys did not object. The jury ultimately returned a verdict in favor of Maxwell and against the Monteys in the amount of $250,000.

In posttrial proceedings, the district court granted Maxwell's motion for a new trial against Stebbins because the district court found that it erred in directing a verdict in favor of Stebbins at the close of Maxwell's case in chief. The Monteys also made a motion for a new trial but did not specifically cite Stebbins' dismissal or the fact that the jury was not instructed to allocate damages between the Monteys and Stebbins as reasons for granting

the new trial. The Monteys did, however, specifically cite the jury instructions relating to a speed contest as a reason for granting a new trial. The district court denied the Monteys' motion.

The Monteys and Stebbins each filed documents styled "Motion for Clarification," requesting that the district court clarify whether the new trial granted to Maxwell against Stebbins was to include the Monteys and Stebbins as defendants. In the Monteys' filing, they requested a determination as to whether the Monteys and Stebbins would be included for apportionment purposes under the Nebraska comparative negligence statutory scheme. The district court held fast to its determination that the new trial would include Stebbins as the sole defendant and the Monteys would not be included in the trial. The court's reasoning was that the parties had not based their motions for new trial on the argument that the Monteys should be involved in the new trial for purposes of allocating damages.

Stebbins appealed and the Monteys cross-appealed the district court's decisions to the Court of Appeals. Prior to oral arguments, Stebbins and Maxwell settled their dispute and the Court of Appeals was left with the Monteys' appeal. On appeal, the Monteys assigned that the district court (1) erred in dismissing Stebbins from the trial, (2) erred in overruling the Monteys' motion for a new trial, (3) erred in granting Maxwell's motion for a new trial against only Stebbins, and (4) committed plain error in submitting a jury instruction on a speed contest after determining that no evidence existed on the issue.

The Court of Appeals affirmed the order of the district court in a memorandum opinion and judgment on appeal filed July 21, 2000. The court determined that the district court did not err in giving the jury instructions regarding a speed contest because the evidence supported the instruction. The court cited Maxwell's testimony that she saw the cars in her rearview mirror traveling side by side quickly approaching her and her testimony that Stebbins "whooshed" past her as enough evidence to support the instruction. The Court of Appeals then consolidated the Monteys' remaining assignments of error into one issue: Whether the Monteys were denied their right to have the jury allocate the liability between the Monteys and Stebbins under Nebraska's comparative negligence system. The court found

that "Montey does not have an unfettered right to include other joint tort-feasors in the case when the plaintiff pursues a claim under the first paragraph of § 25-21,185.10 . . . . For the same reason, Montey had no right to be included in the new trial between Maxwell and Stebbins." The Monteys subsequently filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

In their petition for further review, the Monteys assign, restated, that the Court of Appeals erred (1) in finding enough evidence of a speed contest to justify submitting jury instructions on a speed contest, (2) in finding that the Monteys are not entitled to a new trial involving them and Stebbins as defendants, and (3) in failing to find that Maxwell had failed in her burden of proving joint enterprise.

STANDARD OF REVIEW

[1] 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. *Holmes v. Crossroads Joint Venture, ante* p. 98, 629 N.W.2d 511 (2001).

[2] Whether a jury instruction given by a trial court is correct is a question of law. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

ANALYSIS

Jury Instructions

[3] We first address whether the district court erred in giving the jury instructions relating to a speed contest. In their petition for further review, the Monteys argue that it was plain error for the district court to give the jury instructions on a speed contest after the district court granted Stebbins' motion for directed verdict. The Monteys did not object to the speed contest instructions at trial despite being asked whether they had an objection to the specific instructions relating to a speed contest. Therefore, the Monteys properly point out that in order to reverse the district court's decision on the basis of its speed contest instructions to the jury, it is necessary for the district court to have committed plain error in so instructing the jury. Failure to object

to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

The Monteys complain of jury instructions which informed the jury that if the jury found that Montey had violated a Lincoln city ordinance prohibiting speed contests, it could take such violation into account when determining whether Montey was negligent. Specifically, jury instruction No. 2, which addressed Maxwell's claims against the Monteys and the burden of proof, stated, in part, the following:

> The plaintiff, Jennifer Maxwell, claims that the defendant, Kristy Montey, was negligent in one or more of the following ways:
>
> 1. Failing to keep a proper lookout;
> 2. Failing to keep her vehicle under reasonable control;
> 3. Driving in excess of the speed limit and in excess of that which is reasonable and proper; and
> 4. Participating in a speed contest.

Instruction No. 4 listed the contents of several Lincoln city ordinances and Nebraska statutes. One of the listed ordinances prohibited speed contests: "**10.14.270 Speed Contests.** (a) It shall be unlawful for any person to engage in or participate in any motor vehicle speed contest or exhibition of speed upon the streets of the city as the operator of a motor vehicle." Instruction No. 3 stated that if the jury found that Montey had violated a city ordinance, such violation would not necessarily prove negligence, but it would be evidence that the jury could consider in its deliberation.

The Monteys assert that Maxwell's testimony that she saw headlights in her rearview mirror and saw Stebbins' car "whoosh" past her was insufficient to warrant jury instructions regarding a speed contest. The Monteys assert that there needed to be evidence of the relative speeds of the vehicles before an instruction on speed contests could be given. Further, the Monteys complain that by giving the speed contest instructions, the district court allowed the jury to infer that Montey was involved in a speed contest while Stebbins, whose actions relating to a speed contest cannot be distinguished from Montey's

actions in this case, was dismissed from the case. Therefore, the Monteys claim that giving instructions relating to a speed contest constituted a miscarriage of justice.

[4,5] Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000). A jury instruction is not error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues. *Id.* Because of Maxwell's testimony that she saw the headlights in her rearview mirror, that the cars were side by side and quickly approaching, and that Stebbins "whooshed" past her, we find that the evidence adduced at trial supports the speed contest instructions. Stebbins' early dismissal from this case does not impact upon whether sufficient evidence was adduced at trial for a jury to infer that Montey was involved in a speed contest. Additionally, we note that after Stebbins was dismissed from the case, the district court admonished the jury to refrain from speculating as to why Stebbins was no longer in the courtroom. Further, Stebbins was neither referred to in any jury instructions nor referred to in the verdict forms.

We agree with the Monteys' assertion that by instructing the jury on a speed contest, the jury was able to infer that Montey had engaged in a speed contest—such was the purpose of the speed contest instructions. Because there was sufficient evidence adduced at trial to support the inference and, consequently, to support instructions on a speed contest, it was proper to allow the jury to make such an inference. Therefore, we find no plain error in instructing the jury on a speed contest. The Court of Appeals did not err in upholding the district court's decision to instruct the jury on a speed contest.

New Trial

The Monteys' remaining arguments in their petition for further review essentially assert that there should be a new trial involving both the Monteys and Stebbins as defendants so that damages can be apportioned between them. First, the Monteys argue that they are entitled to an allocation of damages between them and Stebbins under Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995). Section 25-21,185.10 states the following:

> In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.
>
> In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

We conclude that the Monteys cannot avail themselves of this section's allocation provisions in the case at bar.

[6,7] 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. *Fontenelle Equip. v. Pattlen Enters., ante* p. 129, 629 N.W.2d 534 (2001). Section 25-21,185.10 is narrow in scope in that it addresses only a situation where there are multiple defendants in a lawsuit. Under § 25-21,185.10, it is possible, under certain circumstances, for multiple defendants to have a percent of noneconomic damages allocated to them by the finder of fact based on each defendant's percentage of negligence. However, under the plain language of § 25-21,185.10, there must first be multiple defendants in the case before the allocation provisions of § 25-21,185.10 will operate. Therefore, in situations where there is only one defendant remaining in a case, the provisions of § 25-21,185.10 simply do not operate.

[8] We now address how to determine whether there are, in fact, multiple defendants in a case for purposes of § 25-21,185.10. In its application, § 25-21,185.10 only operates at the point when a finder of fact has determined the liability of the parties involved in a case and is apportioning damages between those parties. Because the statute's effect is on only the apportionment of damages between multiple defendants after

liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact. In other words, if there is only one defendant in a particular case at the point the case is submitted to a jury, the jury will not be allowed to allocate a percent of damages or negligence to "phantom" defendants who have never been part or are no longer part of a proceeding. Again, only when there are multiple defendants in a case at the time the case is submitted to the finder of fact can there be the possibility of an allocation of damages between defendants under § 25-21,185.10.

In the instant case, Stebbins was dismissed from the case at the close of Maxwell's case in chief. After Stebbins was dismissed and, importantly, when the case was submitted to the finder of fact, there were only the Monteys as defendants. We observe that the Monteys did not timely preserve in the district court the issue whether Stebbins should have remained a part of the trial for apportionment purposes. The Monteys did not object to the district court's granting a directed verdict in favor of Stebbins, nor did the Monteys object to Stebbins' dismissal from the case. The Monteys' motion for new trial merely addressed the issue of jury instructions relating to a speed contest. In fact, the first time the Monteys raised the issue whether damages should be apportioned between the Monteys and Stebbins was in the Monteys' filing styled "Motion for Clarification." Any objection the Monteys could have raised in their filing styled "Motion for Clarification" would, at best, be likened to a motion for reconsideration, which is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. See *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000). Such filing is insufficient for purposes of asking a trial court to pass upon an issue in order to properly preserve it for appeal.

[9-11] Because the Monteys did not timely present the issue whether Stebbins should have remained a part of the litigation in the district court, we will not address such question on appeal. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994). See,

Martindale v. Weir, 254 Neb. 517, 577 N.W.2d 287 (1998); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). Further, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001). In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000).

[12] The Monteys also seem to argue, in their petition for further review, that by granting Stebbins' motion for directed verdict, the district court prevented them from seeking contribution against Stebbins. With respect to claims of contribution between negligent joint tort-feasors against whom judgment has not yet been rendered, we have stated that a judgment debtor may pursue an action of contribution against those whom a plaintiff has successfully obtained a judgment against as well as those whose liability remains to be fixed. See *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992). We find the Monteys' argument unpersuasive.

Because we determine that the Monteys cannot avail themselves of the provisions of § 25-21,185.10, we do not reach the Monteys' assignment of error relating to whether they were involved in a joint enterprise under § 25-21,185.10 in this case.

CONCLUSION

We conclude that the district court did not commit plain error by giving the jury instructions relating to a speed contest. Further, the Monteys were not entitled to an allocation of damages between them and Stebbins because the plain language of § 25-21,185.10 allows for only the possibility of allocation of damages between defendants when there are multiple defendants at the time the case is submitted to the finder of fact. For all of the reasons stated above, we affirm the judgment of the Court of Appeals.

AFFIRMED.

JERALD W. MCDONALD, APPELLEE, V. GERALD E. MYRE AND JOAN MORRISON-MYRE, APPELLANTS.

631 N.W. 2d 125

Filed July 13, 2001. No. S-00-201.

1. **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.
2. **Pleadings.** A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Judgment affirmed. Motion for contempt denied without prejudice.

J. Bruce Teichman for appellants.

Robert E. Sullivan and Thomas J. Klein, of Haessler, Sullivan, Klein, Ltd., for appellee.

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

STEPHAN, J.

Gerald E. Myre and Joan Morrison-Myre appeal from an order of the district court for Saunders County which determined a disputed boundary line between their property and the adjoining property of Jerald W. McDonald. Finding no error, we affirm.

FACTS

The Myres and McDonald own adjoining lots in Woodcliff, a lakefront subdivision in Saunders County. McDonald purchased Lot S-1078 from the original developer of the subdivision in August 1995. At the time McDonald purchased Lot S-1078, Chuck Mangimelli occupied the adjoining Lot S-1077. Gerald Myre purchased Lot S-1077 from Mangimelli in July 1996. In June 1997, Gerald Myre executed a quitclaim deed conveying the property to himself and the then Joan Morrison, whom he

subsequently married. Lot S-1078 is located generally south of Lot S-1077.

McDonald filed an amended petition on December 1, 1998, asserting that the Myres committed a trespass by locating a propane tank on his property. McDonald requested an order directing the removal of the propane tank from Lot S-1078 and other equitable relief. In their answer filed on February 11, 1999, the Myres admitted ownership of the propane tank but asserted that it was located on Lot S-1077. In a cross-petition filed the same date, the Myres alleged title to the disputed real estate under the theory of adverse possession and requested that the court quiet title in their favor.

A bench trial was held on August 6, 1999. Prior to the presentation of evidence, counsel for the Myres orally informed the court that the answer may need to be amended and requested permission to raise any necessary matters at the conclusion of McDonald's case, which permission the court granted. In opening statements, counsel for the Myres further informed the court as follows:

> [COUNSEL]: Your Honor, I believe that this — this matter as a matter of case law involves a boundary dispute. And in order to — I believe, if I can be of assistance here, the Petition is a Petition in Ejectment and when a Petition is filed in ejectment and an Answer is filed, a boundary dispute comes into play.
>
> I may as well do this now. The defendant filed an Answer and Counterclaim, and under the Answer and Counterclaim, we filed an action in quiet title. I think the counterclaim is captioned the Cross Petition under Rush Creek Land and Livestock. The Supreme Court of Nebraska in 1998 decided that even if the pleadings do not accurately depict what is going on, and they do not as a matter of law, that the court will consider the case a case under 34 — Nebr. [sic] Rev. Stat. 34-301, which comes into play as a boundary dispute. Your Honor, if I may approach, I have copies of the Rush Creek Land and Livestock case.
>
> What we will show, Your Honor, is that — is that the defendants purchased the property that's Lot [S-]1077,

> which lies northerly, and the reason I say northerly instead of north of, I don't think it is true north of Lot [S-]1078, and they relied upon the boundaries that were historical and established as set by the developer.
>
> As such, these boundaries would indicate that the tank that the plaintiffs — plaintiff has asserted lies on the — that the plaintiff alleges is trespassing on his land lies north of the boundary lines, and, therefore, the defendants are not trespassing.

Several witnesses testified at the trial. Louis Austin, the Saunders County surveyor, testified on behalf of McDonald. Austin prepared a survey of Lot S-1078 at the request of McDonald on July 30, 1996. This survey established that the propane tank was located on Lot S-1078, as alleged by McDonald.

On cross-examination, Austin testified that John Poehling was the developer of the Woodcliff subdivision and was originally the owner of all of the lots in the subdivision. The lots at Woodcliff were surveyed at one time, and a copy of the platted survey map was filed in Saunders County. Austin testified that at the time he conducted the survey of Lot S-1078 for McDonald, he saw a metal post with the lot identifier number "S 1078" near the shed in the northwest corner of Lot S-1078. Austin had been to the Woodcliff subdivision 80 to 90 times and testified that similar posts were at many locations in Woodcliff. He testified that he did not know who put the metal post in and that the post did not influence the establishment of the lot line by surveying. On recross, Austin stated that a surveyor could not rely on the metal post as a monument, but that it may be collateral evidence.

McDonald testified that after the survey showed the propane tank was located on his property, he initially asked Mangimelli, who then occupied Lot S-1077, to remove it. Subsequently, when the Myres moved onto Lot S-1077, McDonald requested that they remove the propane tank. On cross-examination, McDonald admitted that the metal post was in its present location at the time he purchased Lot S-1078. McDonald further testified that there was a wooden fence located on Lot S-1078 at the time of his purchase. Other testimony indicated that the fence was directly aligned with the metal post. McDonald

offered no testimony regarding the representations, if any, made to him regarding the metal post and the boundary line between the properties at the time of his purchase.

The court overruled the Myres' motion for a directed verdict at the conclusion of McDonald's case in chief. The Myres made no motion at the close of McDonald's evidence to amend their answer or counterclaim.

Patrick Poehling (Poehling), the son of the original Woodcliff developer, was called as a witness by the Myres. Poehling worked with his father in the Woodcliff subdivision for many years. According to Poehling, the Woodcliff subdivision was platted and filed with the county in 1978. The original surveyor put pins or rebar on the four corners of each lot, and the developer would often put wood or metal posts on top of the rebar. The posts were used to designate the location of the lot line and the address of the particular lot. Of 445 platted lots at Woodcliff, there were 200 to 250 metal posts.

Poehling testified that he was present 200 to 250 times when lots were shown to buyers and when lots were sold. Although he was the listing agent for the 1995 sale of Lot S-1078 to McDonald, Poehling could not recall showing the property to McDonald and did not know if he had pointed out the lot line to McDonald at that time. Poehling also did not recall whether he showed Lot S-1077 to Mangimelli. He did testify, however, that he showed Lot S-1078 more than five times to prospective purchasers and had occasion to point out the lot boundaries. According to Poehling, he would show prospective purchasers the markers or posts and say he believed that such markers identified the property line but that a survey would be required to prove it. On cross-examination, he testified that property in the subdivision was sold according to the survey platted and recorded in Saunders County, not according to markers on the property. He further stated that his general practice was to tell buyers that if they had a property line question, they should have a survey done.

In 1987, Poehling helped install the water system at Woodcliff. At that time, owners of the lots were asked where they wanted their "curb box" located. A curb box is the pipe attached to the main water line which is used to regulate the

flow of water to an individual home. The location of each curb box was recorded in a book maintained by the developer. According to the book, the Lot S-1077 curb box is 5 feet north of the south property line of that lot. Poehling testified that he measured from the metal post identifying Lot S-1078 and located the curb box approximately 5 feet from this marker. On cross-examination, he clarified that the curb box book was not meant to establish the property line, but was meant only to provide a record of the location of the curb box.

Gerald Myre testified that he did not see the plat when he purchased Lot S-1077 from Mangimelli. At the time of purchase, a real estate agent showed Myre the metal post identifying Lot S-1078 and represented that the line from that post to the seawall was the property line. According to Gerald Myre, the south border of his seawall is directly east of the post. Gerald Myre considered the post to be his south boundary line and stated that lots without such an identifying post are the exception in his area of the subdivision. He further testified that if Austin's survey is the correct representation of the boundary line, he will lose access and egress to his driveway and garage. On cross-examination, Gerald Myre admitted that he had a survey conducted in 1997 which showed the lot line very close to that established in Austin's survey. He further stated that his 1997 quitclaim deed conveyed Lot S-1077 as "surveyed, platted and recorded."

The court conducted a site visit on September 9, 1999. Thereafter, on September 21, the court entered an order requiring the Myres to remove the propane tank. In its order, the court found that the matter was "essentially a boundary dispute" which is tried as an action in equity pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1998). The court dismissed the Myres' cross-petition alleging adverse possession after finding insufficient evidence to support the claim.

In setting forth the arguments of the parties, the court noted that the Myres relied upon a marker "which was apparently placed on the lot by the developer," while McDonald relied upon a professional survey. The court found that the lot line is as established in the survey and directed the Myres to remove the tank within 90 days. In a motion for new trial filed on September 28, 1999, the Myres alleged that the court failed to determine the

matter pursuant to the common developer doctrine set forth in *Phillippe v. Horns*, 188 Neb. 304, 196 N.W.2d 382 (1972). This motion was overruled in an October 12, 1999, journal entry that was not file stamped. On October 14, the Myres filed a motion to amend their answer and attached an amended answer and counterclaim. The amended answer raised a number of affirmative defenses, including acquiescence, mutual recognition, estoppel, and the establishment of a common boundary by a common grantor. The proposed amended counterclaim was based on § 34-301 and generally alleged that the metal post was erected by the developer to mark the property lines and that purchasers relied upon such posts as the boundary lines. McDonald objected to the motion to amend the answer and counterclaim. On November 3, the district court overruled the motion to amend.

The Myres appealed to the Court of Appeals on November 9, 1999. That court dismissed the appeal as premature for lack of a final order due to the October 12 order that was not file stamped. The Myres thereafter filed a motion to file stamp the October 12 order, which the district court subsequently granted in a new order dated February 7, 2000. The Myres then filed this timely appeal, which we removed to our docket pursuant to our power to regulate the caseloads of the appellate courts of this state.

During the pendency of this appeal, the Myres filed a "Verified Motion for Issuance of Citation for Contempt," alleging that McDonald violated a supersedeas bond and order by pulling out the boundary marker, pulling out and cementing in waterlines, shutting off the Myres' gasline, and constructing a fence across the Myres' property. McDonald filed a verified response denying the material allegations of the motion. By order of the court, the motion was held in abeyance until final disposition of the appeal.

ASSIGNMENTS OF ERROR

The Myres assign, restated, that the trial court erred in (1) holding that the survey controlled over a boundary line fixed by monuments provided by the common grantor of a subdivided lot; (2) failing to adjudicate the case according to the evidence presented, even if such evidence was at variance with the pleadings, when no objection was made; or (3) failing to permit the filing of an amended answer and counterclaim to conform to the evidence.

STANDARD OF REVIEW

[1] 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. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000); *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000).

[2] A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *Parnell v. Madonna Rehab. Hosp.*, 258 Neb. 125, 602 N.W.2d 461 (1999); *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

ANALYSIS

All of the assignments of error asserted by the Myres rest upon their claim that this case is controlled by *Phillippe v. Horns*, 188 Neb. 304, 196 N.W.2d 382 (1972). *Phillippe* involved a boundary line dispute between adjoining property owners in a residential subdivision. The evidence in that case established that the county surveyor had surveyed the subdivision lots in 1960 and, at that time, marked the lot corners with wooden stakes and iron pipes. When the original developer subsequently conveyed lots to the plaintiffs and the defendants, the boundaries of the particular lots at issue were pointed out by referencing the iron pipes. Emphasizing that the evidence revealed that "at the time of the purchases it was the intention of the common grantor and the grantees that such stakes marked the common boundary line of the lots on the ground purchased by the plaintiffs and the defendants," *id*. at 306-07, 196 N.W.2d at 384, we held that

> [w]here conveyances from a common grantor to adjoining landowners describe the premises conveyed by lot numbers, but adjoining owners purchase with reference to a boundary line then marked on the ground, the boundary line, as marked on the ground by the common grantor, is binding upon such adjoining landowners and all persons claiming under them irrespective of the length of time which has elapsed thereafter[,]

id. at 307, 196 N.W.2d at 384.

The material facts in this case are distinguishable from those presented in *Phillippe v. Horns, supra*. The rule announced in *Phillippe*, by its very terms, applies to those situations in which a common grantor and both adjoining landowners reference specific monuments and intend such monuments to establish the boundary line. Although Gerald Myre testified that a "listing agent" of the real estate agency represented to him at the time of his purchase that the metal post established the boundary line between Lots S-1077 and S-1078, the record reveals that the Myres received title to Lot S-1077 from Mangimelli, an owner other than the original developer. No evidence was offered relating to representations made by the developer to Mangimelli, the Myres' predecessor in title, with respect to the boundary line. In addition, while McDonald acknowledged that he was aware of the metal post at the time of his purchase, no testimony was elicited from him relating to the grantor's representations at the time of McDonald's purchase. Moreover, and perhaps most important, the undisputed testimony of Poehling established that it was the developer's general practice to inform prospective purchasers that any markers may indicate the boundary line, but that a survey would be necessary to conclusively establish the line. Poehling further testified that lots were sold according to the platted survey, not according to any markers on the property. Thus, assuming without deciding that the existence of a single marker on Lot S-1078 could establish a boundary, the evidence presented at trial clearly fails to establish a conveyance by a common grantor to adjoining landowners with reference to a marked and binding boundary line.

On these facts, the rule of *Phillippe v. Horns*, 188 Neb. 304, 196 N.W.2d 382 (1972), is clearly inapplicable. Accordingly, the district court did not err in not applying the common grantor doctrine. Moreover, because the Myres moved to amend their pleadings only to conform with *Phillippe*, the district court did not abuse its discretion in denying the motion.

Based upon our de novo review of the record, we agree with the district court that the Myres failed to establish title by adverse possession of the disputed area and that the boundary between Lots S-1077 and S-1078 is that shown on the survey.

The record further establishes that the propane tank was situated on McDonald's property and that McDonald was entitled to an order directing the Myres to remove it.

The Myres' motion for contempt raises disputed factual issues which were not resolved by the district court because of the pendency of this appeal. To the extent they are not rendered moot by our affirmance of the judgment of the district court, the issues raised in the contempt motion should be resolved by the district court upon remand. Accordingly, we deny the motion without prejudice.

CONCLUSION

For the reasons stated herein, the orders of the district court establishing the disputed boundary, directing the removal of the propane tank from McDonald's property, and denying the Myres' motions to amend and for new trial are affirmed. The Myres' verified motion for contempt is denied without prejudice.

JUDGMENT AFFIRMED.
MOTION FOR CONTEMPT DENIED WITHOUT PREJUDICE.

McCORMACK, J., not participating.

JAMES H. HEESACKER, APPELLANT, V.
TWILA D. HEESACKER, APPELLEE.

629 N.W. 2d 558

Filed July 13, 2001. No. S-00-309.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody: Child Support: Rules of the Supreme Court.** The determination that parents have joint physical custody for the purpose of calculating child support obligations under the joint custody worksheet is not based on simply the percentage of overnight visits a noncustodial parent has with his or her children.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Michael F. Pistillo and Mark A. Steele, of Pistillo & Pistillo, P.C., for appellant.

Ronald E. Frank and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellee.

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

CONNOLLY, J.

James H. Heesacker appeals from a decree of dissolution. The only issue on appeal is James' child support obligation. The district court used the sole custody worksheet instead of the joint custody worksheet to determine James' child support obligation. We determine that James' liberal visitation schedule was not a joint physical custody arrangement. Accordingly, the trial court's use of the sole custody worksheet was correct. We affirm.

ASSIGNMENTS OF ERROR

James assigns that the district court erred in (1) failing to use a joint custody worksheet to determine his child support obligation, (2) failing to find that he paid an equal amount of day-to-day expenses for his child under the joint physical custody arrangement, and (3) finding that *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), required him to have physical custody at least 40 percent of the time before the joint physical custody guidelines could be used for calculating his child support obligation.

BACKGROUND

During their marriage, James and Twila D. Heesacker had one child, Shannon, born January 12, 1990. They separated in 1998, and James filed for divorce in 1999. Through mediation, the parties agreed to joint custody. At trial, counsel for the parties recited their stipulations regarding the joint custody arrangements. James was to have custody of Shannon on alternating weekends from Friday after school until Monday morning and from Wednesday after school until Thursday morning. In addition, James was to have custody an additional Friday night each month and one other day each month at a time to be

agreed upon by the parents. The visitation plan also called for each parent to have custody of Shannon for one-half of her summer and winter breaks from school, with holidays and birthdays split on an alternating yearly schedule.

At the time of trial, James' gross monthly income was $1,617. Twila testified that her gross monthly income was approximately $2,980. James submitted four joint custody worksheets to the court for calculating the parties' child support obligations. The first two worksheets were based on James having physical custody of Shannon for 12 days a month, which he calculated to be 39.45 percent of the time. The other two worksheets were based on James having physical custody of Shannon 10 days a month, which he calculated to be 32.88 percent of the time. Twila submitted a single worksheet based on sole custody of Shannon.

The district court found that "the evidence clearly shows that [James] spends no greater amount of time than 35% with the minor child." The court further found that it could not use a joint custody worksheet for determining James' child support obligations because he did not have physical custody of Shannon for at least 40 percent of the time as required by *Elsome v. Elsome, supra*.

STANDARD OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000); *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001); *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

ANALYSIS

James argues the district court erred by failing to use the joint custody worksheet under the Nebraska Child Support

Guidelines because he had joint physical custody of Shannon. Twila argues that the sole custody worksheet is appropriate because she has physical custody of Shannon and is responsible for the majority of her day-to-day care and expenses.

At the close of the trial, the court found that James spent 12 days a month with Shannon and that the evidence on the amount of time was undisputed. The court further stated that the time division between Twila and James was almost exactly a 65/35-percent split, a finding that was repeated in the dissolution decree. In its order, the court stated that *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), required a parent to have physical custody of his or her child at least 40 percent of the time before the joint custody guidelines could be used for child support calculations.

In *Elsome*, we clarified that courts in joint custody cases are to differentiate between joint legal custody and joint physical custody. We directed trial courts

> to employ worksheet 3 [the joint custody worksheet] in cases of joint physical custody unless a sound reason not to do so is established by the record, in which case the trial court shall indicate in the findings portion of the child support decree or order or on worksheet 5 the reason why worksheet 3 was not used.

Id. at 900, 601 N.W.2d at 545. We defined joint legal custody as the " ' "authority and responsibility for making 'major' decisions regarding the child's welfare," ' " and joint physical custody as the " 'joint "responsib[ility] for 'minor' day-to-day decisions" and the exertion of continuous physical custody by both parents over a child for significant periods of time.' " *Id*. at 898, 601 N.W.2d at 544.

The evidence in *Elsome* showed that the father was entitled to have his support obligation determined by a joint custody worksheet when he had physical custody of the children 38 to 40 percent of the time. See *id*. The parents in *Elsome* divided their time with their children on a 14-day cycle, which generally provided for the mother to have physical custody of the children 4 days a week and the father to have custody the other 3 days a week. See *id*. The parents had agreed to an alternating, continuous physical custody arrangement. In such cases, both parents share equally in the responsibility for their child's day-to-day care.

[3] In this case, the district court found that James had visitation with Shannon 12 days a month. Under that finding, James would have physical custody of Shannon 144 days a year, or 39.45 percent of the time, as he reported on his joint custody worksheets. Thus, if the percentage of overnight visits a year were the test under *Elsome*, the district court would have erred in its finding that the joint custody worksheet should not have been used in this case. But *Elsome* was not decided on the basis of how many overnight visits a noncustodial parent has with his or her children.

In distinguishing *Elsome*, the Nebraska Court of Appeals recently considered a visitation plan similar to the one in this case. See *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000). In *Pool*, the father had custody of his children every other weekend, plus an additional weekend day per month, weekday visitation two times a week from 4 to 8 p.m., alternating holidays, and extended summer visitation continuously from June 1 to July 31 each year. See *id*. The district court found that the father had physical custody for 33 percent of the time and determined his support obligation based on the joint custody worksheet. The Court of Appeals reversed. It determined that the evidence demonstrated that the father had been granted the " 'typical' weekend, holiday, and summer visitation rights," which did not satisfy the requirements of joint physical custody. *Id*. at 458, 613 N.W.2d at 824.

The New Jersey Supreme Court came to the same conclusion when it was asked to consider what constitutes traditional custody and visitation arrangements. See *Pascale v. Pascale*, 140 N.J. 583, 660 A.2d 485 (1995). In *Pascale*, the parents were granted joint custody with a visitation schedule for the father that included two evenings a week, a 24-hour overnight visit every weekend, and alternating holidays. In the summer, the father had overnight visits for two weekdays as well. See *id*. The court noted that "[a]lthough there is no established norm for [joint physical] custody, experts cite common schedules for a child within a joint physical custody framework as spending three entire days with one parent and four entire days with another parent or alternating weeks or even years with each parent." *Id*. at 596-97, 660 A.2d at 492.

The *Pascale* court determined that joint physical custody means "the child lives day in and out with both parents on a rotating basis. Numerous 'parenting times' with a child do not constitute joint physical custody." 140 N.J. at 597, 660 A.2d at 492. To make the distinction clear, the court referred to *McCown v. McCown*, 277 N.J. Super. 213, 649 A.2d 418 (1994), where the noncustodial parent had custody on "alternate weekends, one night per week, and alternate major holidays, including holidays like Labor Day and extended school holidays." *Pascale v. Pascale*, 140 N.J. at 597, 660 A.2d at 492. The court cited that case as an example of " 'liberal visitation' " with primary physical care vested in one parent. *Id.* Compare, *In re Marriage of Phillips*, 244 Ill. App. 3d 577, 615 N.E.2d 1165, 186 Ill. Dec. 108 (1993) (rejecting noncustodial mother's argument that deviation from guidelines was proper because of income disparity between parents and because children were with her two evenings a week, alternate weekends, one-half of summer break, and alternate holidays); *State ex rel. Lara v. Lara*, 495 N.W.2d 719 (Iowa 1993) (affirming trial court's finding that father's 50-percent visitation schedule did not justify a deviation from guidelines where deviation was allowed to provide for needs of children and do justice between parties); *Anzalone v. Anzalone*, 449 Pa. Super. 201, 673 A.2d 377 (1996) (reversing trial court's downward deviation from guidelines for father who had his children 11 out of 28 days, or 40 percent of time, under guidelines that permitted such deviation if noncustodial parent spent unusual amount of time with children).

This case is similar to both *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000), and *Pascale v. Pascale, supra*. While James has a liberal visitation schedule, Twila is still the primary caregiver. See *Pascale v. Pascale, supra*. The district court in this case found that there was no evidence that James was paying for an equal amount of Shannon's day-to-day expenses. In addition, we note that it is Twila who sees to it that Shannon is prepared and ready for school during 80 percent of the school year.

Although James argues that he incurs his own expenses for the times that Shannon spends with him, he has not argued that he incurs more expenses than any other noncustodial parent. After a divorce, both parents retain responsibility for their child's needs

regardless of their custody arrangements. But Twila is still the parent who deals most with Shannon's needs and the physical and emotional demands of her day-to-day care. We conclude that the visitation plan adopted by the district court is a grant of physical custody to Twila, with a liberal visitation schedule for James. Accordingly, the trial court was correct in calculating James' child support based on the sole custody worksheet.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GARY E. HEITMAN, APPELLANT.

629 N.W. 2d 542

Filed July 13, 2001. No. S-00-429.

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. **Entrapment: Appeal and Error.** Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law.
3. **Criminal Law: Conspiracy: Statutes: Legislature.** In enacting Neb. Rev. Stat. § 28-202 (Reissue 1995), the Legislature adopted the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code.
4. **Conspiracy.** Under the unilateral approach to the agreement element of conspiracy, only the defendant need agree with another person; the second party can feign agreement and can be a government agent.
5. **Criminal Law: Conspiracy.** In addition to an agreement, a criminal conspiracy requires an overt act.
6. ____: ____. An overt act need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
7. **Criminal Law: Entrapment: Words and Phrases.** Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for the commission of the criminal offense.
8. **Criminal Law: Entrapment: Intent.** Entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.

9. **Entrapment: Evidence: Proof.** Entrapment is in the nature of an affirmative defense, and thus, the burden of going forward with evidence of government inducement is on the defendant.
10. ____: ____: ____. A defendant need only adduce more than a scintilla of evidence to satisfy his or her initial burden when asserting an entrapment defense.
11. **Entrapment: Evidence.** A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from cross-examination of the government's witnesses.
12. **Entrapment: Evidence: Proof.** When a defendant produces sufficient evidence to raise an entrapment defense, the question of entrapment becomes one of fact with the burden on the State to prove beyond a reasonable doubt that the defendant was not entrapped.
13. **Entrapment: Words and Phrases.** Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.
14. **Entrapment: Evidence.** Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it.
15. **Entrapment: Evidence: Proof.** Where the government has induced an individual to break the law, the government must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.
16. **Criminal Law: Entrapment.** Predisposition to commit a criminal act must be independent and not be the product of the attention the government directed at the defendant.
17. **Entrapment: Evidence.** If, after the government begins inducing a defendant, he or she makes it clear that he or she would have committed the offense even without the inducement, that would be evidence of predisposition.
18. **Entrapment.** Only statements that indicate a state of mind untainted by the inducement are relevant to show predisposition.
19. **Entrapment: Circumstantial Evidence.** Predisposition may be shown by circumstantial evidence.
20. **Criminal Law: Sexual Assault.** Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault on a child under Neb. Rev. Stat. § 28-319 (Reissue 1995).
21. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, and Martin W. Swanson for appellee.

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

CONNOLLY, J.

The appellant, Gary E. Heitman, after a bench trial, was convicted of criminal conspiracy to commit first degree sexual assault on a child. In this case, Heitman initiated the events by giving a 14-year-old girl an envelope containing a sexually suggestive letter, money, condoms, and his e-mail address. After exchanging numerous e-mail messages with a police officer who was posing as the girl, and after eventually agreeing to meet the girl for a sexual encounter, Heitman was charged with the crime of which he was convicted. Heitman contends that the evidence was insufficient to convict and that he was entrapped. We conclude there was sufficient evidence to support the conviction. We further determine that the district court was not clearly wrong in finding that Heitman was predisposed to commit the crime and that thus, the district court was correct in rejecting his entrapment defense.

BACKGROUND

The record shows that on June 20, 1998, Heitman, age 53, drove to the drive-up window of a Bronco's restaurant in Omaha, Nebraska, and gave an envelope to a girl who was working at the window, whom we will refer to as "A.S." The envelope contained a $100 bill, three condoms, and a letter. The letter and other subsequently written materials in this case contain numerous spelling and grammatical errors. Because indicating each mistake would be distracting and correcting all of the errors poses the risk of altering the meaning of the messages, we have reproduced all written materials in their original form. See *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000). The letter reads as follows:

> Hello!
>
> I have been driving thru many, many times buying the fish deluxe and a vanilla shake (I'm a vegatarian) and most times I am never evan hungary! I come thru just for a glimpse of you. The magic of brushing or touching your fingers in passing change is enough to send me to bliss till the next time you are the cutest most interesting looking

> girl-woman around. I wish you were doing something else with your beauty, modeling or the like.
>
> Take this go have a nice time, buy a sexy dress for your lover, save it for school. I may be to embarrased to drive thru anymore and I will save this much, in not buying food I don't need! Good Luck! & 2 old 4 U.

Written along the side of the letter was "My e-mail is IcanBgood@webtv.net Gary!" At the time A.S. received the envelope from Heitman, she was 14 years of age.

A.S. showed the envelope and its contents to her manager, who called the police. Heitman returned to Bronco's the following weekend. A.S. went to the back of the restaurant when she saw him. Someone at Bronco's wrote down Heitman's license plate number. The police were called, and Det. Steven J. Henthorn came to Bronco's and met with A.S. and her mother.

Henthorn told A.S. that he could e-mail Heitman, posing as her, let him know that A.S. was 14, and see what Heitman would do or that he could talk directly to Heitman. A.S. chose the e-mail option. Henthorn then began to send e-mail messages to Heitman, posing as A.S. Henthorn testified that he purposely included incorrect grammar and typing errors in the e-mail messages to make them appear more authentic. Henthorn testified regarding the various techniques he used in composing the e-mail messages, including providing Heitman with opportunities to cease contact. Henthorn admitted that he took a proactive approach to the investigation because there was not enough evidence that Heitman had committed a crime when he gave A.S. the envelope and its contents. In the e-mail messages, Henthorn did not use A.S.' real name, but instead used the name "Rodeo Queen," which we will use when referring to Henthorn's e-mail messages.

Rodeo Queen first sent an e-mail message on July 27, 1998, stating that a friend saw her receive the envelope from Heitman and had told Rodeo Queen's parents. Rodeo Queen wrote that her parents would not let her work at Bronco's if she talked to Heitman. She explained that she did not have a computer at home and that she was using a friend's computer. Henthorn testified that the friend, "Sue," was not a real person. Rodeo Queen then wrote, "ican not see you at work but if yowant me to write again just send the message bg yes if you dont just send bg no

sue says she will let me know." In the first message, Rodeo Queen did not state her age. Heitman replied with one message, stating "bg yes," and another, stating "A hundred ,thousand,million,trillion yes,s."

In her next e-mail, dated July 29, 1998, Rodeo Queen told Heitman her age. Rodeo Queen wrote:

> I am so glad that you think i should be a model my mom and dad say no that 14 is to young for that. maybe we could write to each other till i get my computer and my own email what do you think? hope to hear from you soon. it is so nice to talk to someone who understands me and my needs. i could go on all day but i better get this off.

Heitman sent the following reply:

> HI ! I must admit I am a little surprised to hear from you. . . . After the last time I drove thru your window at work. And was greeted so strangely by everyone, I havent been near the place since it was all to embarrassing. I feel the same about you, nothing has changed, I only want to say the last thing I want to see is any problems for you or for myself. How is it you are working at [Bronco's] and you are 14? . . . Love You me.

A little less than an hour later, Heitman wrote:

> Hey, ok, so It is going to be difficult for me to be just a freind. it must be pretty clear to you in light of my first offering to you. I only hope to God you didnt think I was offering you money for sex. . . . The condoms, I don't know were just a spur of the moment thing, I guess I was feeling, you being what you are, young, alarmingly beautiful , sweet and probably quite intelligent. Would have a long line of guys waiting to be the one. They were a symbol from me to protect yourself.

Rodeo Queen replied that she was able to get a work permit to work at Bronco's, explained that she used the name "Rodeo Queen" because she liked horses, and reminded Heitman that it was best if he did not go to Bronco's. Rodeo Queen wrote that her friend Sue was the only one who understood her. She then added that "boyes well just forget it the ones my age dont know anything about girls and i am just to young for the older guys at school it is such a pain." Heitman replied in part, "Rodeo Queen

I Love You . . . . Its crazy but true,maybe I shouldnt write you anymore . . . . I have no defenses against a beautiful woman no matter the age. I will write if written to Love you." Rodeo Queen next wrote:

> I thought that the money was for a sexy outfit Ididnt know if you wanted me to model it for you i didnt think that you paying me to have sex with you not that that would be all-wrong i guess sometimes i have these thoughts and feelings that i need to take care of. Sue and i talk about this and sometimes we do well you know i just want you to know that i am not mad at you and i was wondering why you gave me 3 rubbers i just thought you could use that many if you know what I mean. i will tell you somerthing if you promise not to tell and that i dont know much about guys excpt what sue and i talk about i dont know what they like and what they dont like what i can do to make them happy. When i got that stuff from you i thought maybe a real man was going to teach me dont know if i was wrong or not. sorry about you not being able to come around but if anyone sees you mom says i cant work ther any more Rodeo Queen

Heitman replied:

> OK So I am wanting to be the one, that wants you the most. I m yours to do whatever you want with me. And I will be a gentleman with and for you as you learn your way around. Excuse me if I am if I am missunderstanding you but are you telling me that Sue and you are fooling around or sexually involved, if you are that is to hot . . . Love You me

On July 30, 1998, after exchanging several more e-mail messages, Heitman wrote a lengthy message telling Rodeo Queen about himself. In the message, Heitman stated, "First I want to say I dont know where this Love will take me,I just hope it isnt to jail." Heitman also wrote, "All my love affairs and 2 sons have been thru much younger women, I cant ever remember dating or seeing someone my own age its not something I worked at it just happens . . . ."

Heitman next sent an e-mail message to Rodeo Queen asking what color her fingernails were on the day that he gave her the envelope. Without answering the question, Rodeo Queen replied that her mother had seen a vehicle like the one Heitman drove

and indicated that her parents discussed sending her away. In the same e-mail message, Rodeo Queen then wrote:

> I dont want to leave you now that i know you. there is so much to learn and i was hoping that you could be my teacher. I dont want you to think that sue an I are gay we just share everything she is a yer younger that i am . . . so you wnat to make love to me :) can you tell me how you would do that. you said that you have had younger girlfriends like me did you teach them to.

Heitman replied, stating that he wanted to continue to communicate but that he needed to know the color of Rodeo Queen's fingernails on the day he gave her the envelope. Heitman then wrote:

> ITs because I am paranoid, I am not sure you are who you say you are. And no I am not a pedophile someone who is only attracted to young people this is nothing like that. Whn I said all my experiences with women were all much younger than me it is the truth they were all of legal age though you are new and somewhat frightening territory for me and as I said before I dont want any problems for you or myself. You must remember the color you wore it for a long time---Guess

Heitman also asked if Rodeo Queen could not tell him the color of the fingernail polish, he would like her to call him because he knew her voice. Henthorn testified that he did not know the color of A.S.' fingernail polish. Henthorn wrote to Heitman as Rodeo Queen, replying that she did not remember. Henthorn testified that he also gave Heitman an opportunity to get out of the situation by writing that Rodeo Queen would understand if Heitman did not want to write to her anymore. Heitman replied:

> ok you know how I feel about you, i am not sure where to go from here. I had no Idea you are as young as you are! We need to start out slowly as freinds ok. I dont want to loose any of the confidence you may have in me. ------- Love You

Heitman and Rodeo Queen exchanged several more e-mail messages regarding the possibility of conversing by telephone, the possibility of not continuing to correspond, and Heitman's trust

in Rodeo Queen. In one of the messages, Heitman stated, "Please dont end this if I am willing to risk my freedom for you . . . ." One of Rodeo Queen's messages was signed, "Love your Rodeo Girl." Rodeo Queen then agreed to call Heitman.

Henthorn arranged to have A.S. call Heitman on July 30, 1998. During the call, Henthorn monitored the conversation and wrote notes to A.S. telling her what to say. A.S. called Heitman and told him that she thought the color of her fingernail polish was green but that she was not sure. Heitman agreed that it was green. During the conversation, Heitman indicated that he could be sexually creative. A.S. encouraged him to use e-mail to describe how he could be sexually creative.

After the telephone call, Heitman wrote a lengthy and detailed message to Rodeo Queen describing a sexual encounter between himself, Rodeo Queen, and Sue in a park, which he attached to an e-mail message. Heitman then wrote an e-mail message expressing his love for Rodeo Queen and stating that he was sending her something that was part fantasy mixed with his desires for her. He stated that if it offended her, he would stop. In a separate message, Heitman stated, "Yes if I were to take your virginity, 3 rubbers may be insufficient or I may choose not to use them at all." In another message, referring to the attachment, Heitman stated, "Well, you did ask me in your first note of the day yesterday how I planned on making Love to you. This is how I would begin. So let me know what you think."

On July 31, 1998, after several e-mail messages were exchanged between Rodeo Queen and Heitman, Rodeo Queen wrote:

> we got it we got it i can hardly type i am so excited i cant believe that you understand me so well sue and i are so happy that you want to include her to we had hoped that you would but was afraid to ask we thought that was to much to hope for what you wrote is wonderful i can hardly wait to hear more i will be back this afternoon :) :) :) :) :)
> Rodeo Queen

After Heitman wrote several more e-mail messages describing his fantasies of sexual encounters between him, Rodeo Queen, and Sue, Rodeo Queen replied, "i am so glad that you are letting me know how i can make you happy you will not believe how

happy sue and i are and we will be even happier later thinking about you the whole time."

On August 1, 1998, Heitman wrote an e-mail message stating he would like to purchase sexual items for both Rodeo Queen and Sue to keep in their rooms and that he had bought them each something to wear. Heitman stated that Rodeo Queen and Sue were to give some thought as to how he could get the items to them. Heitman also sent several messages asking for details regarding any sexual encounter that might have happened between Rodeo Queen and Sue. Rodeo Queen replied:

> you caouldnt believe how good it was sue and i decided that since you are the special one and the teacher we are going to tell you all about it together we dont want you to stop writing so we will just have to surprise you . . . you really havent told me what you would want us to do to make you as happy as we are

Heitman responded that he would like Rodeo Queen and Sue to fall in love and stated, "It is going to be very difficult for you and I to be lovers as I would like. I would like Sue to be there to serve you as I cant."

Rodeo Queen replied, "we are not teasing believe me we have a big surprise for you i thought we would wait until till we knew for sure.i think that we can get away for 3 to4 hours so we can all get together." In another message, Rodeo Queen wrote:

> i do not know if things are moving to fast or what i dont know if you want to try to get together or if you just want to keep it this way it seems like i have been waiting forever for some like you and now that you are here i cant believe it we want to be laying nesxt to you on either side and be telling you what we did we think that is something that you would like am i wrong . . . Love your Rodeo Queen

Several more e-mail messages were then exchanged, including one in which Heitman stated that what would make him happy would be if Rodeo Queen and Sue let him watch them make love to each other. Heitman then wrote a long e-mail message stating that he did want to meet them and asked if they would wear sundresses. In his message, Heitman stated that there was more in the bargain than he had thought or hoped, adding, "I only hope it doesnt double my jail sentence as well." Rodeo Queen replied that

she and Sue had purchased sundresses and included a suggestion that she and Sue would perform oral sex on each other when they met with Heitman. Heitman then wrote a short e-mail message of a sexual nature, followed by another lengthy description of a sexual encounter between himself, Rodeo Queen, and Sue.

Henthorn, now posing as both Rodeo Queen and Sue, continued to exchange e-mail messages with Heitman. In these messages, Rodeo Queen wrote that her parents were taking her on a trip to Kansas and that they had only 2 more days before she would leave. Rodeo Queen then suggested that they meet for the first time in a motel room. Additional messages between Heitman and Rodeo Queen were sexual in nature, and others were in regard to setting up a meeting on Wednesday, August 3, 1998, at a motel. In one message, Rodeo Queen wrote, "we are glad that you know how to do it without hurting us we were worried that it would hurt." Heitman replied, "That it will be painfree is difficult to say . . . ." In another message, Heitman asked if Rodeo Queen and Sue expected to remain virgins through Wednesday. Rodeo Queen replied, "no a hundred thousand million trillion times no we want to give everything we can to you."

Also on August 2, 1998, Henthorn arranged to have A.S. make another telephone call to Heitman. During the telephone call, Heitman and A.S. discussed arrangements for meeting at a motel. Heitman suggested that it might be nice to meet in a "more innocent" place at first. In response, A.S. stated that they did not have much time. At times, the conversation between Heitman and A.S. was sexual in nature. Heitman told A.S. that he wanted A.S. to wear stockings at the meeting, while A.S. asked Heitman if he wanted Rodeo Queen and Sue to leave their underwear at home. After the telephone call, more e-mail messages were exchanged regarding the meeting at the motel. In these messages, Rodeo Queen continued to express her excitement about meeting and continued to include sexual suggestions in some of the messages. In one of Heitman's last messages, he wrote in part that "[t]he reality is, I have no master plan. I have tried to imagine things as I think they may or should take place. And have decided to let nature take its own course."

On August 3, 1998, the police arrested Heitman at the motel. In the motel room, police found the prescription drug Viagra,

two sundresses, two packages of sheer stockings, five condoms, flavored lubricant, three vibrators, a package of batteries, a videotape entitled "The Lover," two pairs of panties, and a man's robe. The refrigerator contained three bottles of beer, two soft drinks, and a bucket of ice.

Heitman signed permission forms for the officers to search his vehicle and apartment. In his vehicle, the police found a Bronco's napkin. At Heitman's apartment, the police seized a Sony webtv system. The police also found a sheet of paper which listed words such as "Model outfit 'yes,' " "No $ 4 sex 'no,' " and "we got it we got it." Written twice on the side of the letter was "entrapment???" with lines drawn through it.

In finding Heitman guilty, the district court noted that Heitman was the one who had initiated the contact and then had returned to Bronco's a week later. The court found that there had been multiple overt acts in furtherance of a conspiracy. The court then stated:

> As to any issue of whether or not he was predisposed to commit this offense, I — the examples are so numerous that we again would be sitting here all day if I went through every example of every e-mail and the physical exhibits that were received, but just some kind of note, the fact is he approached her and gave her the letter . . . on June the 20th of 1998, not the other way around. Also, the Defendant returned the following Saturday to the Bronco's store. The fact that the Defendant double-checked her on the color of her fingernail polish that she wore on June 20th when he saw her to deliver the note indicates what his intent was, what his purpose was, but that he was trying to be careful so that he wouldn't get caught. He also, I note, at least four times in the e-mail transmissions is given an option to break off the contact with this little girl by the police and he ignores all four options. . . . [T]here is an e-mail transmission where the Defendant makes a statement that he has no defense against beautiful women — now, he is talking, he thinks, to a 14-year-old girl — no matter what the age, so it is very apparent that it's been impressed upon him her age. Also . . . I hope this love won't take me to jail.

> So it is very apparent that the Defendant is predisposed to commit the offense and that he is being as careful as he can not to get caught committing the offense, but that he is definitely going to give it a try if he thinks that the road's in his favor of successfully completing this sexual liaison with 14- and 13-year-old girls.

The district court sentenced Heitman to 8 to 12 years' imprisonment. Heitman appeals.

ASSIGNMENTS OF ERROR

Heitman assigns, rephrased, that the district court erred in (1) finding him guilty when there was insufficient evidence to establish a conspiracy, (2) finding that he was not entrapped, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[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. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[2] Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982); *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967).

ANALYSIS

At the outset, we note that the State argues that this case should be dismissed for lack of jurisdiction. Specifically, the State argues that Heitman filed a motion to proceed in forma pauperis in which he failed to state in his poverty affidavit the nature of the action, defense, or appeal and a statement of his belief that he is entitled to redress as required by Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000). We reject this argument. See *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

CONSPIRACY

Heitman contends that there was insufficient evidence to convict him of conspiracy to commit first degree sexual assault on a child. In particular, Heitman argues that there was no evidence of an agreement to commit sexual penetration.

Heitman was charged with conspiracy to commit sexual assault on a child under Neb. Rev. Stat. § 28-319(1) (Reissue 1995). Section 28-319 provides that "[a]ny person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree."

Neb. Rev. Stat. § 28-202 (Reissue 1995) provides:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.
>
> . . . .
>
> A person prosecuted for a criminal conspiracy shall be acquitted if such person proves by a preponderance of the evidence that his or her conduct occurred in response to an entrapment.

[3,4] We have held that in enacting § 28-202, the Legislature adopted the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code. See, *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992); *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982); Model Penal Code § 5.03 (Tent. Draft No. 10, 1960). Under the unilateral approach, only the defendant need agree with another person; the second party can feign agreement. *Id*. This principle applies equally when the party who feigns agreement is a government agent. See *State v. John, supra*. Accordingly, the fact that Heitman's agreement was made with an officer who was posing as A.S. does not preclude his conviction for conspiracy.

[5,6] In addition to an agreement, a criminal conspiracy requires an " 'overt act.' " *State v. Hansen*, 252 Neb. 489, 500,

562 N.W.2d 840, 849 (1997). Accord *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). An overt act manifests that a conspiracy is " 'still at work.' " *Hansen*, 252 Neb. at 500, 562 N.W.2d at 849. Accord *State v. Copple, supra*. It tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. *Id*. An overt act, however, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act. *Id*.

Heitman argues that there was insufficient evidence to convict him of conspiracy to commit first degree sexual assault on a child because there was no evidence of an agreement to engage in penetration. Although Heitman's correspondence indicated his desire to watch Rodeo Queen and Sue engage in sexual activities and he indicated at times that he could not engage in sexual penetration with them, the record also contains evidence that Heitman did intend to engage in sexual penetration. During his first telephone conversation with A.S., when asked what he was comfortable with, Heitman stated, "I'm happy going all the way." Heitman later stated that he could not guarantee that his experiences with Rodeo Queen and Sue would be "painfree." In one message, Heitman asked Rodeo Queen and Sue if they intended to remain virgins through the day of the planned meeting. Rodeo Queen answered that they did not. Heitman did nothing to refute the impression that Rodeo Queen and Sue were expecting to engage in sexual intercourse with him. Rather, Heitman went to the motel as planned and took Viagra and condoms with him. As the district court noted, these items speak for themselves and provide compelling evidence that he agreed to engage in acts involving sexual penetration with Rodeo Queen and Sue. Additionally, by renting the motel room and bringing condoms, Viagra, and other items of a sexual nature to the room, Heitman also engaged in an overt act in furtherance of the conspiracy. After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of conspiracy to commit first degree sexual assault on a child beyond a reasonable doubt. Accordingly, we find Heitman's first assignment of error to be without merit.

ENTRAPMENT

[7,8] Heitman next contends that he was entrapped. Entrapment is the governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for the commission of the criminal offense. *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000). Entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. See *id*.

[9-11] Entrapment is in the nature of an affirmative defense, and thus, the burden of going forward with evidence of government inducement is on the defendant. *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). The defendant need only adduce "'"more than a scintilla"'" of evidence to satisfy this initial burden. *State v. Stahl*, 240 Neb. 501, 510, 482 N.W.2d 829, 837 (1992), quoting *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). See *State v. Graham, supra*. The defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from cross-examination of the government's witnesses. *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000).

[12] When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact. The burden is on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *State v. Connely, supra*; *State v. Stahl, supra*. The standard of review is a limited one. Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and the findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. *State v. Parks, supra*; *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967).

INDUCEMENT

[13,14] Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would

commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. See, e.g., *U.S. v. Poehlman, supra*. Inducement requires, however, something more than that a government agent or informant suggested the crime and provided the occasion for it. See, e.g., *U.S. v. Dozal-Bencomo*, 952 F.2d 1246 (10th Cir. 1991). Thus, an inducement consists of an opportunity plus something else such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive. *Id*., citing *U.S. v. Gendron*, 18 F.3d 955 (1st Cir. 1994).

In *U.S. v. Poehlman, supra*, a government agent posed as a woman seeking someone who would understand her family's " 'unique needs.' " 217 F.3d at 695. Poehlman, who was a cross-dresser and foot fetishist, initially sought only an adult relationship with the woman. The woman, however, sent e-mail messages to Poehlman in which she made it clear that she was asking Poehlman to engage in sexual activities with her children. Throughout the course of the correspondence, the woman showed acceptance of Poehlman and encouraged him to come and live with her family. After some resistance, Poehlman eventually agreed to meet the woman and act as a " 'special man teacher' " for her children. *Id*. at 696. Poehlman was convicted of crossing state lines for the purpose of engaging in sex acts with a minor. After determining that the government played on Poehlman's need for an adult relationship and for acceptance of certain sexual proclivities, the Ninth Circuit concluded that "[t]hrough its aggressive intervention, the government materially affected the normal balance between risks and rewards from the commission of the crime, and thereby induced Poehlman to commit the offense." *Id*. at 702-03.

In this case, the State went beyond simply providing Heitman with the opportunity to commit the crime. Instead, Henthorn sent Heitman numerous e-mail messages aimed at affecting his emotions and desires. Posing as A.S., Henthorn indicated to Heitman that Heitman was one of the few people who seemed to understand Rodeo Queen and indicated that Rodeo Queen wanted Heitman to be her sexual teacher. Henthorn, as Rodeo Queen, then mirrored Heitman's expressions of love for A.S. by

signing some of Rodeo Queen's letters with the word love. Rodeo Queen specifically requested that Heitman provide a description of how he would engage in sexual activity with her and encouraged him to continue writing such descriptions. Of most importance, it was Rodeo Queen, and not Heitman, who first suggested meeting at the motel. Rodeo Queen created a sense of urgency for the meeting to occur through letters from Rodeo Queen to Heitman in which she stated that she was going out of town for a period of time. During the second telephone call to A.S., when Heitman suggested they meet some place more innocent, A.S. reminded him that there was not much time. Thus, the State went beyond merely providing an opportunity to commit the crime, but instead encouraged Heitman to respond to Rodeo Queen's e-mail messages in a sexual manner and urged him to continue to think of her sexually.

We further note that the district court did not specifically discuss the element of State inducement, and instead discussed only the element of predisposition. Additionally, the State, both at trial and on appeal, focused its arguments on the issue of predisposition. Under the facts of this case, we conclude that the State induced Heitman to commit the crime.

Predisposition

Despite the fact that he was induced to commit the crime, Heitman could still be found guilty if he was predisposed to commit the crime. See *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000). Heitman argues that he was not predisposed to commit the crime and points to evidence that he initially wrote to Rodeo Queen that they were just friends, that he initially thought she was 16 years of age, and that his writings regarding sexual activity were simply expressions of fantasy.

[15-19] Where the government has induced an individual to break the law, the government must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992); *U.S. v. Poehlman, supra*. Predisposition to commit the criminal act must be independent and not be the product of the attention the government directed at the defendant. See, *id*; *State*

v. Connely, 243 Neb. 319, 499 N.W.2d 65 (1993) (discussing jurisdictions critical of *Jacobson*, but agreeing that predisposition to commit crime must exist prior to and independent of government's contact). This is not to say, however, that statements made after the government's inducement can never be evidence of predisposition. If, after the government begins inducing a defendant, he or she makes it clear that he or she would have committed the offense even without the inducement, that would be evidence of predisposition. *U.S. v. Poehlman, supra*. "But only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition." *Id*. at 704-05. Predisposition may be shown by circumstantial evidence. See *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982).

In *Jacobson v. United States, supra*, the U.S. Supreme Court reversed Jacobson's conviction of receiving child pornography through the mail. Government officials had discovered Jacobson's name on the mailing list of an adult bookstore from which he legally ordered two magazines and a brochure depicting nude children. Shortly after the legal purchase, Congress enacted the Child Protection Act of 1984, making such purchases illegal. Through five fictitious organizations and a bogus pen pal, the government made repeated efforts to explore Jacobson's willingness to break the new law by sending him various mailings. Many of the mailings represented that they were founded to protect freedom of choice and that they promoted lobbying efforts through catalog sales. After 2½ years, Jacobson ordered a magazine depicting young boys engaged in sexual activities. Jacobson was arrested, and a search of his home revealed no materials other than those sent by the government and the purchase he had made legally. The Court ruled that the defendant's conviction could not stand because the government failed to prove that the defendant's predisposition was independent and not the product of the attention that the government had directed at the defendant over the 2½-year period. See, also, *U.S. v. Poehlman, supra* (defendant not predisposed to commit crime when government, utilizing e-mail, initiated all suggestions of improper activity, defendant actively resisted, government actively appealed to defendant's emotions, and no evidence of prior interest by defendant to seek sexual activity with children was presented).

In this case, when it analyzes whether Heitman was predisposed to commit the crime, a court may only consider evidence that he was predisposed before the State became involved. Accordingly, information from the e-mail messages can be used only to the extent that they show a predisposition before the time that the State became involved. Therefore, the district court was in error when it considered facts such as Heitman's concern about the color of fingernail polish A.S. was wearing, that he ignored opportunities provided by the police to break off the contact, and that he made statements indicating that he knew what he was doing might be illegal. Nothing about these facts helps to differentiate between Heitman's state of mind before the State's involvement and afterward.

The district court also considered, however, the envelope that Heitman gave to A.S. before the State became involved and his statement in an e-mail message of "I have no defenses against a beautiful woman no matter the age." We additionally note that in another e-mail message, Heitman stated, "It is going to be difficult for me to be just a freind. it must be pretty clear to you in light of my first offering to you." All of these are relevant to Heitman's state of mind before the State became involved and indicate that Heitman was predisposed to commit the crime. In particular, the contents of the envelope that Heitman gave to A.S. provide an inference that he had a predisposition to seek sexual intercourse with her. The letter was flattering and mentioned sexuality by suggesting that A.S. use the $100 included with the letter to buy a sexy dress for her lover. More important, the envelope contained three condoms. Heitman then provided the means for A.S. to contact him by including his e-mail address, IcanBgood@webtv.net, which also could be interpreted to have a sexual meaning. This case is unlike *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535, 118 L. Ed. 2d 174 (1992), and *U.S. v. Poelhman*, 217 F.3d 692 (9th Cir. 2000), where it was the government who initiated contact or suggestions of impropriety. In this case, it was Heitman who initiated the events by giving a 14-year-old girl a sexually suggestive letter, money, condoms, and his e-mail address.

[20] Heitman argues that he thought A.S. was 16 at the time he gave her the envelope. This argument ignores the fact that

consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault on a child under § 28-319. *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991). As long as Heitman agreed to engage in sexual penetration with A.S., regardless of what he thought her age was, he could be found guilty of conspiracy to commit first degree sexual assault on a child. It is Heitman's predisposition to seek sexual penetration with A.S. that is at issue, not whether he was aware of her age.

Heitman also points to other evidence in the record indicating that he initially intended to be only friends with A.S. Heitman further argues that any sexual correspondence was simply his expression of fantasy. In addition, the record does contain evidence that Heitman had never previously dated a person under the age of 16 and that he was cautious at times about becoming sexually involved with A.S.

The fact that there is evidence supporting Heitman's position, however, is not determinative. Rather, under our standard of review, facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and the findings will be disturbed on appeal only when the preponderance of the evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law. *State v. Parks*, 212 Neb. 635, 638, 324 N.W.2d 673, 676 (1982); *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967). The district court determined as a factual finding that Heitman was predisposed to commit the crime. The district court's finding of predisposition was supported by evidence in the record, and although there was evidence against the findings, it was not so great as to make the factual finding clearly wrong. Accordingly, under our standard of review, the district court did not err in rejecting Heitman's entrapment defense.

SENTENCING

[21] Heitman contends that the district court imposed an excessive sentence. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000); *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000). Heitman was convicted of a Class II

felony, which is subject to a maximum sentence of 50 years' imprisonment and a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). We determine that the district court did not abuse its discretion in sentencing Heitman to 8 to 12 years' imprisonment. Accordingly, Heitman's assignment of error is without merit.

CONCLUSION

We determine that there was sufficient evidence to convict Heitman of conspiracy to commit first degree sexual assault on a child. We further determine that the district court did not err in rejecting Heitman's entrapment defense. Finally, we determine that the district court did not abuse its discretion in sentencing Heitman to 8 to 12 years' imprisonment. Accordingly, we affirm.

AFFIRMED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF IDA GARCIA, AN INCAPACITATED PERSON. ARTHUR GONZALES, GUARDIAN AND CONSERVATOR, APPELLEE, V. SIMON AND BETTY GARCIA, INTERESTED PERSONS, APPELLANTS.

631 N.W. 2d 464

Filed July 13, 2001. No. S-00-893.

1. **Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In instances where 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.
3. **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.
4. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
5. **Trusts.** In the absence of express direction to the contrary, the power to revoke a trust is personal to the settlor, when reserved to him, and does not pass to his successors in interest on his death, nor is it transferable by him.
6. **Estates: Courts.** The Legislature has granted broad powers to the court which may be exercised directly or through a conservator with respect to the estate and the affairs of protected persons.

7. **Evidence: Words and Phrases.** Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge. Reversed and remanded with directions to dismiss.

John P. Weis, of Sorensen, Zimmerman & Mickey, P.C., for appellants.

Thomas T. Holyoke, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this case, we are asked to consider whether a conservator may be allowed to "step into the shoes" of an incompetent settlor in order to amend a revocable trust that was created prior to the settlor's incompetency. For the reasons set forth herein, we reverse the decision of the lower court, which granted the conservator the right to make changes to the trust, and we remand the cause with directions that the conservator's petition be dismissed.

SCOPE OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

[2] In instances where 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. *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000).

FACTS

Arthur Gonzales, the guardian and conservator of Ida Garcia (Garcia), filed a petition in Scotts Bluff County Court requesting that he be allowed to exercise Garcia's rights under the

fourth restatement of the Ida Garcia Revocable Trust Agreement (Trust Agreement), including the right to amend, modify, or revoke the Trust Agreement. Following a trial, the county court granted Gonzales the relief sought in his petition. Simon and Betty Garcia (hereinafter referred to as "the appellants"), as interested persons and beneficiaries of the Trust Agreement, timely perfected this appeal. We moved this matter to our docket pursuant to our statutory authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

The record shows that on July 8, 1997, Garcia executed the fourth restatement of her Trust Agreement. The validity of the Trust Agreement was not contested at trial. When the trust was established on December 21, 1992, the appellants were named as trustees. The fourth restatement nominated Alfred Garcia as successor trustee and provided that if neither the appellants nor Alfred Garcia could serve as trustee, Norwest Bank Nebraska, N.A. (Norwest Bank), in Omaha, Nebraska, should serve as successor trustee. The fourth restatement of the Trust Agreement provided for specific monetary bequests to several relatives, including $300,000 to Simon Garcia and $100,000 to Betty Garcia.

On December 31, 1998, Gonzales was appointed guardian for Garcia, who had been determined to be mentally incompetent. Gonzales was appointed her conservator on June 10, 1999. The petition requesting the authority to exercise Garcia's rights under the fourth restatement of the Trust Agreement was filed by Gonzales on April 12, 2000.

At trial, Gonzales testified that Garcia is his aunt. He said that at the time the fourth restatement of the Trust Agreement was signed, Garcia was staying with the appellants in Omaha, but she has never lived in Douglas County, and it was not her intent to live there on a permanent basis. The Norwest Bank trust officer assigned to administer the Trust Agreement is located in Omaha. At the time of trial, Norwest Bank had been administering the trust for several years, including about 1 year before Gonzales was appointed conservator.

The second article of the Trust Agreement states:

> *Right to Amend, Revoke, or Give Gifts*. Grantor reserves the right to amend, modify, and revoke this Trust in whole or in part at any time and from time to time, and the

> Trustee agrees, upon the direction of the Grantor, to convey, assign, and deliver over to the Grantor any part or all of the assets held under this Agreement. Grantor further specifically reserves the right to withdraw any or all assets from the Trust and direct that the Trustee as agent for Grantor make gifts of any such assets to such person or entity as then specified by Grantor.

Gonzales testified that he did not believe he had the power to exercise the rights specified in the second article of the Trust Agreement and that he and Garcia had discussed the subject on a number of occasions. Gonzales stated that one change he wished to make was to move the trust to Scottsbluff, Nebraska. Gonzales said that the move would be in Garcia's best interests and that the move would make it more convenient for Gonzales to fulfill his responsibilities as conservator. He said Garcia's wishes were for the trust to be in Scottsbluff. The Platte Valley National Bank in Scottsbluff has expressed a willingness to become the trustee.

Gonzales testified that he has had communication problems with Norwest Bank, including difficulty in contacting the trust officer and determining who will prepare the tax returns for the estate. Bills have been sent to Gonzales, who then has had to return them to the bank, and there has been confusion about federal employer identification numbers for employees hired to assist Garcia. Gonzales said he needs to determine what to do with Garcia's car, which is part of the trust but which she does not use. The bank has stated that it does not want the car. Gonzales testified that he receives quarterly reports about the trust, but the reports are difficult for Gonzales to read. He also stated: "I don't feel like they've really acknowledged me as conservator or . . . guardian."

Upon cross-examination, Gonzales stated that Garcia was "not found incompetent" at the time the fourth restatement of the Trust Agreement was executed, but he believed she was "easily swayed." Gonzales further stated that the change in trustee was not the only change he had contemplated, rather "[m]y aunt has talked to me about some things that she'd like to do. . . . [H]er biggest wish is since she had the altercation with my uncle and my aunt, Simon and Betty Garcia, that she would like them removed from that trust." Gonzales said that, on behalf

of Garcia, he would like to change the provision of the trust which gives money to the appellants.

The parties stipulated to the receipt into evidence of a report from Garcia's guardian ad litem, who was appointed on December 3, 1998. After a visit with Garcia on April 27, 2000, the guardian ad litem reported that her condition had not changed greatly and that she continued to be unable to manage her own financial affairs and required the services of a guardian and a conservator.

On June 20, 2000, the county court granted Gonzales' petition and held that Gonzales "as the Conservator and Guardian of Ida Garcia has the right to exercise the rights of Ida Garcia under the Fourth Restatement of Ida Garcia Revocable Trust which include, but are not limited to, the right to amend, modify or revoke such trust."

The appellants filed a motion to withdraw the journal entry and order and a motion for new trial on June 27, 2000. They took issue because the journal entry was not approved as to form by their counsel and because the journal entry "contains language which is broad and expansive and allows the petitioner greater discretionary powers then [sic] requested." The motions were overruled, and this appeal was timely filed.

ASSIGNMENTS OF ERROR

The appellants allege that the county court erred (1) in granting Gonzales the authority to amend, modify, or revoke the validly executed Trust Agreement; (2) in overruling their oral motion to have the pleadings conform to the evidence pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1995); and (3) in failing to sustain their motion to withdraw the journal entry and order and in entering an order that was overly broad and not sustained by the evidence presented at trial.

ANALYSIS

The county court granted Gonzales' petition and held that he has the right to exercise Garcia's rights under the Trust Agreement, which include, but are not limited to, the right to amend, modify, or revoke the trust. At the core of the disagreement between the parties is Neb. Rev. Stat. § 30-2637 (Cum. Supp. 2000), which states:

> The court has the following powers which may be exercised directly or through a conservator with respect to the estate and affairs of protected persons:
>
> . . . .
>
> (3) After hearing and upon determining by clear and convincing evidence that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his or her household, all the powers over his or her estate and affairs which he or she could exercise if present and not under disability except the power to make a will. These powers include, but are not limited to, power . . . to create revocable or irrevocable trusts of property of the estate which may extend beyond his or her disability or life . . . .

The appellants argue that § 30-2637(3) does not allow a conservator to change the provisions of a validly executed trust agreement. They assert that the statute allows the court to make decisions for an incapacitated person if the incapacitated person is the trustee or to order a successor trustee to replace the incapacitated person. In this case, the incapacitated person is the settlor, not the trustee. The appellants also assert that the trust was established when Garcia was competent and reflects her wishes at a time when she was able to make decisions. She has now been found to be incompetent and does not necessarily understand the consequences of changing the Trust Agreement.

[3,4] Section 30-2637(3) has not previously been analyzed by this court. Gonzales asserts that the statute gives a conservator the right to take the place of a settlor in order to make changes to a trust, even if the settlor has become incompetent. In reviewing a statute, we have often held that 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. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). 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. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001).

Section 30-2637(3) provides that the court may exercise directly or through a conservator "all the powers over his or her estate and affairs which he or she could exercise if present and not under disability except the power to make a will." Thus, we conclude that the court may take action on behalf of a protected person or that the court may direct a conservator to take those actions if the court determines by clear and convincing evidence that such actions are in the best interests of the protected person.

We must determine whether § 30-2637(3) grants the court the power to exercise the rights reserved to the settlor in a trust agreement when the settlor has become incompetent. In the fourth restatement of the Trust Agreement, Garcia "reserve[d] the right to amend, modify, and revoke" the Trust Agreement, in whole or in part, at any time. Garcia, who was competent at the time she executed the fourth restatement of the Trust Agreement, did not provide that any guardian or conservator of her affairs should be granted the right to amend, modify, or revoke the trust.

[5] Where there is no statute outlining a court's powers related to modification or revocation of a trust agreement, authorities have generally noted that only the settlor may amend, modify, or revoke a trust. "In the absence of express direction to the contrary, the power to revoke is personal to the settlor, when reserved to him, and does not pass to his successors in interest on his death, *nor is it transferable by him*." (Emphasis supplied.) George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 1000 at 322 (rev. 2d ed. 1983), cited in *In re Guardianship of Lee*, 982 P.2d 539 (Okla. App. 1999).

In *In re Guardianship of Lee*, the trial court found that the settlor created the trust for her own benefit during her lifetime and had specifically reserved the right of revocation and amendment of the trust. The settlor had also appointed Charles Lee as her attorney in fact, granting him power to " 'act in all matters with respect to all powers described herein as freely, fully, and effectively as I could or might to personally if present and of sound and

disposing mind.' " *Id.* at 541. The trial court found that such power of attorney permitted Charles Lee to revoke the trust and marshal the assets of the trust to be applied for the benefit of the settlor.

On appeal, the Oklahoma Court of Appeals determined this issue to be one of first impression and quoted the Oklahoma statute at issue:

> "If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator . . . or other fiduciary charged with the management of all of the principal's property . . . the attorney-in-fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated."

In re Guardianship of Lee, 982 P.2d at 541. See Okla. Stat. Ann. tit. 58, § 1074A (West 1995).

The Court of Appeals cited the "Bogert principle" and pointed out that in those jurisdictions where the issue has been addressed, the authority appears uniform that

> "[i]n the absence of express direction to the contrary, the power to revoke is personal to the settlor, when reserved to him, and does not pass to his successors in interest on his death, nor is it transferable by him. Bogert, The Law of Trusts and Trustees § 1000 at 322 (2d ed.1962); *Weatherly v. Byrd*, 566 S.W.2d 292, 293 (Tex.1978); *Webb v. St. Louis County National Bank*, 551 S.W.2d 869, 878 (Mo. App.1977); *Matter of Schroll*, 297 N.W.2d 282, 284 (Minn.1980)." *Matter of Marital Trust under John W. Murphey and Helen G. Murphey Trust*, 169 Ariz. 443, 819 P.2d 1029, 1030 (App.1991). See also, e.g., *Jones v. Clifton*, 101 U.S. 225, 11 Otto 225, 25 L.Ed. 908 (1879).

In re Guardianship of Lee, 982 P.2d at 541. Citing *Kline v. Utah Dept. of Health*, 776 P.2d 57 (Utah App. 1989), the Court of Appeals held that a trust reserving solely unto the settlor the power to revoke becomes irrevocable upon the settlor's incapacity, notwithstanding execution of an otherwise general, durable power of attorney, where the trust and power evince the settlor's intent that the revocation power be personal to the settlor.

In *Muller v. Bank of America, N.A.*, 28 Kan. App. 2d 136, 12 P.3d 899 (2000), the question before the court was whether the broad, general powers granted to the attorney in fact included the withdrawal of all trust assets, which would in essence revoke the trust. There was no language in the trust that either precluded or granted the attorney in fact the power to revoke or modify the trust. The court, in citing the Bogert principle, held that unless the settlor expressly states otherwise in the trust document or the power of attorney, the power to revoke a trust is personal to the settlor and is nondelegable.

[6] We conclude, however, that we need not apply the Bogert principle here because § 30-2637(3) controls, rather than the terms of the Trust Agreement. The Trust Agreement did not provide that it would become irrevocable upon the incapacity of Garcia. Section 30-2637(3), adopted as part of the Nebraska Probate Code in 1974, was in existence prior to the execution of the fourth restatement of the Trust Agreement. The Legislature granted broad powers to the court which may be exercised directly or through a conservator with respect to the estate and the affairs of protected persons. Given the plain language of the statute, we conclude that § 30-2637(3) gives the court the power to amend or revoke a trust after the settlor becomes incompetent.

The Trust Agreement provided that Garcia, while competent, could have amended, modified, or revoked any provision therein. Pursuant to § 30-2637(3), the court may exercise all powers over the estate of the settlor which the settlor could exercise if he or she were not under disability, except the power to make a will. Therefore, § 30-2637(3) gives the court the power to amend, modify, or revoke a trust agreement "[a]fter hearing" and based upon "clear and convincing evidence." Before a conservator may exercise any power permitted by the statute, the court must determine by clear and convincing evidence that such actions are in the best interests of the protected person.

[7] In this case, we find that there was insufficient evidence to support the county court's order. Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

At the hearing, the only evidence presented as a basis for transferring the trust to Scottsbluff was the testimony of Gonzales. Gonzales stated that he wanted to move the trust to Scottsbluff because it would be more convenient for him, because Garcia had told him that she wished for the trust to be located there, and because he had experienced difficulty in communicating with Norwest Bank in Omaha. Gonzales complained that although he receives quarterly reports from the bank, he has difficulty understanding them. Gonzales also testified that he wanted to remove the appellants from the trust.

Gonzales' testimony does not produce a firm belief or conviction about the existence of any fact to be proved. He did not present clear and convincing evidence that he, as conservator, should be granted the power to amend, modify, or revoke the provisions of the Trust Agreement. Garcia's alleged wishes to amend the Trust Agreement, stated only to Gonzales, are not sufficient because the guardian ad litem's report showed that Garcia was incompetent.

Because we determine that the county court erroneously granted Gonzales' petition, we find it unnecessary to address the appellants' remaining assignments of error.

CONCLUSION

The county court erred in granting Gonzales' petition seeking to amend, modify, or revoke the Trust Agreement. We therefore reverse the decision of the Scotts Bluff County Court and remand the cause with directions to dismiss Gonzales' petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CONNOLLY, J., not participating.

JOHN SCHAFERSMAN AND EILEEN SCHAFERSMAN, HUSBAND AND WIFE, APPELLEES, V. AGLAND COOP, A NEBRASKA COOPERATIVE CORPORATION, APPELLANT.

631 N.W. 2d 862

Filed July 20, 2001. No. S-98-623.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Rules of Evidence: Expert Witnesses.** When a court is faced with an offer of a novel form of expertise which has not yet received judicial sanction, it must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results.
4. ____: ____. In this state, where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.
5. ____: ____. This state has previously adhered to the test in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists.
6. **Trial: Rules of Evidence: Expert Witnesses.** Under the standard of helpfulness required by Neb. Evid. R. 702, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact.
7. ____: ____: ____. When an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.
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. **Rules of Evidence: Expert Witnesses.** For trials commencing on or after October 1, 2001, in trial proceedings, the admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

10. ____: ____. When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. In making this preliminary assessment, the trial judge has the discretion both to avoid unnecessary Neb. Rev. Stat. § 27-104 (Reissue 1995) hearings, where the reliability of an expert's methods is stipulated to or properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.
11. **Trial: Expert Witnesses: Proof.** Once the validity of an expert witness' reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence; vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof remain the traditional and appropriate means of attacking evidence that is admissible, but subject to debate.
12. **Courts: Expert Witnesses.** In evaluating expert opinion testimony under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.
13. ____: ____. In determining the admissibility of an expert's testimony, a trial judge may consider several specific factors that might bear on a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.
14. **Expert Witnesses.** In applying the standards of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the focus must be on the principles and methodology utilized by expert witnesses, and not on the conclusions that they generate. Reasonable differences in scientific evaluation are not a basis for exclusion of an expert witness' opinion.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the District Court for Burt County, DARVID D. QUIST, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

Dan H. Ketcham and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellant.

David A. Domina and Pamela J. Dahlquist, of Domina Law, P.C., for appellees.

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

GERRARD, J.

INTRODUCTION

John Schafersman and Eileen Schafersman sued Agland Coop (Agland), a Nebraska cooperative corporation, and won a $120,000 jury verdict, based upon the jury's finding that contaminated hog feed, negligently delivered to the Schafersmans, caused illnesses and deaths among the Schafersmans' herd of dairy cows. Agland seeks further review of a decision of the Nebraska Court of Appeals affirming the district court's judgment. The primary question presented in this appeal is whether sufficient foundation was presented for the opinion of the Schafersmans' expert witness, Dr. Wallace Wass.

For the reasons that follow, we conclude that the district court abused its discretion in permitting Wass to testify regarding his theory that "multiple mineral toxicity" caused the injuries to the Schafersmans' cows and, therefore, reverse the judgment of the district court and remand the cause for a new trial. Furthermore, we conclude that the framework for evaluating expert opinion testimony in Nebraska should no longer be guided by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), but should instead reflect the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny.

FACTUAL AND PROCEDURAL BACKGROUND

The Schafersmans operate a commercial dairy farming operation in Washington County, Nebraska. Agland sells grain and feed for various agricultural endeavors. On the date of the incident that forms the basis of the Schafersmans' claims, they allege that there were 54 lactating cows in their dairy herd and 21 additional cows that were not lactating located in a "dry lot."

The Schafersmans allege that in June 1994, they ordered 40 bushels of unadulterated commercial grade oats from Agland. On June 22, Agland delivered 3,260 pounds of product to the

Schafersmans' grinder-mixer, to be mixed with other ingredients for the Schafersmans' dairy mix, and from which the mix was augered into a gravity bin to be fed directly to the cows.

Agland does not dispute that the oats were contaminated with "Envirolean 2.5L Swine Concentrate" (Envirolean), a hog premix concentrate that included high-protein minerals, vitamins, and other micronutrients. The Schafersmans allege that they noticed the contaminant just after the oats were delivered, but that they were verbally reassured by Agland that the substance was harmless.

The Schafersmans further allege that after the mixture was fed to the dairy herd, the cows went off their feed and milk production dropped. The Schafersmans allege that the cows dried up, became lame, and developed poor body condition; that some died or were liquidated; and that none of the 54 cows that consumed the mix ever returned to proper milk production. The Schafersmans allege that of the 54 lactating cows that consumed the contaminated feed, 23 dried up in July, 31 dried up later, some developed jaundice, and many developed diarrhea.

The Schafersmans claimed damages for lost milk production, cows lost to natural death or slaughter, increased labor costs, and veterinary costs, for a total of $117,743.29 in special damages. The Schafersmans' operative petition claimed theories of recovery in negligence, implied warranty, express warranty, and misrepresentation, although the latter theories were voluntarily dismissed by the Schafersmans at trial. Agland's answer asserted that the Schafersmans were contributorily negligent in failing to allow Agland to remedy the contamination, in continuing to feed the contaminated feed to the cows after problems developed, and in failing to immediately notify Agland or consult a veterinarian.

At trial, the Schafersmans presented the expert opinion testimony of Wass, who opined that the alleged damage to the Schafersmans' cows was caused by "multiple mineral toxicity," a condition that Wass said was the result of the aggregation of above-normal quantities of minerals potentially toxic to dairy cows. Agland filed a motion in limine seeking to prevent Wass' testimony and objected at trial on foundational grounds, but both the motion in limine and the foundation objection were overruled. The substance of Wass' testimony is set forth in more

detail in the analysis portion of this opinion. Agland's expert witness testified that the Envirolean contained no minerals above tolerable levels and that the contaminated feed was non-toxic and did not harm the cows.

After the case was submitted, the jury returned a verdict finding for the Schafersmans on the negligence theory of recovery. The jury found the Schafersmans' total damages to be $147,190, found that the Schafersmans failed to mitigate their damages in the amount of $27,190, and returned a verdict for the Schafersmans in the amount of $120,000. The district court entered judgment accordingly.

Agland appealed to the Court of Appeals, which affirmed the judgment of the district court. See *Schafersman v. Agland Coop*, No. A-98-623, 2000 WL 704984 (Neb. App. May 30, 2000) (not designated for permanent publication). We granted Agland's petition for further review.

ASSIGNMENTS OF ERROR

Agland assigns, consolidated and restated, that the Court of Appeals erred in determining that (1) Wass' expert testimony was properly admitted, (2) contributory negligence should not have been submitted to the jury, and (3) the jury was properly instructed regarding damages and that the damages were supported by the evidence.

STANDARD OF REVIEW

[1,2] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

ANALYSIS

The first argument to be addressed is Agland's claim that Wass' opinion lacked appropriate foundation. In connection

with this claim, Agland argues on further review that this court should again consider adopting the standards for evaluating expert opinion testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See, generally, *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring, joined by Hendry, C.J., and Miller-Lerman, J.).

Wass' Testimony

Wass is a professor at Iowa State University in the department of diagnostic and production animal medicine and was head of that department when it was known as the department of clinical sciences. Wass is board certified in veterinary internal medicine, and he specializes in diseases of metabolism, nutrition, and toxicology. Wass obtained both a bachelor of science degree in agriculture and a doctor of veterinary medicine degree from the University of Minnesota, and later obtained a doctorate degree in veterinary medicine with a minor in pathology from the same university.

Wass testified that in preparing his opinion, he physically went to the Schafersman farm, but only examined the Schafersmans' records relating to the cows. Wass admitted that he did not perform a clinical examination of any of the cows and did not treat the cows. Wass did not perform any tests on the cows to rule out other causes of the jaundice that had been observed in the cows by the Schafersmans' veterinarian, nor did he test for copper toxicity, which Wass opined was a contributing factor to the illness afflicting the cows. Wass performed no tests to rule out other potential causes for the alleged drop in milk production. Wass acknowledged that he should have tested for copper toxicity and performed other tests on the cows. Wass further testified that while he tested a sample of the mixture delivered to the Schafersmans by Agland, he did not test the composition of the total ration actually fed to the cows after it was combined by the Schafersmans with corn and other nutrients.

Nonetheless, Wass testified that it was his opinion that the problems with the cows were caused by the Envirolean because the cows that had eaten the Envirolean-contaminated mix became sick. The basis for Wass' opinion was his theory that the

cows were afflicted with "multiple mineral toxicity," which Wass claimed could result when a number of potentially toxic minerals were simultaneously fed to cows in otherwise-tolerable quantities. Wass admitted that no minerals were present in the feed that were, singly, above scientifically accepted toxic or even tolerable levels.

With respect to the theory of multiple mineral toxicity, Wass testified that he had neither studied multiple mineral toxicity nor authored any publications concerning multiple mineral toxicity. Wass testified that he was aware of no controlled studies that related to multiple mineral toxicity, although he claimed that people in the field have observed it. Wass conceded that the theory he proposed set forth no standard for determining what levels of any given minerals could result in a toxic effect. In his deposition, which was admitted at the hearing on Agland's motion in limine, Wass stated that he had seen a similar prior case, but he did not testify regarding the mineral levels present in that instance, nor did he discuss any testing that might have been performed in that instance. Wass conceded, in his deposition, that he had not conducted any tests that were intended to bear out his theory of multiple mineral toxicity.

In addition, Agland's expert witness, Dr. David Reed, a veterinarian who specializes in dairy cows and nutritional consulting for dairy producers, reviewed Wass' deposition testimony and the attached exhibits. Reed testified that the scientific literature did not contain a theory of multiple mineral toxicity and that in his opinion, that theory did not apply to the instant case.

Frye Analysis

[3-5] When a court is faced with an offer of a novel form of expertise which has not yet received judicial sanction, it must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). In this state, where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the

relevant scientific community. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). Stated otherwise, Nebraska has adhered to the *Frye* test, under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists. *Buckman, supra*; *Sheridan, supra*.

[6,7] Under the standard of helpfulness required by Neb. Evid. R. 702, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). When an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue. *Id.*

The Schafersmans argue, and the Court of Appeals agreed, that Wass' diagnosis of multiple mineral toxicity was not novel and, thus, that the *Frye* test does not apply. We disagree. The testimony of Wass and Reed clearly establishes the novelty of the theory underlying Wass' conclusions regarding the cause of the illnesses afflicting the Schafersmans' cows. In originally promulgating the *Frye* test, the Court of Appeals of the District of Columbia stated that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

The deduction at issue in this case, Wass' opinion on the cause of the illnesses afflicting the Schafersmans' cows, is not derived from a principle or procedure that has gained general acceptance in the particular field in which it belongs. Wass' opinion is dependent upon the underlying theory of multiple mineral toxicity, and the evidence at trial established that this theory is not generally accepted in any scientific field.

Nor does the record reveal any other basis to support Wass' conclusions regarding the causal connection between the Envirolean and the illnesses. For instance, Wass admittedly did not conduct a differential diagnosis to rule out other potential causes of any illnesses. Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. See, e.g., *Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986 (8th Cir. 2001); *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255 (6th Cir. 2001); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999); *Jennings v. Baxter Healthcare Corp.*, 331 Or. 285, 14 P.3d 596 (2000). See, also, *In re Diet Drugs*, No. MDL 1203, 2001 WL 454586 (E.D. Pa. Feb. 1, 2001); *Kelley v. American Heyer-Schulte Corp.*, 957 F. Supp. 873 (W.D. Tex. 1997) (noting that observed association between exposure and condition may reflect true cause-effect relationship or spurious finding, and to distinguish between these alternatives, it is necessary first to consider confounding factors). A reliable differential diagnosis can provide suitable foundation for an expert opinion, see *Kelley, supra*; however, Wass admitted that he did not perform tests in this instance to rule out other potential causes of the illnesses among the Schafersmans' cows.

Essentially, the only basis for Wass' opinion, other than his theory of multiple mineral toxicity, was that since the cows consumed the feed and then became ill, the feed must have caused the illness. First, the assumption that correlation proves causation presents fallacious post hoc propter hoc reasoning that cannot be said to be helpful to the trier of fact under Neb. Evid. R. 702, even absent the application of a more stringent *Frye* or *Daubert* analysis. See, *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *Nelson v. American Home Products Corp.*, 92 F. Supp. 2d 954 (W.D. Mo. 2000) (discussing fallacy of post hoc propter hoc reasoning). See, also, *Glastetter v. Novartis Pharmaceuticals Corp., supra* (stating that association is not scientifically valid proof of causation). Second, this reasoning can be deduced equally by the trier of fact; Wass' opinion on the matter is superfluous and again fails to assist the trier in determining a factual issue. See *State v. Reynolds*, 235 Neb. 662, 457

N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

In short, Wass' theory of multiple mineral toxicity did not meet the requirements of the *Frye* test, and Wass offered no other reasoning or scientific analysis that would support his opinion on causation. The district court abused its discretion in permitting Wass to testify regarding multiple mineral toxicity and in allowing Wass to offer his opinion that any illnesses among the Schafersmans' cows were caused by the presence of Envirolean in the feed. As this error was clearly prejudicial to Agland, we conclude that the Court of Appeals erred in not reversing the judgment of the district court and remanding the cause for a new trial. That determination, however, does not end our analysis.

Adoption of *Daubert* Standards

[8] Agland urges this court to again consider adopting the test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), for the evaluation of expert opinion testimony. This issue is not necessary for our disposition of the present appeal. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). We decline to discuss Agland's assignments of error with respect to contributory negligence and damages. We do, however, find it appropriate to discuss the standards that should be applied to the expert testimony proffered on retrial.

The most significant recent developments in the area of evaluating expert opinion testimony have resulted from the decision of the U.S. Supreme Court in *Daubert, supra*. In that case, the Supreme Court held that the "general acceptance" test for the admissibility of testimony about scientific evidence, as set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), had been superseded by the adoption of the Federal Rules of Evidence. *Daubert, supra*. The Supreme Court rejected the *Frye* test and redefined the standard for the admission of expert testimony in the federal courts. *Id.* See, also, *General Electric Co. v. Joiner*,

522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Moreover, the Federal Rules of Evidence have recently been amended to incorporate and codify the *Daubert* standards. See Fed. R. Evid. 701 to 703.

Most states with evidentiary rules modeled after the Federal Rules of Evidence have adopted the *Daubert* standards. See, generally, *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring) (citing cases and noting that 27 states had adopted *Daubert* standards). See, also, *People v. Shreck*, 22 P.3d 68 (Colo. 2001) (abrogating *Frye* test in favor of *Daubert* reliability standards). This court, however, has previously rejected the adoption of *Daubert* and continued to rely on the *Frye* test. See, *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

The *Daubert* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion. Under *Daubert, supra*, when faced with a proffer of expert scientific testimony, a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Daubert, supra.*

The Court in *Daubert* also set out a list of considerations that a trial court may use to evaluate the validity of scientific testimony. These include: (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) the "general acceptance" of the theory or technique. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Thus, the Court did not sweep

away the *Frye* test, but simply determined that it was to be one of a myriad of possible considerations in determining the validity of evidence. See *Phillips, supra*.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Supreme Court determined that *Daubert*'s general holding, setting forth the trial judge's general " 'gatekeeping' " obligation, applies not only to testimony based on " 'scientific' " knowledge, but also to testimony based on " 'technical' " and " 'other specialized' " knowledge. 526 U.S. at 141. The Court in *Kumho Tire Co.* made it clear that the *Daubert* standards were to apply, not only to "scientific" knowledge, but to all types of expert testimony that are admitted pursuant to Fed. R. Evid. 702.

In *Carter, supra*, this court discussed two reasons for continued adherence to the *Frye* test: (1) that the *Daubert* standards were relatively undeveloped and uncertain and (2) that *Daubert* might fail to exclude unreliable "junk science." These concerns were, at the time, entirely reasonable. The experience of the intervening years, however, has put those concerns to rest. See *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring). In that time, *Daubert* has become the majority rule and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), has become an ever-shrinking minority view. Given the number of jurisdictions that have adopted the *Daubert* standards and the extensive development of the *Daubert* standards in the state and federal courts, it can no longer be said that the nature and implications of *Daubert* are unknown. See *Phillips, supra.* In fact, to the extent that this consideration is still relevant, it militates in favor of adopting the *Daubert* standards, as Nebraska courts risk losing the benefit of helpful and persuasive authority from other jurisdictions on newly presented evidentiary issues by their continued reliance on a test that is being increasingly removed from the jurisprudential mainstream. See *Phillips, supra*.

Furthermore,

> [t]he concern about "junk science" expressed in *Carter, supra*, now also weighs in favor of adopting the *Daubert/Kumho Tire* standards. The "gatekeeper" function exercised by trial courts under the *Daubert/Kumho Tire*

> analysis is, in fact, a more effective means of excluding unreliable expert testimony than is the *Frye* test. The experience in jurisdictions which have adopted the *Daubert* standards suggests that the admission of so-called "junk science" evidence is a minimal risk.

Phillips, 257 Neb. at 273, 597 N.W.2d at 388-89 (Gerrard, J., concurring), citing *State v. Coon*, 974 P.2d 386 (Alaska 1999).

As one writer has noted:

> To say that *Daubert* is less restrictive of expert evidence, to say that it opens the door for the introduction of expert evidence that would not have been admissible under the *Frye* test, is not to say that *Daubert*'s test is an easier test. It may be more lenient in that it allows more — and more novel — science into evidence, but it can be much more difficult in that the *Daubert* test can require a more exacting, expensive, and time consuming foundation.
>
> . . . .
>
> On the one hand, more science comes in. Science does not have to be generally accepted by other scientists to be admissible in court; the universe of admissible science is expanded by doing away with the general acceptance requirement. On the other hand, less science comes in. The trial judge is to act as gatekeeper and is to scrutinize carefully the proffered scientific evidence and to keep out what is not good science. The universe of science actually admitted may be contracted by the close scrutiny judges are supposed to give this evidence. While it may be that most science generally accepted in the relevant scientific community will be good science, it is not necessarily so.

G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 Creighton L. Rev. 939, 953 (1996).

Placing the focus on reliability, rather than general acceptance, may have unexpected but not undesirable results. For instance, a court may find that application of the *Daubert* standards results in the admissibility of new theories or techniques, where the court is satisfied that the expert testifying has presented foundation sufficient to demonstrate the reliability of the scientific analysis supporting his or her opinion. On the other

hand, a court may find that evidence that had previously been admitted with little discussion is no longer satisfactory, where the reliability of that evidence has been appropriately challenged.

In this regard, the flexibility of the *Daubert* standards has a clear advantage over the *Frye* test, as the rigid application of *Frye* results in evidence which has once met with judicial approval no longer being "novel," and thus no longer subject to foundational inquiry under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), on the other hand, does not require that courts reinvent the wheel each time that evidence is adduced, but it does permit the re-examination of certain types of evidence where recent developments raise doubts about the validity of previously relied-upon theories or techniques. In other words, once an issue is determined under *Frye*, it is closed to further *Frye* analysis because it is no longer "novel." *Daubert*, on the other hand, permits re-examination of the issue if the validity of the prior determination can be appropriately questioned.

Moreover, the flexibility of *Daubert* does not require that the validity of a theory or technique be determined solely by the general acceptance of a particular field that may prove to be too accepting. As one writer has stated:

> Despite some dicta in *Daubert* stating that the test embodied by Rule 702 is a more liberal one than *Frye*, when compared to the general acceptance test, the *Daubert* test requires more from some fields and less from others depending on the state of the knowledge being offered. *Frye* asks whether something is generally accepted. *Daubert* asks whether it is dependable. These are different questions. Often they will produce the same answer. That happens when the basis of knowledge is weak and a field recognizes it is weak, or when the basis of knowledge is sound and a field recognizes it is sound. But *Daubert* is more liberal when the expert evidence is solid, but on the cutting edge, and therefore not yet generally accepted. . . . On the other hand, *Frye* is more liberal when what is offered is unsound expert evidence that nevertheless has become "generally accepted" in its field. This is the cate-

> gory that judges have encountered in numerous cases in the wake of *Daubert*, and found themselves puzzled about why a supposedly more liberal standard was leading them toward exclusion of evidence that long had been admitted without question.
>
> The *Frye* test required faith to be placed in various fields and their practitioners, and inevitably made the courts more accepting of speculative, pseudo and sloppy science, but it had the appearance of being easier for judges to administer. *Daubert* requires that fields justify their claims, and this places a heavy cognitive burden on judges. The essential requirement of *Daubert* and its progeny is that to avoid exclusion, experts must offer the courts more than unsupported assertions; they must offer evidence about the basis of their asserted expertise sufficient to enable a judge to conclude that their expert testimony will provide dependable information to the factfinder.

David L. Faigman et al., *How Good is Good Enough?: Expert Evidence Under* Daubert *and* Kumho, 50 Case W. Res. L. Rev. 645, 656-57 (2000).

Frye-like tests allow judges to piggyback their decisions onto someone else's judgment of whether the proffered evidence was sufficiently valid to be admitted. See Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 Jurimetrics J. 229 (2000). "The *Frye* test permit[s] judges to ask whether an asserted expertise [i]s believed valid by enough asserted experts. If enough of them [think] so—that is, if the asserted expertise enjoys 'general acceptance'— then a court [i]s justified in concluding that the proffered testimony [i]s valid." Saks, *supra* at 230. In addition to its better known and more obvious defects, the *Frye* test suffers from a special paradox: because less rigorous fields will reach a state of "general acceptance" more readily than more rigorous fields, courts employing *Frye* may more readily admit the offerings of less dependable fields and less readily admit the offerings of more dependable fields. See *id*.

While these distinctions between *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.

2d 469 (1993), are significant, they should not be taken to mean that *Daubert* has worked a sea change in evidence law. A review of the case law after *Daubert* shows that rejection of expert testimony is the exception rather than the rule. See Fed. R. Evid. 702 advisory committee's note. In most instances, obviously, that which is reliable will be generally accepted, and vice versa. Only by permitting the trial court to conduct the gatekeeper function for the reliability of expert testimony, however, can we ensure that reliable evidence is presented not just in most, but in *all* instances.

Moreover, as the U.S. Supreme Court noted in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), this gatekeeper function for the trial court retains its utility and imperative regardless of whether the testimony at issue is "scientific" or otherwise. The evidentiary rationale that underlies the *Daubert* gatekeeping responsibility is not limited to scientific knowledge. As the Court stated,

> it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. . . .
>
> Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from . . . specialized experience." [Learned] Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." *Ibid*. The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Kumho Tire Co., 526 U.S. at 148-49.

Despite the evident wisdom of applying the trial court's gatekeeper function to all varieties of specialized expert testimony, Nebraska's reliance on the *Frye* test and the limitation of that test to scientific evidence precludes the trial court from acting as gatekeeper where technical or other specialized knowledge is concerned. *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring). Adoption of the *Daubert* standards, on the other hand, both encourages the trial court to act as gatekeeper and places that function in the context of a sensible and uniform scheme for the evaluation of all types of expert opinion testimony. *Id.*

One commentator cogently noted:

> [B]efore the Daubert/Joiner/Kumho trilogy, courts and lawyers strove mightily to force the analysis of scientific evidence into the legalistic rather than the scientific framework. The Frye rule, which Daubert displaced, focused on "general acceptance" as a surrogate for determining scientific validity, a test steeped in the tradition of precedent, authority, and opinion as evidence.

ALI-ABA, Course of Study on Products Liability (2000), Bert Black, *Lewis Carroll Meets the Law, or How to Use the Daubert Trilogy to Slay the Jabberwock of Jargon*, 277 at 284.

We are convinced that by shifting the focus to the kind of reasoning required in science—empirically supported rational explanation—the *Daubert/Joiner/Kumho Tire Co.* trilogy of cases greatly improves the reliability of the information upon which verdicts and other legal decisions are based. Because courts and juries cannot do justice in a factual vacuum, the better information the fact finders have, the more likely that verdicts will be just. See *id*. Indeed, though the "scientific method" may not be an appropriate "standard" for all experts, the fundamental commonsense requirements of rational explanation and empirical support should apply to all experts. *Id*.

[9] We are persuaded that Nebraska should join the majority of jurisdictions that have already concluded that the *Daubert* standards provide a more effective and just means of evaluating the admissibility of expert opinion testimony. Use of these standards may initially place more demands on trial and appellate courts, but will also permit those courts to ensure that juries in

Nebraska are presented with expert testimony that is theoretically and methodologically reliable. We therefore hold prospectively, for trials commencing on or after October 1, 2001, that in trial proceedings, the admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[10] Specifically, we hold that in those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. We stress, however, that in making this preliminary assessment, the trial judge has the discretion both to avoid unnecessary Neb. Rev. Stat. § 27-104 (Reissue 1995) hearings, where the reliability of an expert's methods is stipulated to or properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases, where cause for questioning the expert's reliability arises. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[11] In so holding, we also note that once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was *applied* in a particular case will generally go to the weight of such evidence. See *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997). Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof remain the traditional and appropriate means of attacking evidence that is admissible, but subject to debate. See *Daubert, supra*.

Application of *Daubert* Standards in New Trial

We note that although Wass' testimony did not meet the requirements of the *Frye* test at the first trial, this does not nec-

essarily preclude the Schafersmans from offering such testimony at a second trial. As stated above, novel scientific theories can be reliable and thus admissible under *Daubert* even if not generally accepted in the scientific field, so long as foundation is presented to satisfy the court of the validity of the theory or methodology underlying the proffered opinion.

[12,13] In evaluating expert opinion testimony under *Daubert*, where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. See *Kumho Tire Co., supra*. In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that *Daubert* said might "bear on" a judge's gatekeeping determination. See *id.* These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. See *id.* These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances. See, e.g., *Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000), *cert. denied*, 532 U.S. 921, 121 S. Ct. 1357, 149 L. Ed. 2d 287 (2001) (setting forth additional factors to be considered).

In the instant case, the questions presented arise in the discipline of veterinary epidemiology. When epidemiology is used in legal disputes, the methodological soundness of a study and its implications for resolution of the question of causation require the assessment of whether the study reveals an association between an agent and disease, whether sources of error in the study may have contributed to an inaccurate result, and whether any relationship between the agent and the disease is causal. See, generally, Michael D. Green et al., *Reference Guide on Epidemiology*, in Reference Manual on Scientific Evidence 333 (Federal Judicial Center 2d ed. 2000), at

http://air.fjc.gov/public/fjcweb.nsf/pages/16. A trial court must also consider whether an expert has accounted for other possible causes of disease; differential diagnosis—the process of eliminating other possible causes—can be an essential component in establishing specific causation. See Sarah Brew, *Where the Rubber Hits the Road: Steering the Trial Court Through a Post-*Kumho Tire *Evaluation of Expert Testimony*, 27 Wm. Mitchell L. Rev. 467 (2000).

Evidence of an association may be sufficient for formulation of a hypothesis that can later be tested and confirmed, but it is not proof of causation in the courtroom or the scientific community. *Nelson v. American Home Products Corp.*, 92 F. Supp. 2d 954 (W.D. Mo. 2000). A gatekeeping court must evaluate the reliability of the bridge the expert takes to the opinion, not the opinion itself. *Owens v. Amtrol, Inc.*, 94 F. Supp. 2d 952 (N.D. Ind. 2000).

[14] Thus, in applying the *Daubert* standards, Nebraska courts should remember that the focus must be on the principles and methodology utilized by expert witnesses, and not on the conclusions that they generate. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Reasonable differences in scientific evaluation are not a basis for exclusion of an expert witness' opinion. See *Falise v. American Tobacco Co.*, 107 F. Supp. 2d 200 (E.D.N.Y. 2000). As Judge Jack Weinstein observed:

> Too nitpicking an approach to find reasons to exclude expert testimony from distinguished scientists will tend to drive the best of them out of the courtroom. The greatest danger to the courts is not the incompetent who will testify for pay, but our failure to encourage sound scientists to assist the law.

Id. at 205.

Exercise of the *Daubert* gatekeeping responsibility requires a balance between rigorous examination of the reliability of the principles and methodology of expert witnesses, and acceptance of reasonable disagreement regarding such principles and methods and the conclusions that they generate. We are confident that the trial courts of Nebraska, like the majority of courts throughout the United States, will be able to strike this balance.

CONCLUSION

We conclude that given the foundation presented, the district court abused its discretion in permitting Wass to testify regarding the theory of multiple mineral toxicity and his ultimate opinion as to causation in the instant case. Consequently, we determine that the Court of Appeals erred in affirming the judgment of the district court. We further determine that for trials commencing on or after October 1, 2001, trial courts shall evaluate the admissibility of expert opinion testimony under the analytical framework first established in *Daubert, supra*, as adopted in the holding of this case.

The judgment of the Court of Appeals is, therefore, reversed, and the cause is remanded to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for a new trial, including proceedings consistent with this opinion.

REVERSED AND REMANDED
FOR A NEW TRIAL.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, APPELLANT, V. SUE H. CHAULK AND KEVIN L. BLEHM, WIFE AND HUSBAND, ET AL., APPELLEES.

631 N.W. 2d 131

Filed July 20, 2001. No. S-00-212.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
3. **Statutes.** Interpretation of a statute presents a question of law.
4. **Eminent Domain: Legislature.** The power of eminent domain may be exercised only on the occasion, and in the mode and manner, prescribed by the Legislature.
5. **Eminent Domain: Statutes.** Statutes conferring and circumscribing the power of eminent domain must be strictly construed.
6. **Constitutional Law: Property.** Every citizen in this state has the constitutional right to acquire, own, possess, and enjoy property.

7. **Constitutional Law: Eminent Domain: Taxation.** A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain.
8. **Constitutional Law: Eminent Domain.** The Nebraska Constitution limits the sovereign's absolute power to take private property by requiring that property owners whose property has been taken or damaged for public use under the eminent domain authority be compensated.
9. **Eminent Domain: Legislature.** The power of eminent domain may be delegated by the Legislature.
10. **Eminent Domain: Railroads.** Although railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain.
11. ____: ____. Pursuant to Neb. Rev. Stat. § 74-308 (Reissue 1996), railroads are required to exercise their eminent domain power in accordance with Nebraska's general eminent domain statutes.
12. **Eminent Domain.** Neb. Rev. Stat. §§ 76-701 through 76-724 (Reissue 1996 & Supp. 1999) prescribe the manner and method by which condemnors may exercise the power of eminent domain.
13. **Statutes: Legislature: Intent.** In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
14. **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.
15. **Eminent Domain: Statutes.** Considering the plain language of Neb. Rev. Stat. § 76-702 (Reissue 1996), the authority to enter land granted under § 76-702 for "examining and surveying" prescribes activities far less intrusive than drilling and sample gathering for geotechnical studies.
16. **Eminent Domain: Legislature: Presumptions.** It is presumed that the Legislature knowingly limited the precondemnation activities a condemnor may conduct upon property pursuant to Neb. Rev. Stat. § 76-702 (Reissue 1996), and, even if this limitation is by legislative oversight, it is not the office of the courts to legislate into existence greater authority to enter upon land to conduct precondemnation activities than that granted under the statute.
17. **Constitutional Law: Eminent Domain.** The Nebraska Constitution's limit on the sovereign power of eminent domain set forth in Neb. Const. art. I, § 21, applies to temporary as well as permanent takings.
18. **Eminent Domain.** A temporary taking must be accomplished in a manner consistent with the exercise of the power of eminent domain.

Appeal from the District Court for Morrill County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Rodney M. Confer, Trev E. Peterson, and Corey L. Stull, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Howard P. Olsen, Jr., of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., and Thomas D. Oliver for appellees Sue H. Chaulk, Kevin L. Blehm, et al.

Terry Curtiss, of Curtiss, Moravek, Curtiss & Margheim, for appellees Daniel N. Dailey and Janet K. Dailey.

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

MILLER-LERMAN, J.

NATURE OF CASE

The Burlington Northern and Santa Fe Railway Company (BNSF) filed an action in the district court for Morrill County. The sole remedy BNSF sought in the district court was injunctive relief permitting it to conduct surveys and tests on the land of property owners who had refused access for such purposes (defendant property owners). BNSF appeals from the order of the district court entered on February 9, 2000, which denied the preliminary and permanent injunctions sought by BNSF and dismissed BNSF's second amended petition. For reasons set forth below, which differ from those articulated by the district court, we affirm.

STATEMENT OF FACTS

The facts essential to our decision are not in dispute. BNSF operates a railroad in Nebraska. A portion of BNSF's railroad track is located in Morrill County, Nebraska. Eastbound trains on this track carry coal from mines near Guernsey, Wyoming, to Northport, Nebraska. At Northport, the BNSF track intersects with track operated by the Union Pacific Railroad, whose dispatchers control the movement of trains through the intersection. The train traffic through this intersection is heavy. BNSF trains are frequently backed up in their efforts to use the intersection, in part because Union Pacific trains are given priority.

From the Northport intersection, the BNSF railroad track runs north and south. The northbound track leads to Alliance, Nebraska. On this route, trains must transverse a steep incline north of Bridgeport, Nebraska, known as the Angora Hill. The track up the Angora Hill has a 1-percent grade, meaning it rises

1 foot for every 100 linear feet of track. As a result of this incline, BNSF utilizes additional locomotives, referred to as "helper consists" or "helpers," to assist loaded coal trains in climbing the Angora Hill. The helpers are added to the back of the loaded trains and push the trains up the 13½-mile hill. In addition to the extra equipment, additional time and personnel are needed to add and remove the helpers from the loaded coal trains, resulting in additional costs to BNSF.

In October 1997, BNSF began to consider laying a new line of track in order to avoid the Angora Hill's steep grade. BNSF contacted Jerry Helm, a railroad consultant who had previously worked for BNSF. Helm was directed to investigate the possibility of a bypass or connection to reduce the grade to .5 percent or less. Helm developed a proposal to bypass the Northport intersection by laying a cutoff track which would run from just east of Bayard, near Prinz, Nebraska, to Angora, Nebraska (bypass route). The new track would be approximately 25½ miles long.

The proposed bypass route had the advantages of avoiding the Northport intersection and the Angora Hill. The proposed bypass route would have only a .5 percent grade, or a rise of 6 inches for every 100 linear feet of track. The land on which BNSF proposed to build the bypass route included land which was owned by the defendant property owners.

BNSF decided to investigate the possibility of constructing the proposed bypass route. To gauge the feasibility of this alternative, BNSF sought to determine whether the land could support the tracks and whether the construction was cost effective. In the fall of 1998, BNSF, through its agent H.C. Peck & Associates, began contacting the owners of the land on which the proposed bypass route would be built (property owners) to gain right-of-entry permits that would allow BNSF to enter upon the property owners' land to conduct certain surveys and tests. Among the surveys and tests that BNSF proposed to conduct on the property owners' land were as follows: an alignment survey; cultural surveys to locate any Native American burial grounds or artifacts; biological and environmental surveys to identify endangered plant and animal species; hydraulic surveys to determine water runoff patterns and wetlands; and geotechnical tests which involved drilling and gathering core soil samples, 2 inches in

diameter and approximately 50 feet deep, which samples would need to be drilled and gathered approximately every quarter of a mile. These samples would then be taken to a lab for analysis.

Initially, BNSF sought access to the property owners' land without any compensation. Later, BNSF offered each property owner $500 as an incentive to gain the necessary right-of-entry permits. The defendant property owners refused to grant BNSF the permits which would allow BNSF to conduct its investigations.

On January 14, 1999, as a result of the defendant property owners' refusal to give BNSF the necessary permits, BNSF initiated the instant action seeking injunctive relief as its sole remedy. The second amended petition filed on April 14 is the operative petition for purposes of the present appeal. In its petition filed pursuant to Neb. Rev. Stat. § 76-702 (Reissue 1996), BNSF sought preliminary and permanent injunctions granting BNSF entry to the defendant property owners' land in order to conduct the above-described surveys and tests. On or about July 7, the defendant property owners answered BNSF's petition, denying, inter alia, that BNSF was entitled to the relief it sought and affirmatively alleging that BNSF had failed to allege a public use which would result from its proposed project.

On December 8 and 9, 1999, a bench trial was had on BNSF's petition. A total of 13 witnesses testified, and 16 exhibits were received in evidence. The evidence included testimony by the following BNSF witnesses: Helm; Robert Patton, a former BNSF employee who is the vice president for Mainline Management, Inc., a railroad consulting firm; Kenneth Girodo, a BNSF employee; Gregg Larsen, an employee of H.C. Peck & Associates, BNSF's agent responsible for gaining the right-of-way permits from the property owners; and Jack Moy, a BNSF employee. BNSF's exhibits included maps of the proposed bypass route and a report developed by a team of BNSF personnel headed by Patton, which report "updat[ed] the information in the five-year horizon" plan for coal transportation requirements along BNSF's railroad tracks, including the Morrill County area in question.

In its memorandum order entered February 9, 2000, the district court denied BNSF the relief it requested and dismissed the

petition. The district court concluded that although BNSF possessed the requisite statutory authority to condemn property under Nebraska's eminent domain statutes, Neb. Rev. Stat. § 76-701 et seq. (Reissue 1996 & Supp. 1999), it could enter upon the defendant property owners' land pursuant to § 76-702, which permits condemnors to conduct precondemnation surveys and examinations, only after it had sustained its burden of proving that its proposed bypass constituted a "public use" rather than a private benefit. Reviewing the evidence, the district court found that BNSF had failed to carry its burden of proof. The district court stated:

> By the greater weight of the evidence BNSF's overwhelming purpose for the contemplated bypass route was to eliminate the helper [consists] thereby saving on crews and expensive equipment to increase profits and better compete with the Union Pacific Railroad. The desire to construct the by-pass track was a business decision, an economic decision similar to economic decisions made daily by private businesses to cut costs and increase profits. . . .
>
> Inasmuch as BNSF has failed [to] prove that its contemplated condemnation proceedings would satisfy the "public use" requirement it has no authority under Section 76-702 to enter upon private lands for testing purposes.

The district court denied BNSF's application for preliminary and permanent injunctions and dismissed BNSF's petition.

BNSF appeals.

ASSIGNMENTS OF ERROR

On appeal, BNSF has assigned four errors. BNSF claims, restated, that the district court erred (1) in requiring BNSF to prove its proposed bypass was for a public use before it could enter the defendant property owners' land for the purpose of conducting investigations pursuant to § 76-702; (2) in failing to find that condemnation of land for a rail line is per se condemnation for a public use; (3) in failing to find that BNSF had offered sufficient evidence to prove the proposed bypass was for a public use; and (4) in failing to find that BNSF had negotiated in good faith pursuant to § 76-702. In view of our disposition of this appeal based on resolution of the first assignment of error, we do not reach the second through fourth assignments of error.

STANDARDS OF REVIEW

[1-3] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000). Interpretation of a statute presents a question of law. *Affiliated Foods Co-op v. State*, 259 Neb. 549, 611 N.W.2d 105 (2000).

[4,5] The power of eminent domain may be exercised only on the occasion, and in the mode and manner, prescribed by the Legislature. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Statutes conferring and circumscribing the power of eminent domain must be strictly construed. *Id.*

ANALYSIS

Principles of Sovereign Power of Eminent Domain

[6-8] Every citizen in this state has the constitutional right to acquire, own, possess, and enjoy property. Neb. Const. art. I, § 25. A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain. *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967). The Nebraska Constitution limits the sovereign's absolute power to take private property by requiring that property owners whose property has been taken or damaged for public use under the eminent domain authority be compensated. Neb. Const. art. I, § 21.

[9-11] The power of eminent domain may be delegated by the Legislature. *Van Patten v. City of Omaha*, 167 Neb. 741, 94 N.W.2d 664 (1959). Although railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain. See Neb. Rev. Stat. § 74-308 (Reissue 1996). See, also, *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996). We have stated that "[p]roceedings to subject the property of another for public use under the doctrine of eminent domain must be conducted in the manner prescribed by the statute delegating the power." *Spencer v. Village of Wallace*, 153 Neb. 536, 544, 45 N.W.2d 473, 477 (1951). See, *SID No. 1 v.*

Nebraska Pub. Power Dist., supra; *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995). Pursuant to § 74-308, railroads are required to exercise their eminent domain power in accordance with Nebraska's general eminent domain statutes. See § 76-701 et seq.

[12] Sections 76-701 through 76-724 prescribe the manner and method by which condemnors may exercise the power of eminent domain. It is essential that property taken under the power of eminent domain be for a public use and not a private one. Neb. Const. art. I, § 21; *Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist.*, 218 Neb. 777, 359 N.W.2d 100 (1984); *Burger v. City of Beatrice, supra*.

§ 76-702 and Temporary Taking

The district court determined that under § 76-702, it was incumbent on BNSF to establish "the 'public use' requirement" prior "to enter[ing] private lands for testing purposes." Section 76-702 provides as follows:

> After negotiations have failed, any condemner, or his representative, upon proper identification and after informing the condemnee of the contemplated action is authorized to enter upon any land for the purpose of examining and surveying same in contemplation of bringing or during the pendency of condemnation proceedings under sections 76-701 to 76-724; *Provided*, when an inventory is made of the damage to personal property by reason of examining or surveying the land by the condemner, or his representatives, a copy of the inventory shall be delivered to the condemnee.

For its first assignment of error, BNSF contends that the district court erred in requiring BNSF to prove its proposed bypass was for a public use before it could enter the defendant property owners' land for the purpose of conducting investigations pursuant to § 76-702.

As more fully explained below, the investigations proposed by BNSF amount to a temporary taking and exceed those activities authorized under § 76-702 pursuant to which statutory provision BNSF filed its petition and sought injunctive relief. Accordingly, although for reasons different than those articu-

lated by the district court, we conclude that the district court correctly denied injunctive relief and dismissed the petition.

BNSF argues that under a strict statutory construction, nothing in the language of § 76-702 requires it to prove that it had an objective of a public use supporting its request to enter the defendant property owners' land for the purpose of conducting the surveys and tests and that the district court erred in denying BNSF its requested preliminary and permanent injunctions to enter the defendant property owners' land.

Section 76-702 authorizes "any condemner . . . to enter upon any land for the purpose of examining and surveying [the] same in contemplation of bringing or during the pendency of condemnation proceedings under sections 76-701 to 76-724." Accordingly, § 76-702 permits and limits BNSF's entry upon the defendant property owners' land to "examining and surveying." BNSF argues that pursuant to § 76-702, it had the authority to enter upon the defendant property owners' land to conduct tests which the record shows included geotechnical studies, in which core soil samples, 2 inches in diameter and 50 feet deep, are drilled and gathered approximately every quarter of a mile along the proposed 25½-mile bypass route. BNSF contends that its proposed "investigations" are consistent with "examining" under § 76-702. We do not agree.

[13,14] In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *In re Referral of Lower Platte South NRD*, 261 Neb. 90, 621 N.W.2d 299 (2001). 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. *Id.*

[15] Considering the plain language of § 76-702, the authority to enter land granted under § 76-702 for "examining and surveying" prescribes activities far less intrusive than the drilling and sample gathering for geotechnical studies proposed by BNSF. The undisputed evidence in the instant case demonstrates that the

tests which BNSF proposes to conduct on the property owners' land, including extracting core samples at depths of 50 feet, exceed "examining and surveying" permitted under § 76-702. Thus, the activities for which BNSF seeks injunctive relief under § 76-702 exceed those activities encompassed by this statute.

In determining that the testing activities proposed by BNSF are more extensive than the "examining and surveying" for which entry is authorized under § 76-702, we note that the Legislature has explicitly authorized certain condemnors to enter upon property prior to instituting a condemnation action to conduct various activities which are more extensive than those permitted under § 76-702. See, e.g., Neb. Rev. Stat. § 2-3232 (Cum. Supp. 2000) (natural resources district authorized to enter upon land to "[m]ake studies, investigations, or surveys and do research"); Neb. Rev. Stat. § 15-229 (Reissue 1997) (cities of primary class authorized to enter land in contemplation of condemnation action to "make surveys, examinations, investigations, and tests, and to acquire other necessary and relevant data"); Neb. Rev. Stat. § 39-1324 (Reissue 1998) (Department of Roads granted authority "to enter upon any property to make surveys, examinations, investigations, and tests, and to acquire other necessary and relevant data").

[16] These examples demonstrate that the Legislature is capable of granting a condemnor authority to enter upon property to conduct activities such as tests, investigations, and data gathering in contemplation of filing condemnation actions. The authority granted a condemnor such as BNSF under § 76-702, however, does not include entry upon property for testing or investigating, and, instead, is limited to entry upon land for the purpose of "examining and surveying." It is presumed that the Legislature knowingly limited the precondemnation activities a condemnor may conduct upon property pursuant to § 76-702, and, even if this limitation is by legislative oversight, it is not the office of the courts to legislate into existence greater authority to enter upon land to conduct precondemnation activities than that granted under the statute. See *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000).

Tests similar to those proposed by BNSF have been considered by other courts. It has been observed that core drilling, such

as BNSF proposes to conduct upon the defendant property owners' land in the instant case, is "an intrusion and interference with [one's] rights as a private landowner," which "subverts [the landowner's] right to use and enjoy [the] property in fee simple absolute." *Missouri Highway and Transp. Com'n v. Eilers*, 729 S.W.2d 471, 473-74 (Mo. App. 1987). Such intrusion, described as "dig[ging] up private property," has been defined as a temporary taking, for which a temporary easement must first be obtained. *Id.* at 473. Compare, *County of Kane v. Elmhurst Nat'l Bank*, 111 Ill. App. 3d 292, 443 N.E.2d 1149, 67 Ill. Dec. 25 (1982) (statute authorizing precondemnation entry upon land for surveys and appraisals does not permit "taking" in form of soil boring or geologic study); *Hicks v. Texas Municipal Power Agency*, 548 S.W.2d 949 (Tex. Civ. App. 1977) (statutory right to conduct precondemnation survey does not include right to conduct core drilling operation).

[17,18] We conclude that the tests BNSF proposes to conduct upon entry on the defendant property owners' land amount to a temporary taking. A temporary taking has been defined as "the occupancy of land . . . or a diminution in value . . . that is temporary in nature." 2A Julius L. Sackman, Nichols on Eminent Domain § 6.05[3] at 6-72 (rev. 3d ed. 2001). This court has recognized that the Nebraska Constitution's limit on the sovereign power of eminent domain set forth in article I, § 21, applies to temporary as well as permanent takings. See *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994) (arbitrary and capricious enactment of zoning ordinance and resulting denial of use permit constituted temporary taking of business property by city for which damages must be paid). See, also, *Maloley v. City of Lexington*, 3 Neb. App. 976, 536 N.W.2d 916 (1995) (Neb. Const. art. I, § 21, permits recovery for damages caused by temporary as well as permanent takings). A temporary taking must be accomplished in a manner consistent with the exercise of the power of eminent domain. See *Maloley v. City of Lexington, supra*.

The power of eminent domain must be exercised "in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right." *Burger v. City of*

Beatrice, 181 Neb. 213, 220, 147 N.W.2d 784, 790 (1967). The power of eminent domain may be exercised only on the occasion, and in the mode and manner, prescribed by the Legislature. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Statutes conferring and circumscribing the power of eminent domain must be strictly construed. *Id*. While the language of § 76-702 permits a condemnor to enter upon land for the purpose of "examining and surveying [the] same," it does not permit entry for the purpose of conducting the type of physical invasion to the land proposed by BNSF. The geotechnical tests and investigations that BNSF seeks to conduct upon the defendant property owners' land exceed the statutory authority given to BNSF under § 76-702 for which injunctive relief of entry for the purpose of conducting such tests and investigations was sought in the petition. The tests amount to a temporary taking which must be accomplished in the mode and manner prescribed by the Legislature for the exercise of the power of eminent domain. Neb. Const. art. I, § 21; *Whitehead Oil Co. v. City of Lincoln, supra*; *Maloley v. City of Lexington, supra*.

When the record demonstrates that the district court's decision is correct, although such correctness is based on a different ground from that assigned by the district court, the appellate court will affirm. *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000). Accordingly, although based on a rationale different than that articulated by the district court, we affirm the district court's denial of BNSF's request for preliminary and permanent injunctions and dismissal of the petition.

CONCLUSION

As more fully explained above, the investigations proposed by BNSF amount to a temporary taking and exceed those activities authorized under § 76-702 pursuant to which the petition was filed and injunctive relief sought. Accordingly, although for reasons different than those articulated by the district court, we conclude that the district court correctly denied injunctive relief and dismissed the petition.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. EHLERS, APPELLANT.

631 N.W. 2d 471

Filed July 20, 2001. No. S-00-216.

1. **Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **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.
3. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Criminal Law: Attorneys at Law: Final Orders: Appeal and Error.** An order disqualifying court-appointed counsel in a criminal case is not a final, appealable order.
5. **Constitutional Law: Criminal Law: Right to Counsel.** When a defendant in a criminal case chooses to privately retain counsel, he or she has a constitutional right to representation by the counsel of his or her choice.
6. **Attorneys at Law: Final Orders.** In the civil context, an order disqualifying privately retained counsel generally is not a final order.
7. **Attorneys at Law: Appeal and Error.** In civil cases and in criminal cases involving the disqualification of privately retained counsel, if an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate.
8. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
9. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
10. **Attorney and Client: Conflict of Interest.** As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.
11. **Criminal Law: Standing: Attorneys at Law.** In the criminal context, the government has a sufficient interest in preserving the integrity of a criminal proceeding to have standing to seek disqualification of defense counsel when the counsel has previously represented a proposed prosecution witness.
12. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution provides that a criminal defendant has a right to have the assistance of counsel for his or her defense.
13. **Right to Counsel.** An essential part of a defendant's right to counsel is the defendant's ability to select the counsel of his or her choice.
14. **Constitutional Law: Criminal Law: Right to Counsel.** Because disqualification of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently.

15. **Constitutional Law: Right to Counsel.** The Sixth Amendment recognizes a presumption in favor of the defendant's chosen counsel.
16. **Constitutional Law: Right to Counsel: Conflict of Interest.** The guarantee of the Sixth Amendment encompasses the right to assistance of counsel unhindered by a conflict of interest.
17. **Right to Counsel: Waiver.** A defendant can waive his or her right to assistance of counsel unhindered by a conflict of interest, provided that the waiver is knowing and intelligent.
18. **Constitutional Law: Right to Counsel: Conflict of Interest: Waiver.** A court is not required to accept a defendant's waiver of his or her Sixth Amendment right to counsel unhindered by a conflict of interest in all circumstances.
19. **Criminal Law: Attorneys at Law: Conflict of Interest: Presumptions.** In a criminal case in which the defendant has a privately retained attorney, a trial court must recognize a presumption in favor of the defendant's counsel of choice, but that presumption may be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict.
20. **Constitutional Law: Right to Counsel: Conflict of Interest.** When determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest.
21. **Criminal Law: Attorneys at Law: Proof.** When the State brings a motion to disqualify a criminal defendant's privately retained counsel, the State bears the burden of proving that disqualification is necessary.
22. **Criminal Law: Attorneys at Law: Presumptions.** The rules and presumptions applied in civil cases in favor of disqualification of an attorney cannot be applied in the same manner in a criminal case.
23. **Criminal Law: Witnesses: Standing.** Although a witness may have some personal interest in the outcome of a criminal trial, he or she is not a party to the action and does not have standing to intervene as a party to the action.
24. **Criminal Law: Right to Counsel: Conflict of Interest.** In a criminal case, when weighing the interests at stake regarding the disqualification of an attorney, courts generally give substantial weight to defense counsel's representations regarding conflicts of interest.
25. **Constitutional Law: Right to Counsel: Conflict of Interest: Waiver: Postconviction.** When waiving the constitutional right to representation free of conflicts of interest, a defendant must be fully informed of any potential consequences of that choice, including the likely foreclosure of a later action for postconviction relief due to the conflict.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Michael N. Schirber, of Schirber Law Offices, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

Michael L. Ehlers appeals from an order of the Sarpy County District Court sustaining the State of Nebraska's motion to disqualify Michael N. Schirber, his privately retained counsel. We determine that because a criminal defendant has a Sixth Amendment interest in representation by the counsel of his or her choice, irrebuttable presumptions that we have applied in favor of disqualification in civil cases cannot be applied in a criminal case. Instead, when making disqualification decisions in a criminal case involving privately retained counsel, a court must balance the defendant's Sixth Amendment right to be represented by counsel of choice against the defendant's right to a defense conducted by an attorney who is free from conflicts of interest. After considering Ehlers' Sixth Amendment interests, we conclude that the district court erred in disqualifying his privately retained counsel, and we reverse, and remand to allow Ehlers to make a knowing and voluntary waiver of his Sixth Amendment right to representation by counsel who is free from conflicts of interest.

I. BACKGROUND

On February 5, 1999, Regina M. Ehlers (Regina) filed a petition for dissolution of her marriage to Ehlers in the Sarpy County District Court. The parties had one minor child affected by the dissolution proceedings. During the course of the dissolution proceedings, Regina sought a restraining order against Ehlers. Regina alleged that Ehlers had threatened to kill the parties' child and had choked the child on two separate occasions.

Regina was initially represented by private counsel in the dissolution action but was later represented by Robert A. Sanford at the Legal Aid Society of Omaha, Nebraska. Jeffrey A. Wagner was employed by the Legal Aid Society and supervised Sanford until October 15, 1999, at which time he became employed by Schirber. Schirber was later disqualified from representing Ehlers in the dissolution action.

On June 11, 1999, Ehlers was charged by amended information with attempted first degree sexual assault, two counts of child abuse, two counts of terroristic threats, and two counts of third degree sexual assault. The victim described in the amended information is the child of Regina and Ehlers, and both Regina and the victim are listed as witnesses.

Ehlers privately retained Schirber to represent him in the criminal action. On January 4, 2000, the State moved to disqualify Schirber from representing Ehlers. The State alleged that Regina was a material witness in its case in chief against Ehlers and that the matters at issue in the dissolution action were similar to those in the criminal case against Ehlers. The State further alleged that Wagner's association with Schirber created an appearance of impropriety that would disqualify Schirber from the criminal case.

The State entered into evidence an affidavit from Sanford. In the affidavit, Sanford averred that he had represented Regina in the dissolution action and had sought a protection order against Ehlers on her behalf. Sanford averred that Wagner had worked as his immediate supervisor and that Wagner was involved in deciding to accept Regina's case. Sanford further averred that he discussed with Wagner the relationship between the dissolution action and the criminal charges against Ehlers. Wagner, however, testified at the disqualification hearing that he did not know Regina, had never met her, and did not have any personal knowledge of her domestic, financial, or legal affairs. Wagner also testified that he never conveyed any confidences about Regina to Schirber. Wagner admitted it was possible that he discussed the merits of Regina's case with Sanford, but testified that he had no recollection of doing so. Regina did not testify at the disqualification hearing.

Relying in part on our decisions in previous civil cases, the district court concluded that the criminal action included issues which were material to the dissolution action. The court further determined that Wagner was presumed to have received confidences about Regina and was presumed to have shared those confidences with Schirber. The court then disqualified Schirber from representing Ehlers in the criminal case. Ehlers appeals.

II. ASSIGNMENTS OF ERROR

Ehlers assigns that the district court erred in granting the State's motion to disqualify his privately retained counsel and in denying his motion for attorney fees.

III. STANDARD OF REVIEW

[1] In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling. *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000).

[2] 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. *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001).

IV. ANALYSIS

1. Jurisdiction

[3] We first consider whether the trial court's order disqualifying Ehlers' privately retained counsel is a final, appealable order. It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Lauck, supra*.

[4,5] We have not previously considered whether an order disqualifying privately retained counsel in a criminal case is a final, appealable order. We have held that an order disqualifying court-appointed counsel in a criminal case is not a final, appealable order. See *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996). *State v. Schlund*, however, is applicable only in a criminal case involving court-appointed counsel. When a defendant in a criminal case chooses to privately retain counsel, he or she has a constitutional right to representation by the counsel of his or her choice. *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

[6,7] In the civil context, we have held that an order disqualifying privately retained counsel generally is not a final order. See *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). But, we have also held in civil cases that if an appeal from an order of disqualification involves issues collateral to the

basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. *Id*. See, *Mutual Group U.S. v. Higgins, supra*; *Detter v. Schreiber*, 259 Neb. 381, 610 N.W.2d 13 (2000); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998). We conclude that this rule is applicable to the disqualification of privately retained counsel in a criminal case.

In this case, delaying the appeal until after a dispositive judgment on the criminal charges would not protect Ehlers' constitutional interest in the counsel of his own choosing. We conclude that interlocutory review is appropriate and that we have jurisdiction over this appeal.

2. Standing

We next address whether the State has standing to seek disqualification. In this case, Regina, the former client, did not seek Schirber's disqualification. Rather, the State sought the disqualification on the basis that Regina was an important witness in their case against Ehlers.

[8,9] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000); *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). See *Mutual Group U.S. v. Higgins, supra*. In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[10,11] As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification. *Hawkes v. Lewis, supra*. We have acknowledged, however, cases from other jurisdictions which hold that disqualification may be sought by a party who is not a former client under certain circumstances. See *id*. In the criminal context, the Second Circuit Court of Appeals has held that the government has a sufficient interest in preserving the integrity of a criminal proceeding to have standing to seek disqualification of defense counsel when the counsel has previously represented a proposed prosecution witness. *United States v. Cunningham*, 672

F.2d 1064 (2d Cir. 1982). We agree. The State has standing to seek disqualification of Ehlers' attorney in this case.

3. Disqualification

In disqualifying Schirber, the district court cited to our decisions in civil cases, under which we have applied certain presumptions in favor of disqualification. See, *Hawkes v. Lewis, supra*; *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998); *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997); *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995). But Ehlers argues that because he has a Sixth Amendment right to counsel of his choice, the presumptions we have applied in civil cases cannot be equally applied in a criminal case.

(a) Overview of Sixth Amendment Principles

[12-14] The Sixth Amendment to the U.S. Constitution provides that a criminal defendant has a right to have the assistance of counsel for his or her defense. The U.S. Supreme Court has long recognized that an essential part of that right is the defendant's ability to select the counsel of his or her choice. See, *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 2d 158 (1932); *U.S. v. Ross*, 33 F.3d 1507 (11th Cir. 1994). The Eighth Circuit Court of Appeals has stated that " '[i]n general defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.' " *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). See *U.S. v. Ross, supra*. Accordingly, because disqualification of a criminal defendant's chosen counsel raises problems of a constitutional dimension, it is a harsh remedy that should be invoked infrequently. *U.S. v. Gotti*, 9 F. Supp. 2d 320 (S.D.N.Y. 1998), citing *U.S. v. Locascio*, 6 F.3d 924 (2d Cir. 1993).

[15,16] The U.S. Supreme Court has held that the Sixth Amendment recognizes a presumption in favor of the defendant's chosen counsel. *Wheat v. United States, supra*. Among reasons for this presumption are (1) a historic respect for the

defendant's autonomy in crafting a defense, (2) the strategic importance of choice in ensuring vigorous advocacy, and (3) practical considerations of cost to the defendant and the judicial system if counsel of choice were wrongly denied. See Roxanne Malaspina, *Resolving the Conflict of the Unsworn Witness: A Framework for Disqualifying House Counsel Under the Advocate-Witness Rule*, 67 N.Y.U. L. Rev. 1073 (1992) (explaining these factors). See, also, Linda Ann Winslow, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 Wash. L. Rev. 863 (1987) (discussing general harms created by disqualification). But the guarantee of the Sixth Amendment also encompasses the right to assistance of counsel unhindered by a conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). See *U.S. v. Ross, supra*.

[17-19] A defendant can waive his or her right to assistance of counsel unhindered by a conflict of interest, provided that the waiver is knowing and intelligent. Indeed, a defendant may waive his or her right to be represented by counsel at all. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). But a court is not required to accept a defendant's waiver in all circumstances. Therefore, the right to counsel of choice is not absolute. *Wheat v. United States, supra*. A trial court must recognize a presumption in favor of a defendant's counsel of choice, but that presumption may be overcome by a demonstration of actual conflict or a showing of a serious potential for conflict. *Wheat v. United States, supra*; *U.S. v. Ross, supra*. Disqualification in such cases is necessary because when a defendant is represented by an attorney who has an actual or potentially serious conflict, the defendant may be deprived of effective assistance of counsel. See *id*.

[20] So, when determining whether or not to disqualify a defense counsel, the court must balance two Sixth Amendment rights: (1) the defendant's right to be represented by counsel of choice and (2) his or her right to a defense conducted by an attorney who is free of conflicts of interest. *U.S. v. Ross, supra*. See *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). The U.S. Supreme Court has also recognized an independent interest of the courts in ensuring that crim-

inal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. *Wheat v. United States, supra*.

In this case, the concern is that the attorney-client relationship with Regina gave rise to continuing obligations of loyalty and confidentiality and that if the confidences were kept, the representation of Ehlers might prove to be ineffective due to the inability of Schirber to conduct a thorough cross-examination. See, *U.S. v. Gotti, supra*; Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201 (1989). The goal is to discover whether a defense lawyer has divided loyalties that prevent him or her from effectively representing the defendant. *U.S. v. Ross*, 33 F.3d 1507 (11th Cir. 1994). If the conflict could cause the defense attorney to improperly use privileged communications in cross-examination, then disqualification is appropriate. *Id*. Disqualification is also appropriate if the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client or to advance the attorney's own personal interests. *Id*.

(b) Burden of Proof

Courts are divided on the question of who should bear the burden of proof when a disqualification motion is made by the government in a criminal case. Some jurisdictions state, often in connection with an abuse of discretion standard of review, that any doubt is to be resolved in favor of disqualification. See, e.g., *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

Others, however, take a contrary position, holding that when seeking disqualification, the government bears the burden of overcoming the presumption in favor of a defendant's choice of counsel by showing that the defense attorney has an actual or potentially serious conflict. *Hanna v. State*, 714 N.E.2d 1162 (Ind. App. 1999); *United States v. Grass*, Nos. Crim.A. 00-120-01, Crim.A. 00-120-02, 2000 WL 1728509 (E.D. Pa. Nov. 21, 2000).

At least one court, while stating that doubts are to be resolved in favor of disqualification, has also stated that the government

bears a " ' "heavy burden" ' " and must meet a " ' "high standard of proof." ' " *In re Cendant Corp. Securities Litigation*, 124 F. Supp. 2d 235, 249 (D.N.J. 2000). In *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986), the Ninth Circuit Court of Appeals held that "[i]n seeking to disqualify a defendant's chosen counsel, the government bears a heavy burden of establishing that concerns about the integrity of the judicial process justify the disqualification."

[21] Certainly, a trial court has an independent duty to explore any conflicts of interest that may arise regardless of whether such conflicts are raised by the parties. See *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 2d 680 (1942) (superseded on other grounds by Fed. R. Evid. 104(a) as stated in *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)). But "the Sixth Amendment right to counsel of choice reflects a constitutional protection of the defendant's free choice independent of the concern for the objective fairness of the proceedings." *Hanna v. State*, 714 N.E.2d at 1165, citing *United States v. Diozzi*, 807 F.2d 10 (1st Cir. 1986), and *Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). When this is coupled with the presumption in favor of the defendant's choice in counsel, the logical conclusion is to place the burden of proof on the government. Further, when the State makes a motion to disqualify, under standard principles regarding the allocation of the burden of proof, the State must bear that burden. See *Hanna v. State*, 714 N.E.2d at 1165 ("[w]here it is the government which moves to disqualify defense counsel, the burden is on the government to show that any infringement on the defendant's choice of counsel is justified"). Accordingly, we hold that when the State brings a motion to disqualify a criminal defendant's privately retained counsel, the State bears the burden of proving that disqualification is necessary.

(c) Application to Ehlers' Case

The district court failed to consider the implication of Ehlers' Sixth Amendment right to counsel of his choice. Instead, the district court applied rules we have used in civil cases to determine that Schirber should be disqualified. The district court first

referred to the principle that an attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client's interest in the same subject matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof. See, *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998); *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998); *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997).

The district court next applied the principle from civil cases that confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm. See, e.g., *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995). Under this presumption, an attorney who leaves a firm is presumed to have acquired client confidences during his or her tenure at the firm. It is then further presumed that the attorney has shared or will share those client confidences with members of any subsequent firm with which the attorney becomes employed. See *Bechtold v. Gomez, supra*. In the civil context, we have also stated that when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation. *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993).

But in a criminal case, it has been held that it is error for a trial court to apply an irrebuttable presumption that former clients imparted confidences to the defendant's attorney when the former clients testified that no confidences had been shared and the defense attorney testified that he received no confidential information. *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). See, also, *Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000) (refusing to apply irrebuttable presumptions in criminal case). See, generally, *United States v. O'Malley*, 786 F.2d 786 (7th Cir. 1986) (refusing to apply holdings from civil cases in criminal case).

The view that the presumptions in favor of disqualification that we apply in civil cases are inapplicable in a criminal case is illustrated by our court's decision in *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

In *State v. Marchese, supra*, the defendant was charged with arson after he was alleged to have deliberately set two of his wife's dresses on fire, which caused damage to a building. At the time that Marchese entered his plea of guilty, his attorney was also representing the wife on a charge of aiding and abetting Marchese to resist arrest on the arson charge, as well as representing her in several other criminal matters and in an action to dissolve her marriage to Marchese. Marchese sought postconviction relief, contending that due to his attorney's conflict of interest, his plea of guilty was the result of ineffective assistance of counsel. The district court denied an evidentiary hearing. On appeal, we made note of the Sixth Amendment concerns at issue. Recognizing the possibility that an actual conflict of interest may have occurred, we reversed for an evidentiary hearing. In doing so, however, we stated:

> [T]he fact of multiple representation alone is not a per se violation of the Sixth Amendment. . . . *Nor is the fact that an attorney has other clients, including one who would be a State witness and testify at trial, sufficient in and of itself to constitute a conflict of interest.* . . . Similarly, the mere possibility of a lawyer's conflict of interest is insufficient to impugn a criminal conviction.

(Citations omitted.) (Emphasis supplied.) *Id.* at 978, 515 N.W.2d at 673. See, also, *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000); *State v. Pope*, 211 Neb. 425, 318 N.W.2d 883 (1982).

State v. Marchese, supra, was decided after this court instituted the use of irrebuttable presumptions in civil cases. Further, if irrebuttable presumptions in favor of disqualification were applied in criminal cases, cases such as *Marchese* would require automatic reversal due to ineffective assistance of counsel. To avoid such cases, trial courts would have little choice but to disqualify a defendant's chosen counsel whenever there is a perceived conflict. To do so is in direct contradiction to a criminal defendant's constitutional right to counsel of choice and the presumption in favor of that choice. See, *United States v.*

Cunningham, 672 F.2d 1064 (2d Cir. 1982) (distinguishing between civil and criminal cases); *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975) (stating that because civil cases do not involve crucial factor of criminal defendant's Sixth Amendment rights, they are not controlling).

[22] By applying the presumptions we have applied in civil cases equally to a criminal case, the district court ignored the presumptions in favor of a criminal defendant's choice of counsel. The problem with such an approach is that the application of presumptions in favor of disqualification in a criminal case, particularly if those presumptions are irrebuttable, acts to deprive the defendant of a constitutional right. Thus, the rules we have applied in civil cases cannot be applied in the same manner in a criminal case.

[23] We further note that in this case, the concern of a conflict is focused on Regina who, as a witness, is not a party to the action, and who was never personally represented by either Schirber or Wagner. Although a witness may have some personal interest in the outcome of a criminal trial, he or she is not a party to the action and does not have standing to intervene as a party to the action. For example, Neb. Const. art. I, § 28, provides that a crime victim has the right to be informed of criminal court proceedings and a right to be present at trial absent a sequestration order by the trial court. It also provides, however, that it does not afford a victim standing to participate as a party. Accordingly, Schirber's representation of Ehlers is not directly adverse to Regina's interests. Instead, it is the State's interests that are directly at issue.

We conclude that the district court erred when it applied presumptions applicable to civil cases to Ehlers' criminal proceedings. Rather, under *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988), a balance must be performed between Ehlers' Sixth Amendment right to counsel of choice and his right to representation free from conflicts.

(d) Balancing

We next apply the test required by *Wheat v. United States, supra*, which includes a rebuttable presumption in favor of the defendant's counsel of choice. We first conclude that this case

does not involve an actual conflict of interest. This is not a case involving concurrent representation where the defense attorney directly represented the government witness. Rather, it is a case of successive representation. Regina was at one time represented by Sanford, an attorney at an agency. Wagner, another attorney employed by that agency at the time who was Sanford's supervisor, later switched employment and now works at the firm of Ehlers' attorney, Schirber. No direct or concurrent representation is involved. Thus, there is no actual conflict.

[24] We further conclude that a potentially serious conflict is not present. The U.S. Supreme Court has stated that the seriousness of any potential conflict depends on its likelihood and dimensions. *Wheat v. United States, supra*. When weighing the interests at stake, courts generally give substantial weight to defense counsel's representations regarding conflicts of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). When the evidence presented shows that no confidences were imparted to the defense attorney that created an actual or potentially serious conflict affecting cross-examination, deference should be given to the defendant's choice when that choice is made knowingly and intelligently.

An affidavit was provided by Sanford stating that he discussed with Wagner the relationship between Regina's dissolution action and the criminal case against Ehlers. Wagner testified that he does not know Regina, has never met her, and does not have any personal knowledge as to her domestic, financial, or legal affairs. Standing alone, this conflicting evidence could be cause for concern. But, Wagner then testified that he imparted no information to Schirber. The State did not present evidence to contradict that testimony. Consequently, even if it were assumed that Wagner was privy to confidential information, there was no evidence provided by the State that Schirber had received that information or that he would receive that information in the future. Further, no testimony was provided by Regina. Thus, there is no evidence in this case that Ehlers' attorney is privy to confidential information that will compromise

any ethical duty to Regina or that will deprive Ehlers of effective assistance of counsel.

Nor is there any concern for protecting the judicial system's interest in safeguarding the fairness and accuracy of the criminal proceedings. When the evidence shows that an actual conflict does not exist and that any potential conflict is not serious but is, instead, highly remote, there is no concern that the interests of the judicial system will be compromised. Rather, under such circumstances, the disqualification of a defendant's counsel of choice would raise concerns of compromising the judicial system by denying the defendant a constitutional right and forcing him or her to start anew with counsel who will be less familiar with the case and may have less time to prepare for trial. See, generally, Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201 (1989).

We conclude that Ehlers' right to counsel of choice outweighs his right to counsel free from conflicts. Thus, the district court erred in disqualifying Schirber.

(e) Waiver

[25] Although we conclude that no actual or potentially serious conflict is at issue, the remote possibility of a conflict is still present. Therefore, because of the competing Sixth Amendment rights at issue, Ehlers may proceed with his counsel of choice, but only if he provides a knowing and intelligent waiver of his right to counsel free from conflicts of interest. By waiving the constitutional right to representation free of conflicts of interest, a defendant is doing so in favor of another constitutional right, the right to counsel of his or her choice, and he or she must be fully informed of any potential consequences of that choice, including the likely foreclosure of a later action for postconviction relief due to the conflict. See, generally, *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 2d 680 (1942) (superseded on other grounds by Fed. R. Evid. 104(a) as stated in *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)). A valid waiver not only protects the defendant, but it also acts to protect the integrity of the process and further alleviates any collateral concerns regarding the necessity to protect that process.

Because the record does not show that Ehlers made a knowing and intelligent waiver of his right to counsel free from conflicts, we reverse the decision of the district court and remand the cause to allow him the opportunity to make such a waiver. See *United States v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975) (remanding to allow for waiver). Ehlers must be carefully and fully informed, both by his attorney and the court, of the competing Sixth Amendment interests at stake and the consequences of a waiver of his right to counsel free from conflicts. See *United States v. DeLuna*, 584 F. Supp. 139 (W.D. Mo. 1984), citing *United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977) (describing procedure to elicit acceptable waiver). If such a waiver is given, Ehlers may proceed with Schirber as his attorney of choice. In the absence of such a waiver, disqualification will be necessary.

4. Attorney Fees

Finally, Ehlers contends that the State's motion to disqualify was a frivolous pleading and seeks attorney fees. This case involves serious Sixth Amendment concerns. The State has a legitimate reason to seek to ensure that Ehlers is not represented by ineffective assistance of counsel in order to ensure the finality of any potential conviction. We conclude that the motion was not frivolous and deny the request for attorney fees.

Reversed and remanded for further proceedings.

Miller-Lerman, J., concurring.

I concur in this criminal case. I write only to state that I do not read the majority opinion as necessarily endorsing an irrebuttable presumption of multiple imputation of shared confidences in civil cases which might be said to exist in opinions such as *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998), *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995), and *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993).

BARBARA R. MONDELLI, APPELLANT AND CROSS-APPELLEE, V. KENDEL HOMES CORPORATION, A NEBRASKA CORPORATION, AND CITY OF PAPILLION, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS. VITO B. MONDELLI, APPELLANT AND CROSS-APPELLEE, V. KENDEL HOMES CORPORATION, A NEBRASKA CORPORATION, AND CITY OF PAPILLION, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS.

631 N.W. 2d 846

Filed July 20, 2001. Nos. S-00-296, S-00-297.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
3. **Expert Witnesses.** Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.
4. **Rules of Evidence: Expert Witnesses.** The facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial. If the data is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
5. ____: ____. Where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.
6. **Evidence: Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value.
7. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
8. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.

9. **Appeal and Error.** In order 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.
10. ____. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
11. **Summary Judgment: Appeal and Error.** 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.
12. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
13. **Negligence: Intent: Words and Phrases.** Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable person to realize the extreme risk to which the conduct subjects the safety of others.
14. **Judgments: Appeal and Error.** In a bench trial of an action at law, the factual findings made by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.

Appeals from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for a new trial on the issues of causation and damages.

W. Craig Howell and Nora M. Kane, of Domina Law, P.C., for appellants.

Richard C. Gordon and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Kendel Homes Corp.

Thomas M. Locher and Thomas M. Braddy, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee City of Papillion.

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

WRIGHT, J.

I. NATURE OF CASE

Barbara R. Mondelli and Vito B. Mondelli (Mondellis), individually and on behalf of their children, Jacqueline and Anthony, sought to recover damages for personal injuries allegedly sustained as a result of the defective construction of their home in Papillion, Nebraska. The district court granted partial summary judgment for the City of Papillion (City) based

on the court's finding that the City did not owe an actionable duty to the Mondellis.

In an earlier appeal, this court determined that genuine issues of material fact existed as to whether the City breached a legal duty owed to the Mondellis. The judgment of the district court was reversed, and the cause was remanded for further proceedings. See *Mondelli v. Kendel Homes Corp.*, 254 Neb. xvii (case Nos. S-96-820 through S-96-823, Apr. 1, 1998).

Upon remand, the parties bifurcated liability and damages. The district court found liability on the part of the City and Kendel Homes Corporation (Kendel), but the court granted the defendants' motion for directed verdict on causation and damages.

II. SCOPE OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[2] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Id.*

III. FACTS

In 1991, the Mondellis entered into a purchase agreement with Kendel for a house to be built in Papillion. During construction, the house was inspected by the City building inspector to determine whether it conformed with the requirements of Papillion's municipal code (Code) and the Uniform Building Code (UBC), which had been incorporated into the Code by the Papillion City Council. The Mondellis and their children moved into the house in April 1992.

Subsequently, Barbara noticed water coming into the basement beneath the dining room window and the formal living room window. Kendel put caulking on the windowsills, but each time it rained between May 1992 and July 1993, the Mondellis noticed water in the basement of the house. Kendel was asked to do some curative work on the brick front of the house, but no action was taken until May 1993, when a bricklayer did some random cutting and retucking.

At about the same time, a Kendel employee cut a 6- by 1-foot section of Sheetrock in both the dining room and Jacqueline's bedroom upstairs. When the employee pulled out the insulation, it was dripping and had an odor. Barbara noticed that the stud plate and the wall were covered with mud and tiny toadstools. The employee told Barbara that the problem was mold and suggested that she hire an attorney.

Barbara testified that she began noticing a strange odor in the home in the summer of 1992 but thought the odor was the smell of a new house. Over time, the odor worsened, and Jacqueline complained that her room smelled funny and that she could not breathe at night.

The Mondellis alleged that surface water and rainwater leaked through the exterior of the house into the interior and that mold, fungi, and airborne spores began growing in the exterior wall insulation and interstitial spaces between the interior and exterior walls of the house. The Mondellis claimed that in June 1993, they learned that mold, fungi, and spores had circulated throughout the house and affected the air, carpeting, furniture, clothing, and personal effects, which made them unusable.

The Mondellis claimed that the mold caused health problems. Starting in November 1992, Barbara began having headaches and nasal congestion. By February 1993, she was short of breath, had developed an annoying cough, and felt pressure on her chest. She sought medical attention in July for her complaints, and the family moved out of the house on the doctor's recommendation. Dr. Manju Patney diagnosed Barbara as suffering from asthma. She suffered several asthmatic attacks that required hospitalization. Dr. Patney stated that mold was a common cause of asthma and that Barbara's asthma was triggered by exposure to high counts of mold in the house.

In their fourth amended petitions, the Mondellis alleged that the City inadequately and negligently inspected the house in a manner constituting a reckless disregard for public health and safety. The Mondellis alleged that the City issued a building permit to Kendel when the blueprints and construction design for the house were in violation of the Code, the UBC, and industry standards. They claimed that the City approved the construction notwithstanding reasonable notice of the existence of the defects.

As to Kendel, the Mondellis alleged that the house had latent and dangerous defects. They claimed that the exterior walls were not properly weatherproofed as a result of Kendel's failure to install water-resistant sheathing between the brick facade and the interior walls of the house, in violation of §§ 1708 and 3006 of the UBC, as adopted by the Code, and industry standards. They further claimed that flashing where the roof line and the garage joined the northeast exterior of the wall of the house was not properly installed; that weep holes between the first course of the brick and the concrete block foundation wall on the north side of the house were not properly installed; that mortar was not properly applied to the bed and head joints of the brick on the north facade of the house; and that mortar work on the brick was improperly done in temperature conditions below generally accepted temperature levels for such work, in violation of the Code, the UBC, and industry standards.

The Mondellis alleged that in connection with the construction and sale of the house, Kendel impliedly warranted that the house would be erected in a workmanlike manner in accordance with good usage and accepted practices in Papillion and similar communities; would be constructed in accordance with the Code, the UBC, and industry standards; and would be fit for its intended purposes free from latent defects and fit for human habitation. The Mondellis' theory of relief also alleged strict liability and negligence.

At the end of the liability phase of the trial, the district court found that the Mondellis had met their burden of proof that the house was defective in that (1) the exterior walls of the house were not properly weatherproofed as a result of Kendel's failure to install water-resistant sheathing, (2) the flashing was not properly installed, (3) the weep holes were not properly installed, and (4) the mortar was not properly applied. The district court found that all these actions were in violation of the Code and industry standards and that these defects constituted a breach of implied warranty that the house would be erected in a workmanlike manner. The district court concluded that the Mondellis failed to prove that the defects constituted a breach of warranty that the house would be fit for human habitation.

On the theory of negligence, the district court found that Kendel was negligent in constructing the house in violation of the Code, the UBC, and industry standards; in failing to supervise and inspect the construction and the work of its subcontractors to ensure that the house was free of defects; and in failing to adequately instruct its subcontractors on the Code, the UBC, and industry standards. The district court entered judgment in favor of the Mondellis against Kendel on liability under the theories of implied warranty and negligence and stated that strict liability was an appropriate theory of recovery. However, the district court reserved for further hearing the issue of whether the defects rendered the home unreasonably dangerous and unsafe for its intended use.

The district court found the City negligent in issuing a building permit when the blueprints and construction design for the house violated the Code, the UBC, and industry standards and in approving construction of the house notwithstanding reasonable notice of the existence of the defects and found that the City acted in reckless disregard for public health and safety. The district court entered judgment on the issue of liability against the City, reserving for further hearing as to both Kendel and the City the issue of damages proximately caused and resulting from the respective breaches of implied warranty, negligence, and/or strict liability.

At the time of trial on causation and damages, the district court denied the Mondellis' motion to join their claims with those of their children based on commonality of facts and witnesses. During the trial, the district court excluded the testimony of the Mondellis' expert witness, Dr. Adi Pour, a toxicologist for the Nebraska Department of Health and Human Services Regulation and Licensure. The district court found that Dr. Pour could not testify as to causation because no standards existed in the scientific community concerning the level of mold which is acceptable in a house. The district court also excluded some of the testimony of Dr. Jerome King, a quality control director for Midwest Laboratories, Inc., and a report prepared by Midwest Laboratories because the court found that the laboratory's sampling procedure was flawed and lacked foundation. At the close of the evidence, the district court

granted the defendants' motion for a directed verdict on the grounds that causation had not been proved. The Mondellis' motion for new trial was subsequently overruled, and they appeal. Kendel and the City have each cross-appealed.

IV. ASSIGNMENTS OF ERROR

The Mondellis assign the following errors: (1) The district court erred in excluding the testimony of Dr. Pour; (2) the district court erred in excluding the testimony of Dr. King concerning the findings of Midwest Laboratories and the findings, conclusions, and opinions derived from research performed by Midwest Laboratories; (3) the district court erred in sustaining the motion for directed verdict of Kendel and the City; and (4) the district court erred in refusing to join the claims of the Mondellis and their children and, in doing so, abused its discretion by removing the children's properly pled claims for relief as minors from Barbara's lawsuit.

The City's cross-appeal claims that the district court erred (1) in stating and applying the law of the case; (2) in finding that the Code incorporated by reference the 1983 edition of the "One and Two Family Dwelling Code" (CABO); (3) in finding that the Code required builders to install tar paper over the sheathing that covers the frame before constructing the exterior brick veneer of a house; (4) in finding that the City had a duty to inspect building plans and construction for compliance with industry standards; (5) in finding that the Mondellis met their burden of proof that the City issued a building permit when the blueprints and construction design for the house were in violation of the Code, the UBC, and industry standards; (6) in finding that the Mondellis met their burden of proof that the City approved construction of the house notwithstanding reasonable notice of the existence of the defects; (7) in finding that the Mondellis met their burden of proof that the negligent acts of the City occurring after February 7, 1992, constituted a reckless disregard for public health and safety; and (8) in failing to find that the City was immune from suit under Neb. Rev. Stat. § 13-910(1), (2), and/or (3) (Cum. Supp. 1992).

In its cross-appeal, Kendel assigns as error: (1) The district court erred in finding that the theory of strict liability applies to

this case and in imposing liability on Kendel on that basis; (2) the district court erred in finding that the CABO applied and that the CABO imposed construction obligations on Kendel and/or that Kendel failed to satisfy those obligations or their equivalents; and (3) the district court erred in finding that the evidence sustained the imposition of liability on Kendel on the basis of breach of warranty, strict liability, and/or negligence.

V. ANALYSIS

1. Mondellis' Appeal

(a) Exclusion of Testimony

We first address the Mondellis' claim that the district court erred in excluding the testimony of Drs. Pour and King.

(i) Dr. Pour

The district court granted the City's motion in limine as to Dr. Pour, finding that there were no standards shown for sampling of the level of spores or mold and any related hazard or danger. The district court found that there were no accepted standards on "environmental [air] in residences" and that Dr. Pour's testimony would not have general acceptance in the scientific community under the *Frye* standard. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[3] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Id*. At the time of trial, Nebraska adhered to the *Frye* standard, under which the proponent of evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). But see *Schafersman v. Agland Coop, ante*

p. 215, 631 N.W.2d 862 (2001). The district court refused to allow Dr. Pour's testimony to be presented to the jury.

Dr. Pour is an environmental toxicologist. She received a bachelor's degree in biology from the University of Nebraska at Omaha, a master's degree in pharmacodynamics and toxicology from the University of Nebraska Medical Center (UNMC), and a Ph.D. in toxicology from UNMC. As a toxicologist for the Department of Health and Human Services Regulation and Licensure, she addresses any cases related to toxicology of water, consumer risks, and other environmental issues.

Dr. Pour stated in her deposition that there are no state regulations concerning indoor air quality. The state does not recommend that air samples be taken for mold. She testified that if there are visible signs of mold, there is no need for air monitoring. Although Dr. Pour did not visit the Mondelli home, she stated that she has inspected 10 homes which had mold. When investigating for microbiological contamination, Dr. Pour said the most important factor is visual inspection. Also taken into consideration are the symptoms of persons living in the home and the history of the home. She had seen photographs of the Mondelli home but did not rely on them to form her opinion.

On December 9, 1993, Dr. Pour wrote a letter to the Mondellis recommending that they not return to the home until the mold problem had been resolved. She made the recommendation on the basis of a laboratory report about the air quality of the home and medical reports on the Mondellis.

Dr. Pour stated that no industry standards exist to determine the acceptable level of mold in an indoor area; only guidelines or recommendations are available. The indoor air quality concentration for total mold should be 25 percent of the outside concentration during the summer. According to Dr. Pour, a house with less than 100 colony-forming units per cubic meter of total molds is a house with no mold problem. Dr. Pour said she based her opinion on general scientific information.

The laboratory report on the Mondelli home indicated readings for the mold level in Jacqueline's bedroom ranging from 550 spores per cubic meter of total molds in the middle of the bedroom to 725 spores per cubic meter. Under the plastic in the bedroom, which had been placed over the hole cut by the Kendel

employee, the total mold count was 950 spores per cubic meter, and in the dining room, under the plastic, the total mold count was 1,675 spores per cubic meter. The reading for the front porch was 625 spores per cubic meter, while the southeast property line reading indicated 100 spores per cubic meter. The report identified several types of mold, including "Aspergillus ochraceous," "Aspergillus sp. (other)," "Penicillium viridicatum," "Aspergillus flavus," and "Verticillium."

Dr. Pour stated that there is a potential hazard if different types of mold are found outdoors from those found indoors. The laboratory report on the Mondelli home showed different species of mold in the air monitoring data, which Dr. Pour said was a significant finding.

Based on peer review of scientific literature, Dr. Pour stated that molds are a cause of asthma and allergic rhinitis. She stated that the literature also supported her opinion that prolonged contact with or repeated exposure to mold may result in permanent lung damage and that the literature supports her finding that mold levels in the Mondelli house were far above mold levels found in clinical studies around the country.

Dr. Pour provided a list of publications that she has read which she said "add to [her] knowledge on the risk of fungi and human health." She stated that these articles included "Managing Allergy in the Asthma Patient," "The Impact of Allergy and Immunology on our Expanding Industrial Environment," "Building-Related Asthma in Denver Office Workers," "Environmental Control of Indoor Biologic Agents," and "Building-Related Factors to Consider in Indoor Air Quality Evaluations," all from the Journal of Allergy and Clinical Immunology and the American Journal of Public Health. In refusing to allow Dr. Pour to testify, the district court determined that there had been no peer review of publications.

We first compare the evidence regarding Dr. Pour's testimony to the four factors used to determine whether her testimony is admissible as expert testimony. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). First, the district court itself noted that Dr. Pour had the qualifications of an expert witness. Second, her testimony was relevant to the issue of damages after liability had been determined by the district

court. Third, the testimony concerning the relationship between mold and health concerns would have assisted the jury in understanding the evidence. Fourth, the testimony's probative value outweighed the danger of unfair prejudice. To satisfy the *Frye* standard, Dr. Pour showed that the issue of mold as it relates to health concerns has been addressed in scientific publications. See *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). We conclude that Dr. Pour's testimony satisfies the four considerations for admission of expert testimony.

[4] The facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial. If the data is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. See *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994). Dr. Pour should have been allowed to present her opinion as to the meaning of the Midwest Laboratories' report, regardless of whether the report itself was admitted. The jury should have been allowed to weigh the credibility of the testimony. See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[5] Where the rules of evidence apply, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. *Sheridan v. Catering Mgmt., Inc., supra*. Dr. Pour testified that there is no established standard to determine the acceptable level of mold. The list of publications which have addressed the presence of microbiological organisms and their relationship to asthma and allergies showed that the scientific community has generally accepted the principle that a connection exists between the presence of mold and health.

[6] Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Nebraska Nutrients v. Shepherd, supra*. Dr. Pour has a background in toxicology and biology and has studied numerous publications concerning allergies and

immunology. She also reviewed the test data on the Mondelli home. Her opinion was probative on the issue of causation.

[7] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Nebraska Nutrients v. Shepherd, supra*. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). We conclude that the district court abused its discretion in refusing to allow Dr. Pour to testify at trial and that the Mondellis were deprived of the right to present their case to the jury when the district court refused to allow Dr. Pour to testify.

(ii) Dr. King

Dr. King, a quality control director at Midwest Laboratories, has a bachelor's degree in biology, a master's degree in zoology, and a Ph.D. in biology with an emphasis on human physiology. Dr. King testified that he has 10 years' experience in air sampling, including the analysis and interpretation of results from air samples.

Dr. King explained that air samples from the Mondelli home were collected using a standard protocol which involved the use of a "Biotest Air Sampler." The Biotest Air Sampler draws a volume of air through the instrument, and a set of impellers forces spores or other organisms into an agar plate. After the sampler is allowed to run for a certain period of time, the agar strip is removed and the number of organisms counted. Dr. King testified that in his opinion, the sampler is reliable. The protocol requires calibration of the instrument, and the samples of the Mondelli home were taken in the "breathing zone of the individual" to measure the air normally inhaled. The breathing zone is approximately 1 foot below the mouth to 1 foot above the mouth. Dr. King said that the protocol meets industry standards.

During a discussion outside the presence of the jury, the district court indicated that it had a problem with Dr. King's testi-

mony because he was testifying prior to the testimony of the individuals who had collected the samples from the Mondelli home. The district court was concerned because the air samples relied upon were "taken in an interstitial space under plastic" rather than in the breathing zone described by Dr. King. The Mondellis argue that the district court made a determination on its own, without cross-examination or any scientific support, that mold in the interstitial space could not be tested through an air sampler.

The district court thereafter sustained numerous foundational objections to questions asked of Dr. King, who testified that the Biotest Air Sampler was accurate because the publications he had received from the manufacturer indicated an error rate of plus or minus 2 percent. Dr. King also testified that he had not referred to publications that were subject to peer review concerning the accuracy of the Biotest Air Sampler. Following that statement, an objection to Dr. King's testimony was sustained based on foundation. The district court also sustained the defendants' motion to strike Dr. King's testimony concerning the accuracy and purported reliability of the Biotest Air Sampler.

When the Mondellis attempted to ask questions concerning the error rate of the laboratory methodologies, relevancy objections were sustained. An analytical report prepared by Dr. King concerning the Mondelli home was offered as a business record exception to the hearsay rule. The defendants' objections based on foundation and hearsay were sustained because the district court found that the sampling was "so flawed" that any opinion expressed on the sampling would not "pass either . . . the Frye or the Daubert standards."

The district court refused to admit Midwest Laboratories' report as a business record because it contained opinions upon which any foundational basis was lacking. Dr. King testified that he had analyzed the laboratory results, but he was not allowed to offer his conclusions.

The Mondellis' offer of proof stated that if Dr. King were allowed to testify, he would have stated that there was a proliferation of molds in the interstitial spaces of the Mondelli home, that there was an amplification of molds in the home, and that there was a confluent growth of mold in the home greater than growth in the outside environment.

With regard to the factors set forth in *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001), to determine the admissibility of an expert's testimony, we conclude that the factors were satisfied as to Dr. King. He was qualified to testify as an expert witness. His testimony explaining the results of the air sampling in the Mondelli home was relevant to the issue of damages. His explanation would have assisted the jury in understanding the evidence, and the danger of unfair prejudice did not outweigh the probative value of the testimony.

As noted earlier, if data relied upon by an expert is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences, the facts or data need not be admissible in evidence. See *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994). We conclude that Dr. King should have been allowed to give an opinion regarding the test results, and the jury should have been allowed to weigh the credibility of the information. See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). The district court abused its discretion in not allowing Dr. King to state his opinion. This deprived the Mondellis of the right to present their entire case to the jury.

(b) Directed Verdict

[8] The Mondellis assert that the district court erred in sustaining the motion for directed verdict by Kendel and the City. A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

The issue of whether the district court should have directed a verdict is tied to the court's error in excluding the testimony of Drs. Pour and King. Had such testimony been admitted, the record would have contained evidence about which reasonable minds could differ, which would preclude the entry of a directed verdict against the Mondellis. See *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001).

(c) Motion for Joinder

The Mondellis assert that the district court erred in refusing to join their claims with those of their children and abused its

discretion in removing the children's claims for relief as minors from Barbara's lawsuit.

State law provides:

> All persons *may* join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and *if any question of law or fact common to all these persons will arise in the action*.

(Emphasis supplied.) Neb. Rev. Stat. § 25-311 (Cum. Supp. 2000).

Joinder is discretionary under § 25-311. In this case, the facts concerning health problems and the amount of damages are different for each plaintiff. We conclude that the district court did not abuse its discretion in refusing to join all of the claims into one action.

(d) Admission of Exhibits

[9] The Mondellis argue but do not assign as error that the district court erred in refusing to admit exhibits 81 and 89 based on the business records exception to the hearsay rule. We decline to consider this argument. In order 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. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000).

2. City's Cross-Appeal

[10] We next address the City's cross-appeal. The City alleges that the district court erred in stating and applying the law of the case with regard to certain facts discussed in our earlier memorandum opinion. See *Mondelli v. Kendel Homes Corp.*, 254 Neb. xvii (cases Nos. S-96-820 through S-96-823, Apr. 1, 1998). In its order on remand, the district court stated that although the court did not believe it critical to the outcome of the case, it accepted the following "propositions of law" from the memorandum opinion of this court as constituting the law of the case:

> (1) Defendant City of Papillion incorporated the 1985 edition of the Uniform Building Code (UBC) by reference in §9-401 of the Code;

(2) §1202 of the UBC adopted the 1983 edition of the One and Two Family Dwelling Code (CABO Code);

(3) §1707(a) of the UBC and §R503.1 of the CABO Code require builders to install tar paper over the sheathing that covers the frame before constructing the exterior brick veneer of a house;

(4) Defendant City of Papillion, through its employees, had a duty to exercise reasonable care in reviewing plans and specifications for the Mondellis' home and inspecting it during construction for compliance with Papillion's building code.

"Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication." *Hoiengs v. County of Adams*, 254 Neb. 64, 69, 574 N.W.2d 498, 502 (1998).

[11] When this matter was first presented to this court, it came as an appeal from a summary judgment granted in favor of the City. Kendel did not actively participate in that appeal, and amended pleadings were filed after the cause was remanded. 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. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000). On review of a summary judgment, this court does not determine how factual issues should be decided. We consider only whether there is a real issue of material fact that exists. We were not asked to, and did not, determine the liability of any party. The "facts" outlined in the memorandum opinion were based on viewing the evidence which had been presented at that time in the light most favorable to the Mondellis and were not the law of the case. Thus, the district court erred in accepting those facts as such.

[12] We next consider the question of the City's immunity. The City argues that the district court erred in failing to find that the City was immune from suit under § 13-910(1), (2), and/or (3) of the Political Subdivisions Tort Claims Act (Act). In actions brought pursuant to the Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.

Desel v. City of Wood River, 259 Neb. 1040, 614 N.W.2d 313 (2000).

Section 13-910(3) provides that the Act shall not apply to

> [a]ny claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to such political subdivision to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the political subdivision had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety.

[13] This language was added to § 13-910 by 1992 Neb. Laws, L.B. 262, and became effective on February 8, 1992. The City conducted inspections of the Mondelli home both prior and subsequent to this date. The Mondellis alleged that all inspections were performed with "reckless disregard." Reply brief and brief on cross-appeal for appellants at 13. Pursuant to the Restatement (Second) of Torts § 500, comment *b*. at 588-89 (1965), "[c]onduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others." See, also, *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990).

Thus, the question of whether the City is immune from liability depends on whether the City had reasonable notice of any hazard or whether its failure to inspect or its inadequate or negligent inspection constituted a reckless disregard for public health or safety. The City inspector testified that he saw no evidence of leaking when he inspected the house after it was enclosed, nor was he told of any problems with water. There is nothing in the record to indicate that any City employee intentionally took any action without regard to whether it would subject another to extreme risk.

When the district court adopted statements made in our memorandum opinion as facts, it failed to consider evidence presented at the trial concerning those facts. The district court

erroneously found that the Code had incorporated by reference the 1983 edition of the CABO. On December 4, 1990, the City adopted an ordinance, Papillion Mun. Code, ch. 9, art. 4, § 9-401 (1990), which provided that the City adopted the UBC in addition to all amended editions. Section 103 of the UBC states that whenever reference is made to the appendix, provisions in the appendix shall not apply unless specifically adopted. The CABO is contained in § 1202 of the UBC appendix. The City ordinance adopting the UBC does not contain any language which specifically adopted any part of the appendix. Therefore, we agree with the City's assertion that the Code excluded all appendix sections. The Code did not adopt the UBC appendix and did not, therefore, adopt any of the CABO provisions. The district court erred in making this conclusion.

The district court also erred in accepting as part of the law of the case the proposition that the UBC and the CABO required builders to install tar paper over the sheathing that covers the frame before constructing exterior brick veneer on a house. Section 1707 of the UBC provides that all weather-exposed surfaces shall have a weather-resistant barrier to protect the interior wall covering, unless it is placed over water-repellent sheathing. There was expert testimony offered that the sheathing in the Mondelli house was "water-repellent panel sheathing," as the term is used in the UBC.

The Code also does not require that blueprints and construction design meet industry standards. It requires only that the plans comply with the Code, which incorporates the UBC. On Kendel's application for a building permit, the builder stated that it would comply with all requirements of the City's ordinances. There was no evidence presented to show that the blueprints or construction design did not conform to the Code and the UBC.

After completing an inspection, the building inspector is directed by § 9-103 of the Code to "either approve that portion of the construction as completed" or to notify the permit holder or his agent that the work fails to comply with the requirements of the Code. If no defects are found, the building inspector has no authority to halt construction. No evidence was presented that any of the defects in construction violated the UBC or the Code. Nor was there evidence that the City had notice of any

defects. The Mondellis did not prove that any violations of the Code were evident or that the City had notice of any violations.

The district court also found that the negligent acts of the City occurring after February 7, 1992, the date of the framing inspection, constituted a reckless disregard for public health and safety. The final inspection occurred on April 14. As noted, there was no evidence presented to show that any City employee acted intentionally to subject the public to extreme risk.

Therefore, we conclude that the district court erred in failing to find that the City was immune from liability. The City had no notice of any hazard, and no inspection or failure to inspect constituted a reckless disregard for public health or safety. All such claims against the City should have been dismissed pursuant to § 13-910. Therefore, the district court erred in imposing liability on the City.

3. Kendel's Cross-Appeal

Kendel asserts that the district court erred in imposing liability based on breach of warranty, strict liability, and/or negligence. The district court found that it was undisputed that the blueprints and construction design did not call for tar paper to be installed between the sheathing and brick veneer and that no tar paper was installed. It was also undisputed that the house plans did not call for weep holes or flashing, and none were installed. Although the source of the water infiltration was disputed, the parties did not dispute that the brick veneer front was identified as a possible source of water infiltration due to the excessive "bee holes," as well as cracks in the mortar, and that remedial action was recommended.

The district court found that the greater weight of the evidence established that the brick veneer front was not constructed in a workmanlike manner. The district court also concluded that the flashing between the roofline and the exterior of the wall of the house was not installed in a workmanlike manner. It found that installation of felt or tar paper was necessary to meet good usage and accepted practices of the construction trade in the community at the time the house was built.

[14] In a bench trial of an action at law, the factual findings made by the trial court have the effect of a jury verdict and will

not be set aside unless they are clearly wrong. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). The district court was not clearly wrong in finding that Kendel was negligent in building the house and therefore liable for breach of implied warranties and negligence. Because we reach this conclusion, it is not necessary for us to address any of the issues concerning strict liability.

VI. CONCLUSION

With regard to the Mondellis' appeal, we conclude that the district court abused its discretion in excluding the testimony of Drs. Pour and King. This exclusion of evidence was prejudicial error. The district court did not abuse its discretion in refusing to allow joinder of the claims of the Mondelli family.

As to the cross-appeals of the City and Kendel, we conclude that the City should have been granted immunity from suit under the Act and that the City should be dismissed from the case. The district court was correct in determining that Kendel was negligent in the construction of the house and that Kendel breached its implied warranty that the house would be erected in a workmanlike manner.

For the reasons set forth herein, we reverse the judgment of the district court and remand the cause for a new trial on the issues of causation and damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUES OF CAUSATION AND DAMAGES.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF LEON C. DONLEY, AN INCAPACITATED PERSON. RAYMOND DONLEY, APPELLANT, V. LEON C. DONLEY ET AL., APPELLEES.

631 N.W.2d 839

Filed July 20, 2001. No. S-00-965.

1. **Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.

3. **Attorney Fees.** The general rule with respect to the award of attorney fees under Nebraska law has been that attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
4. **Actions: Guardians and Conservators.** An action to appoint a conservator is not an adversarial proceeding, but, rather, is a proceeding to promote the best interests of the person for whom the conservatorship is sought.
5. **Estates: Guardians and Conservators: Attorney Fees.** Under Neb. Rev. Stat. § 30-2654 (Reissue 1995), a conservator is to expend or distribute sums reasonably necessary for the support, education, care, or benefit of the protected person. The cost, including a reasonable attorney fee, of initiating a good faith petition for the appointment of a conservator, where such appointment is determined to be in the best interests of the protected person, constitutes a necessary expenditure on behalf of the protected person and is compensable out of the conservatorship estate.
6. **Attorney Fees.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court.
7. ___. To determine proper and reasonable fees, it is necessary for the court to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeal from the County Court for Lancaster County: JAMES L. FOSTER, Judge. Reversed and remanded with directions.

Roger P. Cox and Gregory D. Barton, of Harding, Shultz & Downs, for appellant.

Larry D. Ohs, P.C., for appellee Mary Davis.

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

GERRARD, J.

NATURE OF CASE

Raymond Donley filed a petition in the county court for Lancaster County to have a guardian and conservator appointed for his father, Leon C. Donley. The appointment of the guardian and conservator was contested by Leon, Leon's wife, and Leon's daughter. Ultimately, the guardianship proceeding was transferred to Colorado and the parties agreed that coconservators would be appointed for Leon in Nebraska. The sole issue presented on appeal is whether the attorneys hired by Raymond, the petitioner, can recover, from Leon's estate, reasonable attorney

fees incurred in the efforts to have a guardian and conservator appointed for Leon.

FACTUAL BACKGROUND

Raymond is the adult son of Leon and is one of five children born during Leon's first marriage to Raymond's mother. Leon subsequently married Margaret Donley, and the couple had a child during their marriage, Mary Davis. After being married for approximately 30 years, Leon and Margaret were divorced in 1994 but continued living together in the home they occupied during their marriage.

As a result of Leon and Margaret's divorce in 1994, the house and acreage Leon and Margaret lived on in Lincoln were awarded to Leon. The record reveals that the property was in Margaret's name during the couple's marriage and that after the divorce was final, Margaret did not formally transfer title to the property to Leon as required by the divorce decree. Leon and Margaret were remarried on July 8, 1998, and on July 13, Leon and Margaret granted, for $100,000, an option to purchase the acreage and house in Lincoln for $450,000. Margaret testified that the option was granted because the couple had plans to move to Colorado so that they could be closer to Davis. The $100,000 from the sale of the option was used as part of the purchase price for a home in Longmont, Colorado. Margaret testified that she also contributed to the purchase price of the home in Colorado, and the home was titled solely in Margaret's name. The $100,000 from the sale of the option was eventually placed in Leon's conservatorship estate.

Raymond testified that prior to these proceedings, Leon would often visit Raymond's automobile repair shop, just a few blocks from Leon's house in Lincoln. Raymond stated that on many occasions between October 1998 and March 1999, Leon told Raymond that he and Margaret would be moving to Colorado but that Leon did not want to move. Raymond became concerned about his father when Leon came to Raymond's shop one day with two bottles of mouthwash and a bottle of cleaner, handed the bottles to Raymond, and told Raymond that he would not need the bottles anymore because he was moving. Raymond stated that this conversation took place about 10 days after Leon's last expression of his desire not to move to Colorado.

Raymond decided to file the petition for the appointment of a guardian and conservator because he had concerns that things were happening to Leon that Leon did not understand. Raymond stated that he and Leon discussed having someone appointed to look out for Leon's best interests and that Leon thought doing so would be a good idea.

On March 19, 1999, Raymond, through counsel, filed a petition for the appointment of a guardian and conservator for Leon. A temporary guardian and conservator was also requested in the petition for Leon. John McHenry, a lawyer and an independent third party, was suggested in the petition as a suitable guardian and conservator. Raymond thought having an independent party as guardian and conservator would be advisable to avoid potential conflict between the families from Leon's two marriages. In addition to requesting McHenry as the temporary guardian and conservator in the petition, Raymond also had Leon sign a document, which was filed with the county court, nominating McHenry as his guardian and conservator. McHenry was appointed and accepted the position as temporary guardian and conservator.

Leon and Margaret moved to Longmont, Colorado, in early May 1999. Also, on May 6, the county court authorized the sale of Leon's property in Lincoln, where Leon and Margaret had been living, pursuant to the purchase option executed in July 1998. On July 12, 1999, the county court noted that settlement negotiations were progressing, so the case was set for trial on August 31. At a later hearing regarding the allowance of attorney fees, Roger Cox, one of Raymond's attorneys, testified that by August 25, the parties had agreed to settle the case and that the only thing left to do was agree on specific wording in the drafted settlement agreement. Cox stated that on August 26, Cox was informed that Davis had filed petitions for the appointment of a conservator and a guardian in a Boulder County, Colorado, court on August 20 and that the settlement was probably off. The petitions for guardian and conservator in the Colorado court were both signed by Leon.

A hearing on the issue whether the proceedings should be transferred to Colorado was held on September 22, 1999, in the county court for Lancaster County. The county court determined that the guardianship proceeding should be transferred to

Colorado but that the conservatorship proceeding should stay in Nebraska.

The parties eventually filed a joint stipulation for settlement on January 28, 2000, agreeing that McHenry and Davis should be appointed as coconservators for Leon. On February 28, the county court found, by clear and convincing evidence, that a conservator should be appointed for Leon and that there were no less restrictive alternatives available. The county court also found the joint stipulation for settlement to be fair and reasonable. The agreement essentially gave Davis control of the day-to-day spending with respect to Leon and gave McHenry control over how Leon's assets should be invested in the event the coconservators disagreed as to investment of the assets. The final inventory of Leon's estate totaled $841,607.80.

On April 7, 2000, Raymond filed a petition for attorney fees incurred as the petitioner in this matter in the amount of $28,422.02. Briefs in opposition to the payment of fees were filed on behalf of Leon by his attorney as well as by Davis as coconservator. Leon's brief argued that Raymond's attorney's services were not required in this matter because Leon had previously appointed a power of attorney to provide assistance in the future.

It was established at the hearing on the issue of attorney fees that Raymond initially hired the firm of Harding, Shultz & Downs and that there was never an express agreement between that firm and Leon. Further, Cox, an attorney with the Harding, Shultz & Downs law firm, testified that as of the date of the hearing, Raymond had paid the firm $20,000 toward the $28,422.02 incurred by the firm for services the firm had rendered in this matter.

The county court determined that Raymond was not entitled to attorney fees. The court cited *In re Guardianship & Conservatorship of Tucker*, 9 Neb. App. 17, 606 N.W.2d 868 (2000), for the proposition that attorney claims for professional services must be based upon a contract of employment made with the person to be charged. The county court then found that there was never an express or implied contract between Leon and the attorneys employed by Raymond. Therefore, the court ruled that the attorney fees were not to be paid from Leon's estate. Raymond

filed this appeal, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

On appeal, Raymond assigns that the county court erred (1) in ruling that there was no express or implied contract between Leon and the attorneys employed by Raymond and (2) in failing to award Raymond his reasonable attorney fees to be paid by Leon's conservatorship estate.

STANDARD OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999). See *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001).

ANALYSIS

On appeal, Raymond argues that the county court should have ordered attorney fees to be paid from Leon's estate in this case because his attorney's actions benefited Leon's estate and because there is a uniform course of procedure to grant such fees when a petitioner in a guardianship and conservatorship action is ultimately successful. Raymond further argues that attorney fees are appropriate because the petition was ultimately successful, as a guardian and coconservators were appointed for Leon.

[3] The general rule with respect to the award of attorney fees under Nebraska law has been that attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Raymond argues that attorney fees should be paid out of Leon's conservatorship estate under this general rule. The appellee Davis, on the other hand, asserts that there is no uniform course of procedure in guardianship/conservatorship matters to allow attorney fees for petitioner's attorneys. Moreover, Davis argues that the

county court correctly determined that there was never an express or implied contract between Leon and the attorneys employed by Raymond and that, therefore, there was no basis for the recovery of an attorney fee in this conservatorship proceeding. We find that when the petitioner's good faith actions are a necessary expense to the conservatorship estate, attorney fees are authorized by statute in Nebraska and are compensable under the general rule regarding attorney fees.

While we have never considered the precise issue, we are persuaded by the rule adopted in other states that costs and attorney fees incurred in the good faith initiation of conservatorship proceedings constitute necessaries for the support or benefit of the protected person such that payment of reasonable costs incurred may be assessed against the protected person's estate. See, *In re Estate of Bayers*, 295 Mont. 89, 983 P.2d 339 (1999); *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954); *Penney v. Pritchard & McCall*, 255 Ala. 13, 49 So. 2d 782 (1950); *Carney v. Aicklen*, 587 S.W.2d 507 (Tex. Civ. App. 1979); *In re Estate and Guardianship of Vermeersch*, 15 Ariz. App. 315, 488 P.2d 671 (1971); *In re Estate of Sherwood*, 56 Ill. App. 2d 334, 206 N.E.2d 304 (1965); *In re Bundy*, 44 Cal. App. 466, 186 P. 811 (1919).

The rationale supporting the rule is that in guardianship/conservatorship cases, the applicant most often acts for and on behalf of one who is unable to act or care for himself or herself. See, *In re Dunn, supra*; *In re Bundy, supra.* Thus, the filing of the petition and the hearing thereon are indispensable steps in the preservation of the protected person's estate. See, *In re Bundy, supra*; *In re Estate and Guardianship of Vermeersch, supra*. It is recognized that when an individual is in need of physical or financial protection, the law must in many instances think and act for him or her. See, *In re Dunn, supra*; *In re Bundy, supra*. The state and society have a significant interest in bringing the estate of individuals in need of protection under the vigil of the county court. See *In re Estate and Guardianship of Vermeersch, supra.* See, also, *Penney v. Pritchard & McCall, supra*. The court, as general conservator of the rights of persons in need of protection, is dependent upon applications being filed by interested persons so that the court may assume control of the estate and preserve it for the protected person. See *In re Bundy, supra*.

[4] Further, we note that an action to appoint a conservator is not an adversarial proceeding, but, rather, is a proceeding to promote the best interests of the person for whom the conservatorship is sought. A conservatorship action is uniquely nonadversarial in that everyone involved, including the petitioner and the court, is presumably interested in protecting the interest of the person for whom the conservatorship is sought. See Neb. Rev. Stat. § 30-2630 (Reissue 1995) (conservator may be appointed if trial court is satisfied by clear and convincing evidence that (1) person is unable to manage his or her property effectively and (2) person has property which will be wasted or dissipated unless proper management is provided or that funds are needed for support of person and that protection is necessary to obtain or provide funds). Therefore, in a conservatorship proceeding, the interest to be considered by the court and the principles to be applied are quite unlike those in an ordinary litigation case.

[5] Thus, we cannot agree with the appellee that the county court lacked power to assess the costs of the conservatorship proceeding and the petitioner's attorney fees against the alleged protected person's estate. In Nebraska, under Neb. Rev. Stat. § 30-2654(a)(2) (Reissue 1995), a "conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person." Clearly, the cost of initiating a good faith petition for the appointment of a guardian or conservator, where such appointment is determined to be in the best interests of the protected person, constitutes a necessary expenditure on behalf of the protected person. We hold that such costs, including reasonable attorney fees, are compensable out of the conservatorship estate as they are necessary expenditures on behalf of the protected person. Therefore, attorney fees are authorized by statute when a good faith petition results in the appointment of a conservator and, under the general rule regarding attorney fees in Nebraska, may be recovered from Leon's estate. See § 30-2654.

In the instant case, the trial court and the parties agreed that the appointment of coconservators was in the best interests of Leon, and the parties all agreed that the appointment of a guardian was in Leon's best interests. However, in denying Raymond's petition for attorney fees, the county court cited *In*

re Guardianship & Conservatorship of Tucker, 9 Neb. App. 17, 606 N.W.2d 868 (2000), and focused on whether there was a contractual relationship between Leon and the law firm Raymond hired to assist him in filing the petition for the appointment of a guardian and conservator. The county court stated that "it is apparent to me that the Courts of this State are taking the position that attorney claims for professional services must rest upon a contract of employment made with the person sought to be charged."

The Court of Appeals, in *In re Guardianship & Conservatorship of Tucker, supra*, granted attorney fees based upon an implied contract between the petitioner's attorney and the protected person. The court, however, did not hold that a contractual relationship was *required* in a guardianship and conservatorship case in order to grant attorney fees to a successful petitioner. In fact, many situations arise in which an incapacitated individual is in dire need of a guardian or conservator, yet he or she contests the guardianship/conservatorship proceeding. In such a case, a successful petitioner who filed an action in good faith would not be entitled to attorney fees under an express or implied contract theory because the protected person would not have accepted the benefit of the attorney's services by agreeing to the protection. Basing the decision whether to grant attorney fees on whether an incapacitated person, who has been adjudged unfit to manage his or her own affairs, has expressly or impliedly entered into a fee agreement is generally not sound policy, given that the incapacitated person's ability to understand and enter into such agreements is often the very question at issue in conservatorship proceedings. Such a rule can only have the effect of encouraging manipulation of incapacitated persons in order to secure an "agreement" that would make fees recoverable. This would be contrary to the interest of the protected person and inconsistent with the nature of the proceedings.

We determine that the existence of an express or implied contractual relationship between a petitioner's attorney and an incapacitated person is not a prerequisite for the award of attorney fees in a guardianship or conservatorship proceeding. Therefore, because the county court erred in concluding that an express or implied contract between Leon and Raymond's attorneys was

necessary prior to the award of attorney fees, we reverse the order of the county court.

Based on the circumstances of the instant case, we conclude that the costs, including reasonable attorney fees, of initiating and prosecuting proceedings that ultimately resulted in the appointment of a guardian and coconservators for Leon should be compensable out of the conservatorship estate as they are necessary expenditures for the benefit of the protected person. See § 30-2654. Because the county court did not address the issue of the amount of attorney fees in this case, we remand the matter to the county court to determine a reasonable fee to be paid from the conservatorship estate to Raymond's attorneys. We remand the cause for a fee determination, keeping in mind that the county court has seen and heard the witnesses and is familiar with the background and intricacies of these proceedings. Moreover, the county court expressly noted in its August 8, 2000, order that there was sufficient evidence presented to the court to allow it to make a determination as to the amount of attorney fees without further hearing.

[6,7] We note that when an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court. See *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001). To determine proper and reasonable fees, it is necessary for the court to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. See *Schirber v. State,* 254 Neb. 1002, 581 N.W.2d 873 (1998).

CONCLUSION

For the foregoing reasons, we reverse the order of the county court and remand the cause to the county court for a determination of reasonable attorney fees to be paid to Raymond's attorneys out of the conservatorship estate.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

ANNE L. FALOTICO ET AL., APPELLANTS, V. GRANT COUNTY BOARD OF EQUALIZATION AND NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION, APPELLEES.

631 N.W. 2d 492

Filed July 27, 2001. No. S-00-713.

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. **Taxation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
4. **Jurisdiction: Time: Appeal and Error.** To acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal.
5. **Taxation: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2000), appeals may be taken from any action of a county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act. The appeal shall be filed within 30 days after adjournment of the board which, for actions taken pursuant to Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2000), shall be deemed to be July 25 of the year in which the action is taken.
6. **Taxation: Legislature.** The Tax Equalization and Review Commission is an agency which has only the powers conferred upon it by the Legislature.
7. **Taxation: Jurisdiction: Time: Legislature.** The Tax Equalization and Review Commission's jurisdiction is limited to those appeals filed within the statutory 30-day period, and it does not have the authority to adopt the mailbox rule or the doctrine of unique circumstances because such rules and doctrines would expand its jurisdiction beyond what the Legislature provided in the statute.
8. **Taxation: Legislature.** The procedure prescribed by the Legislature in respect to levying a tax must be strictly observed.
9. **Taxation: Statutes.** The statutory provision relating to a tax levy, the objects of which are the protection of taxpayers and to safeguard against excessive levies, is mandatory.
10. **Taxation: Valuation: Notice.** The statute requiring notice by the county assessor to the taxpayer is mandatory, and the failure to give the required notice is fatal to the tax levied on the increase in valuation of the property.
11. **Taxation: Notice.** Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2000) requires that notice must be given by the assessor and that it must specifically contain all the information the statute requires shall be set forth therein.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and vacated.

Michael Creighton Falotico, and George G. Vinton, and John Falotico for appellants.

A. James Moravek, of Curtiss, Moravek, Curtiss & Margheim, for appellee Grant County Board of Equalization.

Don Stenberg, Attorney General, and L. Jay Bartel for amicus curiae State of Nebraska.

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

MCCORMACK, J.

NATURE OF CASE

Anne L. Falotico, Lynch Circle Ranch, and the estate of Frank Lynch (collectively the taxpayers) brought property valuation protests to the Grant County Board of Equalization (the Board). The Board denied the protests, and the taxpayers appealed to the Tax Equalization and Review Commission (TERC). TERC affirmed the Board's determination. The taxpayers sought review in the Nebraska Court of Appeals, and we moved the case to our docket pursuant to our power to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

The taxpayers own a cattle ranch consisting of several parcels of land in Grant County. The Grant County assessor assessed higher valuations for the subject properties for purposes of taxation as of January 1, 1999. The proposed valuations were based on a sample size of only five sales concerning four properties (one property was sold twice over a 3-year period). The taxpayers filed protests to the proposed valuations, claiming that the valuations (1) violated Neb. Rev. Stat. §§ 77-112 and 77-1371 (Cum. Supp. 1998), (2) were arbitrary and capricious and thus violated their rights under the Nebraska and U.S. Constitutions, and (3) violated their rights of equal protection in that other similarly situated taxpayers in other counties are not subject to arbitrary and capricious valuations. The taxpayers requested that the assessed values be returned to the 1998 assessed values.

The Board denied the taxpayers' protests, making its decision on July 23, 1999. The county clerk, though required under Neb.

Rev. Stat. § 77-1502 (Cum. Supp. 2000) to send the taxpayers notice of the Board's decision within 7 days of that decision, did not send the notices until August 19. The taxpayers received the notices on August 21, which fell on a Saturday. The deadline under Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2000) for filing an appeal with TERC was Tuesday, August 24. Thus, the taxpayers had only 2 business days within which to prepare and file their appeals. Moreover, the forms TERC provided to the taxpayers stated that the deadline was August 25, 1 day later than the statutory deadline. The taxpayers mailed their appeal forms to TERC on August 25, and TERC received and filed them on August 26.

TERC held a hearing to determine whether it had jurisdiction to hear the cases and then issued an order declaring that it could properly do so. In its order, TERC found that while it only possesses the powers specifically conferred upon it by law and while the statutes require appeals to be filed on or before August 24, TERC nevertheless hears appeals in equity under Neb. Rev. Stat. § 77-1511 (Reissue 1996). It therefore concluded that it should not dismiss the taxpayers' appeals on jurisdictional grounds because to do so would "violate the princip[le] of equity, and would further deny [the taxpayers] due process of the law," namely the process required by §§ 77-1502 (notification within 7 days of Board's decision) and 77-1510 (30 days within which to appeal).

TERC later consolidated the appeals and held a hearing on the merits. At that hearing, the taxpayers called a professor of statistics, who testified that a sample size of four properties is too small to be statistically valid and that it is not possible to determine whether the values contained in the sample are representative of similar parcels in the county. She testified that making a valuation determination based on such a small sample is not statistically sound because of the risk that biases of various sorts may infect the data.

TERC granted the Board's motion to dismiss largely because the taxpayers had not produced any evidence regarding the actual values of the properties. Because they offered no such evidence, TERC found that the taxpayers had not shown that the Board's valuations were grossly excessive and had thus not rebutted the presumption favoring the Board's action. In addition, TERC found that it lacked jurisdiction to determine

whether the Board used professionally accepted mass appraisal methods because the taxpayers' argument amounted to a collateral attack. TERC also found that the Board was neither unreasonable nor arbitrary in relying on a small sample.

ASSIGNMENTS OF ERROR

The taxpayers assign that TERC erred in (1) finding that it lacked jurisdiction to determine whether the Board used "professionally accepted mass appraisal methods" because the taxpayers' argument was a collateral attack, (2) holding that the Board was neither unreasonable nor arbitrary in relying on a sample of only five land sales relating to four parcels of land to reassess the values of the taxpayers' properties, (3) holding that the Board acted in conformity with § 77-112 because the Board did not use professionally accepted mass appraisal methods to derive the actual values of the taxpayers' real estate for property tax assessment purposes, (4) holding that the Board had jurisdiction to make reassessments when the Board had not conformed with the statute giving it such authority, and (5) relying on an unconstitutional statute as applied to the taxpayers.

STANDARD OF REVIEW

[1,2] Appellate review of a Tax Equalization and Review Commission decision shall be conducted for error on the record. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000). The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm., supra*. See *State v. Hernandez*, 259 Neb. 948, 613 N.W.2d 455 (2000).

ANALYSIS

[3,4] The threshold issue is whether TERC had subject matter jurisdiction over the case. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm., supra*. To acquire jurisdiction over the subject matter of the action, there must be

strict compliance with the time requirements of the statute granting the appeal. *Id.*

[5] Section 77-1510 provides in part:

> Appeals may be taken from any action of the county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act. The appeal shall be filed within thirty days after adjournment of the board which, for actions taken pursuant to section 77-1502, shall be deemed to be July 25 of the year in which the action is taken.

Thirty days past July 25, 1999, is August 24. Here, the taxpayers postmarked their appeals on August 25, and they were actually received and filed by TERC on August 26. Thus, the taxpayers' appeals were filed after the expiration of the statutory 30-day period. The reasons for the delay were threefold. First, the county clerk, who is charged under § 77-1502 with the duty to notify the taxpayers within 7 days of the Board's decision, did not do so. In fact, the taxpayers effectively had only 2 business days within which to prepare and file their appeals. Second, the appeal forms provided to the taxpayers incorrectly stated that the filing deadline was August 25. Third, the taxpayers relied on TERC's "mailbox rule," which we have since declared invalid. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm., supra*.

As stated above, TERC, in its order following a jurisdictional hearing, recognized the mandatory and jurisdictional nature of statutory time periods, but nonetheless found that it would be inequitable and would violate the taxpayers' due process rights to dismiss their appeals on jurisdictional grounds, given that the tardiness of the appeals resulted not from the taxpayers' own inaction, but from the county clerk's violation of a statutory duty to notify the taxpayers and from the erroneous statement on a form provided to the taxpayers. TERC relied on its purported power to hear cases in equity and applied equitable principles in finding that it had jurisdiction to hear the case.

[6,7] TERC's decision on this issue came before our decision in *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). In *Creighton*, the taxpayers had similarly been given an appeal form containing an incorrect statement of the appeal deadline. Also, the taxpayers, relying on

TERC's mailbox rule, postmarked the appeal on the date stated on the form. We faced the questions of whether TERC has the authority to adopt a "mailbox rule" and to adopt the equitable "doctrine of unique circumstances," which would allow TERC to hear an appeal under certain circumstances even though the appeal was taken outside of the statutory time period, e.g., where TERC supplies a form stating an incorrect deadline. We stated the principle that TERC is an agency which has only the powers conferred upon it by the Legislature. *Id.* After examining the enabling statute, § 77-1510, we determined that TERC's jurisdiction is limited to those appeals filed within the statutory 30-day period and that TERC therefore does not have the authority to adopt the mailbox rule or the doctrine of unique circumstances because such rules and doctrines would expand its jurisdiction beyond what the Legislature provided in the statute. *Id.*

Our analysis in *Creighton* assumed, however, that the Douglas County board's decision was a valid, appealable decision, i.e., a decision from which the taxpayers *could* appeal. This case presents the question of whether the Board's decision was valid and appealable, given that the taxpayers were not given the statutory notice of the Board's decision.

Under the statutory scheme the Legislature has established, the county assessor is required to assess the value of real property in the county each year before March 20. See Neb. Rev. Stat. § 77-1301 (Cum. Supp. 1998). The assessor must then notify the record owner before June 1 regarding each item of real property which has been assessed at a value that is different from the value given in the previous year. See Neb. Rev. Stat. § 77-1315(2) (Cum. Supp. 1998). The taxpayer may file a protest before June 30 with the county board of equalization, which meets between June 1 and July 25, hearing taxpayer protests and rendering decisions regarding the merits of the protests. See § 77-1502. Under § 77-1502, after the board makes a decision regarding a particular protest, the county clerk must then give notice to the taxpayer within 7 days of the decision. See *id*. The taxpayer has until 30 days following the board's adjournment on July 25 within which to file an appeal with TERC. See § 77-1510.

The question in this case, which we have not previously addressed, is whether the notice required under § 77-1502 is

essential to the validity of the Board's decision. We have, however, considered whether the notice the county assessor is required to give under § 77-1315 at an earlier step in the assessment process is essential to the validity of the levy.

[8-10] In *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932), we considered this question and, quoting *Clark & Wilson Lbr. Co. v. Weed*, 137 Or. 186, 2 P.2d 12 (1931), we stated that the procedure prescribed by the Legislature in respect to levying a tax must be strictly observed. We further stated that the statutory provision relating to a tax levy, the objects of which are the protection of taxpayers and to safeguard against excessive levies, is mandatory. *Id.* We concluded that the statute requiring notice by the county assessor to the taxpayer is mandatory and that the failure to give the required notice is fatal to the tax levied on the increase in valuation of the property. *Id.* The remedy in *Rosenbery* was that the amount of the increase in valuation was void. *Id.*

[11] In *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954), *overruled in part on other grounds, Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972), the county assessor had given notice to the taxpayer but had not included all the information required by the statute. We declared the tax void, stating: "We find the statute requires the notice must be given by the assessor and that it must specifically contain all the information the statute requires shall be set forth therein." *Id.* at 427, 67 N.W.2d at 497.

The notice requirements under § 77-1502 occur at a different point in time in the assessment process than the notice required by what is now § 77-1315. However, its object is largely the same, namely, notice. Given that appeals to TERC must be taken within 30 days after the adjournment of a board of equalization, § 77-1502 ensures that a taxpayer will be notified of the board's decision in order that the taxpayer may have time to prepare and file an appeal within the statutory 30-day period. Without this notice provision, the board could very well delay notification to the taxpayer, thereby preventing review of the board's decision. Likewise, if a violation of this provision were without consequence, the board could similarly engage in such delay and defeat the taxpayer's appeal, effectively denying the

taxpayer the process that is due under the statutes. We conclude that just as notice by the county assessor under § 77-1315 is essential to the validity of the levy, so too is notice by the county clerk under § 77-1502.

Because the county clerk violated the statutory duty under § 77-1502, the increase in the valuation is void. TERC thus lacked jurisdiction over the case. We therefore reverse the affirmance by TERC of the Board's decision which denied the protests filed by the taxpayers, vacate the decision of the Board denying the protests of the taxpayers, and declare that the action of the Grant County assessor increasing the valuations of the subject properties for the purposes of taxation as of January 1, 1999, is void.

REVERSED AND VACATED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RONALD E. FRANK, RESPONDENT.

631 N.W. 2d 485

Filed July 27, 2001. No. S-00-853.

1. **Disciplinary Proceedings: Proof: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ___. The following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
5. ___. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
6. ___. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.

7. ___. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
8. ___. An isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
9. ___. The propriety of a sanction must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

On August 17, 2000, formal charges were filed by the Committee on Inquiry of the Second Disciplinary District of relator Nebraska State Bar Association against respondent Ronald E. Frank. Also on August 17, amended formal charges consisting of two counts were filed against Frank by the Disciplinary Review Board. A referee was appointed and heard evidence. With respect to count I, the referee found that the allegations had not been established by clear and convincing evidence. With respect to count II, the referee found sufficient evidence and recommended a public reprimand. Our opinion discusses only count II.

The amended formal charges alleged, inter alia, that Frank violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (5), and Canon 5, DR 5-105(A) and (B). DR 1-102(A)(1) and (5) provide: "(A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice." DR 5-105(A) and (B) provide:

> (A) A lawyer shall decline proffered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests . . . .
>
> (B) A lawyer shall not continue multiple employment if the exercise of his or her independent professional judgment

> in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests . . . .

The amended formal charges also alleged Frank violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

On September 14, 2000, Frank filed an answer to the amended formal charges, admitting certain of the allegations, but denying that he had violated either the disciplinary rules or his oath as an attorney. On September 21, this court appointed a referee to hear evidence and make a recommendation as to the appropriate sanction to be imposed. A referee hearing was held on November 8, at which hearing evidence was adduced and argument was made. On February 6, 2001, the referee filed his report, and on February 12, he filed his revised report (hereinafter report).

The parties did not file written exceptions to the referee's report. Relator has filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001), which provides that when no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by the evidence.

The relator's burden of proof in disciplinary proceedings is to establish the allegations set forth in the formal charges against the attorney by clear and convincing evidence. See, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000); *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000). Based on the final and conclusive findings in the referee's report, relator's motion under rule 10(L) is granted, and Frank is publicly reprimanded as set forth below.

FACTS

The substance of the referee's findings may be summarized as follows: Frank was admitted to practice law in the State of Nebraska on January 25, 1973. Since 1981, he has been employed as an attorney employee of the Sodoro, Daly & Sodoro, P.C., law firm (Sodoro firm) in Omaha, where he continued to be employed at the time of the referee's report. The Sodoro firm concentrates its practice primarily in the area of

insurance defense litigation. One of its primary clients is St. Paul Insurance Company (St. Paul), which the Sodoro firm represents in both Iowa and Nebraska. During the period from 1992 through 1997, Frank, on behalf of the Sodoro firm, represented St. Paul in insurance defense matters.

In 1992, Frank served as cocounsel in a claim involving Iowa law with Sheldon Gallner, a licensed Iowa attorney. The claim concerned Donald Peterson, a workers' compensation and personal injury client, who had contacted Frank to represent him in an Iowa workers' compensation claim. Believing Gallner to be an experienced Iowa workers' compensation attorney, Frank referred Peterson to Gallner. Frank had no agreement with Gallner or Peterson regarding the extent of Frank's involvement in the claim or his fees. Frank worked on the Peterson claim, providing Gallner with copies of Peterson's medical records, as well as conducting telephone conferences with Peterson and Gallner. Frank did not participate in any discovery meetings with expert witnesses or document evaluation. Frank did not prepare pleadings or correspondence. In October 1992, Frank received $20,670 in fees from Gallner for his work on the Peterson claim.

Prior to his participation in the Peterson matter, Frank did not determine whether or not he had a conflict of interest in representing Peterson in Peterson's Iowa workers' compensation claim. In particular, Frank did not attempt to discover the identity of the employer's insurance carrier defending against Peterson's claim in Iowa until 1998. The insurance carrier was St. Paul.

The referee concluded that Frank was representing Peterson in a claim against St. Paul at the same time he was representing St. Paul in other matters. The referee found that although Frank did not know he was representing clients with differing interests, he was not excused by his ignorance, concluding that such representation may have diluted Frank's loyalty or undermined his efforts to represent either or both of his clients effectively.

In addition to the facts recited above, the referee noted in his report that the conflict of interest arose from Frank's "negligence" rather than an intentional act to benefit himself or another client. The referee found no evidence that any client was harmed. The referee also noted that Frank had cooperated fully in the disciplinary proceedings and had shown an attitude of

regret and remorse. The referee found that Frank was not a threat to the public.

The referee found that Frank had demonstrated his commitment to the legal profession and the community by serving as the chair of the Nebraska State Bar Association's workers' compensation section, serving on the Omaha Bar Association's domestic relations committee, presenting continuing legal education seminars, contributing to the workers' compensation manual, and serving on Omaha's human relations board.

The referee stated that the record contained 27 affidavits from lawyers and judges whom Frank knew professionally as a result of his years in practice. The affidavits attested to Frank's competence, professionalism, honesty, integrity, commitment to his clients, and fitness to practice law. Some of the affidavits referred to Frank's civic and community involvement, his volunteer coaching of youth sports, his commitment to his profession, and his dedication to his family.

In his report, the referee specifically found by clear and convincing evidence that Frank had violated DR 1-102(A)(1) and (5), DR 5-105(A) and (B), and his oath as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations and considering the mitigating factors the referee found present in the case, the referee recommended that Frank be publicly reprimanded.

ANALYSIS

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-recited facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of Frank's conflict of

interest in representing Peterson in a claim against St. Paul, Frank has violated DR 1-102(A)(1) and (5) and DR 5-105(A) and (B). We further conclude that Frank has violated the attorney's oath of office. See § 7-104.

[3,4] We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. NSBA v. Brown*, 251 Neb. 815, 821, 560 N.W.2d 123, 128 (1997). Accord *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

[5,6] With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). We have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

> To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

State ex rel. NSBA v. Rothery, 260 Neb. at 766, 619 N.W.2d at 593. Accord, *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

[7-9] We have noted that "[t]he determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors." *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 631, 599 N.W.2d 592, 601 (1999). An isolated incident not representing a pattern of conduct is considered as a factor in mitigation. *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996). Finally, the propriety of a sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances. *State ex rel. NSBA v. Rothery, supra*; *State ex rel. NSBA v. Jensen, supra*. In this regard, we review cases involving conflicts of interest under DR 5-105.

In *State ex rel. NSBA v. Freese, supra*, the respondent was found to have a conflict of interest when he represented both the husband and wife in a personal injury claim and, while the personal injury claim was pending, represented the wife in a divorce action against the husband and represented the husband in certain criminal matters. Furthermore, during the pendency of all three proceedings, the respondent engaged in a sexual relationship with the wife. The respondent also was found to have neglected an unrelated estate matter. As a result of this misconduct which we found violated DR 1-102(A)(1) and (5); DR 5-101(A) and DR 5-105(A) through (C); Canon 6, DR 6-101(A)(3); and the attorney's oath of office, we suspended the respondent from the practice of law for 18 months.

In *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), the former State Attorney General was found to have violated numerous disciplinary rules, including DR 5-105, during his tenure as Attorney General, when he failed to disclose prior business and legal dealings he had had with a savings company and its director and failed to withdraw from a state investigation of the savings company and director involving allegations of illegal activities. As a result of multiple rules violations, the respondent was suspended from the practice of law for 4 years.

In *State ex rel. Nebraska State Bar Assn. v. Dunker*, 203 Neb. 589, 279 N.W.2d 609 (1979), we suspended the respondent from the practice of law for 1 year, after the referee concluded that the respondent had committed nine separate acts of misconduct, including violating DR 5-105. One of the factors we considered

in imposing the suspension was the respondent's prior involvement in a disciplinary proceeding.

In *State ex rel. Nebraska State Bar Assn. v. Hollstein*, 202 Neb. 40, 274 N.W.2d 508 (1979), we publicly reprimanded the respondent who violated DR 5-105 when he voluntarily represented a defendant in a criminal proceeding while serving as part-time city prosecutor.

In *State ex rel. Nebraska State Bar Assn. v. Gobel*, 201 Neb. 586, 271 N.W.2d 41 (1978), we suspended the respondent for 3 months when he violated DR 5-105 by representing clients with conflicting interests; violated Canon 7, DR 7-104, by directly contacting a party whom he knew to be represented by counsel; and violated DR 7-105 by threatening criminal prosecution to obtain an advantage in a civil proceeding.

These cases demonstrate that this court has imposed differing sanctions for cases involving violations of DR 5-105 and that the degree of the punishment is dependent upon the factors present in each case. In the instant action, the referee has recommended a public reprimand. Previously, this court has ordered a public reprimand and probation in a case in which the attorney admitted to failing to maintain a balance in his trust account equal to or greater than his obligation to a client whose funds had been deposited in the account. See *State ex rel. NSBA v. Kratina*, 260 Neb. 1030, 620 N.W.2d 748 (2001). We noted in the opinion that the respondent had cooperated in the disciplinary proceeding. In *State ex rel. NSBA v. Owens*, 260 Neb. 164, 615 N.W.2d 489 (2000), we publicly reprimanded a county attorney who had reduced the charge her brother had received on a speeding ticket, thereby lowering his fine. In *State ex rel. Nebraska State Bar Assn. v. Divis*, 212 Neb. 699, 325 N.W.2d 652 (1982), we concluded that the respondent, who had neglected certain legal matters entrusted to him resulting in unnecessary delay, should be publicly reprimanded for his misconduct and placed on probation.

The evidence in the present case establishes, inter alia, that at the time he was representing Peterson in a claim against St. Paul, Frank was also representing St. Paul in unrelated litigation. Pursuant to DR 5-105, Frank had an ethical obligation to decline representation involving differing interests, and to

discontinue representing multiple clients if such representation involved differing interests. See DR 5-105(A) and (B). As a result of his conduct, Frank has violated DR 5-105(A) and (B), as well as DR 1-102(A)(1) and (5), which prohibits a lawyer from engaging in conduct violating a disciplinary rule and from engaging in conduct prejudicial to the administration of justice. Frank has also violated his oath as an attorney. See § 7-104.

As mitigating factors, we note the isolated nature of Frank's misconduct, his cooperation during the disciplinary proceedings, his continuing commitment to the legal profession and the community, and the lack of evidence of any harm to the clients.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, this court agrees with the referee's recommendation and finds that Frank should be publicly reprimanded. Thus, Frank is hereby publicly reprimanded for conduct in violation of the Code of Professional Responsibility and his oath of office as a member of the Nebraska State Bar Association. Pursuant to Neb. Ct. R. of Discipline 23(B) (rev. 2001), costs and expenses are taxed to Frank.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EUGENE J. HYNES, RESPONDENT.

631 N.W. 2d 499

Filed July 27, 2001. No. S-01-266.

Original action. Judgment of reprimand, suspension, and probation.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court charged respondent, Eugene J. Hynes, on March 6, 2001, with violating his oath of office as an attorney, Neb. Rev. Stat.

§ 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility, Canon 1, DR 1-102(A)(1); Canon 6, DR 6-101(A)(3); and Canon 9, DR 9-102(B), which provide as follows:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> . . . .
>
> (3) Neglect a legal matter entrusted to him or her.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Respondent was duly admitted to the practice of law in the State of Nebraska on June 25, 1971. At all times relevant to these proceedings, respondent was engaged in the practice of law in Oshkosh, Nebraska.

On March 27, 2000, the Counsel for Discipline received a complaint regarding respondent's neglect of a client's case and failure to refund a portion of the fees. On February 8, 2001, a complaint was filed against respondent with the Committee on Inquiry of the Sixth Disciplinary District, and on March 1, the committee informed the Counsel for Discipline that it had determined that formal charges should be filed with this court. On March 6, the Counsel for Discipline filed formal charges with this court, alleging that respondent had neglected a legal matter entrusted to him and had failed to return the unused portion of the client's retainer until after a complaint had been filed against him.

Respondent filed a conditional admission of charges with this court on June 13, 2001, pursuant to Neb. Ct. R. of Discipline

13(B) (rev. 2001). In the conditional admission, respondent admits the facts alleged in the formal charges and admits that his acts constitute a violation of his oath of office as an attorney and DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B). Respondent made such admissions conditioned upon receipt of the following imposition of discipline:

> A 30-day suspension from the practice of law, public reprimand, probation for one year with monitoring, and costs taxed to respondent. Said 30-day suspension to begin on August 1, 2001. Respondent's license to practice law shall automatically be reinstated at the end of the 30-day suspension provided respondent has complied with Disciplinary Rule 16, and provided that the Counsel for Discipline has not notified the Court that respondent has violated any Disciplinary Rule during said suspension. The one year probation shall begin immediately after the 30-day suspension. At the conclusion of the term of probation, the monitoring lawyer shall notify the Court of respondent's successful completion thereof.
>
> The probation shall include the monitoring of respondent by Paul Hofmeister, an attorney member of the District Six Committee on Inquiry. Paul Hofmeister shall not be compensated for his monitoring duties; however, he shall be reimbursed by respondent for actual expenses incurred. During the one year probationary period respondent shall provide the monitor, at least monthly, a list of all cases for which respondent is then responsible.
>
> The names of respondent's clients shall be kept confidential by way of a number assigned to each case. The list of cases shall include the following for each case:
>
> 1. Date attorney-client relationship began[.]
>
> 2. General type of case (i.e. divorce, adoption, probate, contract, real estate, civil litigation, criminal, tax return preparation). For tax return preparation cases, respondent need only provide the date the return is due.
>
> 3. Date of last contact with client.
>
> 4. Last type and date of work completed on file (pleading, correspondence, document preparation, discovery, court hearing).

5. Next type and date of work that should be completed on case.

6. Any applicable statute of limitation and its date.

The monitor shall have the right to contact respondent with any questions the monitor may have regarding the list. If at any time the monitor believes respondent has violated a disciplinary rule or has failed to comply with the terms of probation, he shall report the same to the Counsel for Discipline.

Attached to the conditional admission was the agreement of Paul Hofmeister to serve as probation monitor for respondent. In addition, the conditional admission contained the signed statement of the Counsel for Discipline indicating his determination that the requested 30-day suspension from the practice of law, public reprimand, and probationary period of 1 year with monitoring were appropriate under the facts of the case.

Based on the conditional admission of respondent and the recommendation of the Counsel for Discipline, the court finds by clear and convincing evidence that respondent has violated his oath of office and DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(B), and that respondent should be publicly reprimanded, suspended from the practice of law for 30 days beginning August 1, 2001, and subject to probation with monitoring as outlined above for 1 year immediately following the 30-day suspension. Thus, respondent is hereby publicly reprimanded for conduct in violation of the Code of Professional Responsibility and his oath of office as a member of the Nebraska State Bar Association and is hereby suspended from the practice of law for 30 days beginning August 1, 2001, and ordered to be subject to probation with monitoring as outlined above for 1 year immediately following the 30-day suspension. Respondent's license to practice law shall automatically be reinstated at the end of the 30-day suspension provided respondent has complied with Neb. Ct. R. of Discipline 16 (rev. 2001) and provided that the Counsel for Discipline has not notified this court that respondent has violated any disciplinary rule during said suspension. Pursuant to Neb. Ct. R. of Discipline 23(B) (rev. 2001), costs and expenses are taxed to respondent.

JUDGMENT OF REPRIMAND, SUSPENSION, AND PROBATION.

STATE OF NEBRASKA, APPELLEE, V. PETER HOCHSTEIN, APPELLANT. STATE OF NEBRASKA, APPELLEE, V. C. MICHAEL ANDERSON, APPELLANT.

632 N.W. 2d 273

Filed August 3, 2001. Nos. S-99-1344, S-99-1345.

1. **Statutes: Appeal and Error.** 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.
2. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
3. **Statutes: Legislature: Intent.** In reading 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.
4. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed in favor of the defendant.
5. ____: ____. A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.
6. ____: ____. Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
7. **Statutes: Legislature: Intent.** Under principles of statutory construction, 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.
8. **Homicide: Sentences: Death Penalty.** A three-judge panel designated under Neb. Rev. Stat. § 29-2520(3) (Reissue 1995) must vote unanimously for a sentence of death before the death penalty can be properly imposed.
9. **Sentences: Death Penalty: Appeal and Error.** The appellate remedy for an incorrectly imposed death sentence based on a nonunanimous vote of the sentencing panel is, by operation of law, the vacation of the death sentence imposed on the defendant, thereby resulting in imposition of a sentence of life imprisonment.
10. **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.
11. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., WILLIAM B. CASSEL, and RANDALL L. REHMEIER, Judges. Sentences vacated, judgments affirmed in part and in part reversed, and causes remanded with directions.

Emil M. Fabian, of Fabian & Thielen, for appellant Peter Hochstein, and, on brief, Peter Hochstein, pro se.

Alan G. Stoler and Jerry M. Hug for appellant C. Michael Anderson, and, on brief, C. Michael Anderson, pro se.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellees.

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

MILLER-LERMAN, J.

INTRODUCTION

In case No. S-99-1344, Peter Hochstein appeals the death penalty imposed upon him by the November 5, 1999, order of the district court for Douglas County. In case No. S-99-1345, C. Michael Anderson appeals the death penalty imposed upon him by the November 5, 1999, order of the district court for Douglas County. Because the appeals involve virtually identical issues, both cases will be discussed and resolved in this opinion.

In summary, Anderson and Hochstein were each convicted of murder in the first degree. Pursuant to the 1997 mandate of the Court of Appeals for the Eighth Circuit, three-judge sentencing panels were designated pursuant to Neb. Rev. Stat. § 29-2520(3) (Reissue 1995). In each case, two of the judges on the three-judge sentencing panel voted in favor of imposition of the death penalty and one judge voted against imposition of the death penalty. On November 5, 1999, the district court imposed a sentence of death in each case. Anderson and Hochstein each challenge the propriety of the imposition of the death penalty based on a nonunanimous vote of the three-judge sentencing panel, an issue which arose for the first time in these cases in 1999. As explained below, we conclude in each case that given the provisions of the "Special Procedure in Cases of Homicide," Neb. Rev. Stat. §§ 29-2519 through 29-2546 (Reissue 1995 & Cum. Supp. 1998), the district court erred as a matter of law in imposing sentences of death rather than life sentences where the sentencing panel designated under § 29-2520(3) did not vote unanimously to impose the death penalty. Where a defendant has been convicted

of murder in the first degree pursuant to Neb. Rev. Stat. § 28-401 (Reissue 1975) (now Neb. Rev. Stat. § 28-303 (Reissue 1995)), the permissible sentences are a sentence of life imprisonment or a sentence of death. See, § 29-2522 (Reissue 1975); Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Consequently, where the defendant has been convicted of first degree murder and acquitted of the death penalty due to the sentencing panel's failure to unanimously agree that a sentence of death should be imposed, by operation of law, the proper sentence which should be imposed by the district court is life imprisonment. Accordingly, in each case, we vacate the sentence of death, reverse the judgment, and remand the cause to the district court with directions to impose a sentence of life imprisonment. In all other respects, the orders of the district court are affirmed.

STATEMENT OF FACTS

Anderson and Hochstein were originally sentenced to death in 1978 following their convictions for murder in the first degree. Their convictions and sentences were affirmed by this court in 1980. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981).

During the period 1981 to 1997, Anderson and Hochstein sought postconviction and habeas corpus relief in the state and federal courts. Such petitions in state court were denied, and the denials were affirmed by this court as follows: *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Anderson*, 216 Neb. 521, 344 N.W.2d 473 (1984); *Anderson and Hochstein v. Gunter*, 226 Neb. 724, 414 N.W.2d 281 (1987); and *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990).

As noted, Anderson and Hochstein sought habeas corpus relief in the U.S. District Court for the District of Nebraska, and on January 16, 1996, the U.S. District Court issued a memorandum opinion in each case, rejecting the majority of Anderson's and Hochstein's claims but concluding that Anderson and Hochstein were entitled to relief on a sentencing claim relating to the "exceptional depravity" aggravating circumstance. *Anderson v. Hopkins*, CV. 84-L-741 (D. Neb. Jan. 16, 1996); *Hochstein v. Hopkins*, CV. 84-L-755 (D. Neb. Jan. 16, 1996). The U.S. District

Court determined that Anderson's and Hochstein's petitions for writs of habeas corpus must be granted based on this issue.

The U.S. District Court entered an order and judgment dated January 16, 1996, in each case stating:

> This action is remanded to the Nebraska Supreme Court to reduce petitioner's sentence to life imprisonment unless within ninety (90) days of the date of this opinion, [it] reweigh[s] the aggravating and mitigating circumstances, conduct[s] a harmless error review, or remand[s] the case back to the Douglas County District Court for resentencing.

The State appealed the decisions of the U.S. District Court to the Court of Appeals for the Eighth Circuit, and Anderson and Hochstein cross-appealed. The Court of Appeals for the Eighth Circuit affirmed the U.S. District Court's decisions in both cases. *Anderson v. Hopkins*, 113 F.3d 825 (8th Cir. 1997); *Hochstein v. Hopkins*, 113 F.3d 143 (8th Cir. 1997). The Court of Appeals for the Eighth Circuit concluded in each case:

> The order and judgment of the [U.S] district court is modified to provide that [each] petitioner's sentence will be reduced to life imprisonment, unless within ninety (90) days of the date of our mandate in the present case, the Nebraska Supreme Court reweighs the aggravating and mitigating circumstances, conducts an independent harmless error review, or remands the case to the sentencing court for resentencing.

Anderson, 113 F.3d at 832. Accord *Hochstein, supra*. The Court of Appeals for the Eighth Circuit subsequently modified the orders to change the reference to "ninety (90) days" to "one hundred and fifty (150) days." *Anderson v. Hopkins*, 122 F.3d 1160, 1161 (8th Cir. 1997); *Hochstein v. Hopkins*, 122 F.3d 1160, 1161 (8th Cir. 1997). The relief granted by the Court of Appeals for the Eighth Circuit was limited to the sentencing issue, and mandates were, accordingly, limited to the sentencing issue. The U.S. Supreme Court denied certiorari in the Hochstein case. *Hochstein v. Hopkins, Warden*, 522 U.S. 959, 118 S. Ct. 388, 139 L. Ed. 2d 303 (1997).

Subsequent to the issuance of the mandates of the Court of Appeals for the Eighth Circuit, the State, on July 17, 1997, filed motions with this court to initiate resentencing proceedings in

both cases. In response to the State's motions, on August 4, we entered an order in each case, stating, "Motion considered; no federal stay having issued, cause remanded to district court for resentencing."

Upon remand to the district court, a three-judge sentencing panel was named in each case pursuant to § 29-2520(3). A sentencing hearing as to both Anderson and Hochstein was held before the panel on September 7 and 8, 1999. Prior to the sentencing hearing, Anderson and Hochstein filed various preliminary motions including motions for new trials, motions to determine death eligibility, motions to prohibit imposition of the death penalty, and motions to declare the Nebraska death penalty unconstitutional. The district court entered an order on miscellaneous motions dated November 5, denying these and other pending motions filed by Anderson and Hochstein.

On November 5, 1999, the district court entered orders in both cases, imposing the death penalty on Anderson and Hochstein. The orders stated that as to the aggravating circumstances, the sentencing panel found that the aggravating circumstance set forth in § 29-2523(1)(c), that "[t]he murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant," existed beyond a reasonable doubt in each case. The sentencing panel found no other statutory aggravating circumstances present in either case. As to statutory mitigating circumstances, the sentencing panel found the mitigating circumstance set forth in § 29-2523(2)(a), that "[t]he offender has no significant history of prior criminal activity," was applicable in each case. The sentencing panel found no other statutory mitigating circumstances applicable in either case.

The sentencing panel further considered certain nonstatutory mitigating circumstances urged by Anderson and Hochstein. The following circumstances were urged by both Anderson and Hochstein: (1) the length of time on death row, then exceeding 21 years; (2) exemplary adjustment to institutional life; (3) lack of any evidence of future dangerousness; and (4) demonstration of rehabilitation while imprisoned. As to the first circumstance, the panel found that the length of incarceration did not constitute in itself a mitigating factor. As to the second circumstance, the order stated that while the evidence established that each

defendant had adjusted to institutional life, a "majority of the sentencing panel" determined that such adjustment was "entitled to little weight." As to the third circumstance, the sentencing panel was "unable to accord . . . significant weight" to evidence of the likelihood of lawful future behavior. As to the fourth circumstance, the sentencing panel found that Anderson's and Hochstein's adjustment to institutional life "may or may not be compatible with rehabilitation" and thus accorded "little weight" to such circumstance.

Anderson additionally urged the following as nonstatutory mitigating circumstances pertinent to his case: (1) family responsibility and ties, (2) invasion of his constitutional and statutory rights resulting from private individuals tainting the prosecution, and (3) disparity in sentencing due to a coconspirator being granted total immunity from prosecution. The sentencing panel accorded no weight to the first circumstance, found that the second did not constitute a mitigating factor, and accorded "little weight" to the third.

Hochstein additionally urged the following as nonstatutory mitigating circumstances pertinent to his case: (1) his emotional and intellectual immaturity at the time of the murder and (2) his history of being easily influenced or led. The panel accorded no weight to either of these circumstances.

The sentencing order stated that in determining the sentences, the panel unanimously determined that the statutory aggravating circumstance regarding murder for hire was applicable beyond a reasonable doubt in each case. The order further stated that the sentencing panel unanimously found that the statutory mitigating circumstance regarding lack of prior criminal activity was applicable in each case. The order states, however, that "a majority of the panel" rather than a unanimous panel, determined that such statutory mitigating circumstance, "even when coupled with the non-statutory mitigating evidence which the Defendant[s] [have] presented for consideration, are not of sufficient weight to approach or exceed the weight which has been given to the aggravating circumstance." The same majority of the panel determined that the sentence of death should be imposed upon each defendant. The same majority of the panel further determined that the sentence of death imposed in each

case was not excessive or disproportionate to the penalty imposed in similar cases.

In each case, one member of the panel dissented from the result of the majority and determined that a life sentence should be imposed with the following explanation:

> I respectfully dissent from the sentence imposed by the majority. The premeditated, calculated, contract murder of Ronald J. Abboud was an outrage against the State of Nebraska, and the victim's family and friends. However, an analysis of the aggravating and mitigating circumstances set forth in Neb. Rev. Stat. §29-2523 and §29-2521 [Reissue 1995] causes me to conclude that the mitigating circumstances approach or exceed the weight given to the aggravating circumstance in this case, and that a sentence of life imprisonment should be imposed.

Although the sentencing panel did not vote unanimously for imposition of the death penalty, the district court ordered that the penalty of death be imposed on each defendant. Anderson and Hochstein now appeal the November 5, 1999, orders of the district court for Douglas County imposing the death sentence on each of them based on a nonunanimous vote of the three-judge sentencing panel.

ASSIGNMENTS OF ERROR

Anderson and Hochstein assert, renumbered and restated, that the district court erred in imposing the death penalty rather than sentences of life imprisonment where the panel failed to unanimously conclude that death sentences should be imposed. Anderson and Hochstein also assert that the sentencing panel erred in (1) failing to find that the statutory and nonstatutory mitigating circumstances approached or exceeded the statutory aggravating circumstance, (2) failing to give adequate weight to nonstatutory mitigating circumstances, (3) failing to submit to a jury the determination of the existence of an aggravating circumstance, (4) failing to apply a reasonable doubt standard to the sentencing determination; and (5) failing to conduct a meaningful comparative review. Anderson and Hochstein further assert that the district court erred in (1) failing to sustain motions for new trial on the basis that the original trial court failed to instruct

the jury on lesser-included forms of homicide and that trial counsel and direct appeal counsel provided ineffective assistance by failing to pursue such issue at trial and on direct appeal; (2) failing to sustain motions (a) to prohibit imposition of the death penalty, (b) to declare the Nebraska death penalty statutes unconstitutional, (c) for determinations of death eligibility, (d) for arrest of judgment, and (e) to reopen motion for new trial filed in 1978; (3) failing to find death by electrocution to be cruel and unusual punishment; and (4) failing to find their length of time spent on death row to be cruel and unusual punishment.

STANDARD OF REVIEW

[1] 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. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

ANALYSIS

Sentencing Assignment of Error: Improper Imposition of Death Penalty Based on Nonunanimous Determination of Sentencing Panel

Nebraska statutes contain a section entitled "Special Procedure in Cases of Homicide," §§ 29-2519 through 29-2546, which provides, inter alia, procedures for imposition of the death penalty. Section 29-2520 provides that when a defendant is convicted of first degree murder,

> the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

In the instant case, following remand to the district court for Douglas County in accordance with the 1997 federal mandate, a three-judge panel was appointed to determine whether the death penalty should be imposed on Anderson and Hochstein. See § 29-2520(3). Two of the three judges on the sentencing panel determined that the death penalty should be imposed in each case. The third judge, however, disagreed in each case, based upon his determination that "the mitigating circumstances approach or exceed the weight given to the aggravating circumstance." Although the three-judge panel did not vote unanimously for the death penalty, the district court imposed a sentence of death on each defendant on November 5, 1999.

Nebraska statutes provide no explicit provision regarding what number of a three-judge sentencing panel is necessary for a sentence of death to be properly imposed. The question presented in the instant cases is whether the three-judge sentencing panel convened pursuant to § 29-2520(3) must vote unanimously to impose a sentence of death under the statutes as currently enacted. If a unanimous vote is required, then we must determine the effect of the failure of the sentencing panel to reach unanimity upon the death sentences ordered in these cases.

Anderson and Hochstein contend that the panel's determination must be unanimous before the death penalty can be imposed. The State contends, inter alia, that because one judge can impose the death penalty under § 29-2520(1), it follows that the vote of two judges is adequate to impose the death penalty under the provision calling for a three-judge panel under § 29-2520(3).

[2,3] A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995). Because § 29-2520(3) fails to address the issue of what number of a three-judge panel must determine that the death penalty is to be imposed for a sentence of death to be properly imposed, the

statute is open for construction. In this regard, we note that we have previously construed the sentencing statutes in homicide cases where silent, and such construction has not evoked a change by the Legislature. See *State v. Simants*, 197 Neb. 549, 560, 250 N.W.2d 881, 888 (1977) (holding that where § 29-2522 is silent regarding burden of proof, "[w]e believe it is the intent of the act to require the facts upon which the aggravating circumstances . . . are based to be proved beyond a reasonable doubt, and so construe it"), *overruled on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). See, also, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000) (when judicial interpretation of statute has not evoked legislative amendment, it is presumed that Legislature has acquiesced in court's interpretation).

[4-7] It is a fundamental principle of statutory construction that penal statutes are to be strictly construed in favor of the defendant. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997); *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995). Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Bottolfson, supra.* Under principles of statutory construction, 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. *State v. Seberger*, 257 Neb. 747, 601 N.W.2d 229 (1999).

The intent of the Legislature with respect to imposition of the death penalty can be discerned in part by considering § 29-2521.01, which is contained in the "Special Procedure in Cases of Homicide," and in which the Legislature has provided in relevant part:

> (1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

> (2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria.

This stated legislative policy is consistent with the views expressed by the U.S. Supreme Court and this court regarding the need for reliability in capital sentencing determinations. The U.S. Supreme Court has stated:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). See, also, *State v. Simants, supra*. It has also been said that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano v. Florida*, 468 U.S. 447, 468, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (Stevens, J., concurring in part, and in part dissenting).

We have recently stated that " 'the death sentence is different from any other criminal penalty. . . . No system based on human judgment is infallible. Thus, with the death penalty, we have taken, and should continue to take, the extra step—indeed walk the extra mile—to ensure fairness and accuracy' " in cases involving the death penalty. *State v. Reeves*, 258 Neb. 511, 534, 604 N.W.2d 151, 167 (2000) (quoting *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993)).

[8] Because § 29-2520(3) does not state what number of votes of the three-judge sentencing panel is required to properly impose the death penalty, we read the statutes in the "Special Procedure in Cases of Homicide" section together and construe them conjunctively to determine the intent of the Legislature with respect to § 29-2520(3) so that different provisions of the statutes are consistent, harmonious, and sensible. *State v. Seberger, supra*. In this regard, we are especially cognizant of the language used by the Legislature in § 29-2521.01 evincing

legislative intent, which in relevant part acknowledges the "enormity" of the death penalty and provides that in imposing the death penalty, "the most scrupulous standards of fairness" should be followed. We are also mindful that a penal statute should be strictly construed in favor of the defendant, see *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999), and that the U.S. Supreme Court has recognized that the death penalty is qualitatively different from imprisonment. Applying these principles of statutory construction and given the stated intent of the Legislature, we conclude that a three-judge panel designated under § 29-2520(3) must vote unanimously for a sentence of death before the death penalty can be properly imposed.

There is a substantial basis in Nebraska jurisprudence and elsewhere for requiring unanimity in criminal cases. In this regard, we note that with respect to a trial to determine guilt or innocence, in Nebraska, a jury must be unanimous in order to convict a criminal defendant. See Neb. Const. art. I, § 6 (providing that "right of trial by jury shall remain inviolate" and allowing Legislature to provide for nonunanimous verdicts only in civil cases). See, also, *State v. Parker*, 221 Neb. 570, 571, 379 N.W.2d 259, 260 (1986) ("before one may be convicted of violating a state statute, the jury must reach a unanimous verdict"). We have also stated that for double jeopardy purposes, capital sentencing hearings in Nebraska have been held to have characteristics which resemble a criminal trial. *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999) (citing *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995)).

The requirement of unanimous jury verdicts in criminal cases exists in virtually every American jurisdiction, and those states that do allow a nonunanimous verdict in some criminal cases nevertheless require unanimity in capital cases. See Richard H. Menard, Jr., Note, *Ten Reasonable Men*, 38 Am. Crim. L. Rev. 179 (2001) (acknowledging unanimity voting rule governing petit juries in almost all American jurisdictions and noting that exceptions, Louisiana and Oregon, nevertheless require unanimity in capital or first degree murder cases). See, also, Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. Kan. L. Rev. 933, 935

(1998) (acknowledging "near-universal requirement that a jury reach a unanimous verdict" in criminal cases and noting proposal in California that would eliminate unanimity in criminal cases *except death penalty cases*). The fact that even those jurisdictions that have eliminated or have proposed eliminating a requirement of unanimity in reaching some criminal convictions nevertheless require unanimity in capital cases reflects the understanding that such cases are qualitatively different and require an added measure of reliability. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). See, also, *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) (Stevens, J., concurring in part, and in part dissenting); *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *overruled on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 539 (1990).

We also note that in most jurisdictions, capital sentencing is a jury function, and most relevant statutes prescribe that the failure of a jury to reach a unanimous agreement regarding sentencing results in the imposition of a life sentence by default. See, generally, James R. Acker and Charles S. Lanier, *Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform*, 32 Crim. L. Bull. 134 (1996). See, also, *Jones v. United States*, 527 U.S. 373, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999) (Ginsburg, J., dissenting); *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995); *State v. Daniels*, 207 Conn. 374, 542 A.2d 306 (1988) (emphasizing need for reliability as basis for requiring unanimity on capital sentencing juries), *habeas corpus granted on other grounds, Daniels v. Bronson*, 736 F. Supp. 1215 (D. Conn. 1990).

Our conclusion that unanimity is required of a three-judge panel before the death penalty can be properly imposed is consistent with the statutory schemes established in the other jurisdictions which provide for three-judge sentencing panels. At least three states other than Nebraska provide for three-judge sentencing panels: Colorado, Nevada, and Ohio. All three require by statute that the sentence of death be based on the unanimous determination of the three-judge panel. See, Colo. Rev. Stat. Ann. § 16-11-103(2)(d) (West Cum. Supp. 2000) (if panel of judges cannot unanimously agree on sentence, it shall make

record of each judge's position and shall then sentence defendant to life imprisonment); Nev. Rev. Stat. § 175.556 (2000) (sentence of death may be given only by unanimous vote of three judges); Ohio Rev. Code Ann. § 2929.03(D)(3) (Anderson 1999) (if panel of three judges unanimously finds, by proof beyond reasonable doubt, that aggravating circumstances outweigh mitigating factors, it shall impose sentence of death). Although Nebraska's statute does not specify what number of votes of the panel is required to properly impose the death penalty, we are inclined to believe that the same public policy goals as were expressed by the Nebraska Legislature in § 29-2521.01(1) and (2) would have been shared by the legislatures of Colorado, Nevada, and Ohio when those states enacted their three-judge sentencing panel death penalty statutes which explicitly require unanimity. Those statutes suggest that unanimity of the panel is necessary to effectuate the intent of the death penalty sentencing statutes that capital punishment be imposed fairly and reliably.

Having concluded that the imposition of the death penalty was error in each of these cases, we must determine the effect that such error has on the sentences of Anderson and Hochstein. Section 28-303 provides that murder in the first degree is punishable only as either a Class I or a Class IA felony. Section 28-105 provides that the penalty for a Class I felony is death and that the penalty for a Class IA felony is life imprisonment. Thus, the only sentences available in a case of murder in the first degree are the death penalty or life imprisonment.

As we have previously stated in a first degree murder case, "the sentencer is not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather . . . the sentencer is required to choose between the above-mentioned two options [life sentence or the death penalty] and only those options." *State v. Rust*, 247 Neb. 503, 513, 528 N.W.2d 320, 327 (1995). We have also held that the imposition of a life sentence acts to acquit the defendant of the death penalty. *State v. Rust, supra*. See, also, *State v. Seberger*, 257 Neb. 747, 601 N.W.2d 229 (1999).

In the instant cases, the objective of the hearing before the three-judge panel was "to reach a determination of whether the death penalty should be imposed." *State v. Seberger*, 257 Neb. at

750, 601 N.W.2d at 231. Because the three-judge panel did not vote to unanimously impose the death penalty, Anderson and Hochstein were acquitted of the death penalty. See, generally, *State v. Rust, supra*. The district court erred as a matter of law in each case by entering judgments sentencing Anderson and Hochstein to death which were inconsistent with the determinations of the three-judge panel acquitting Anderson and Hochstein of the death penalty. Given the sentencing panel's acquittal of Anderson and Hochstein as to the death penalty, by operation of law, a sentence of life imprisonment should have been imposed on Anderson and Hochstein by the district court.

[9] Where the defendants have been convicted of murder in the first degree pursuant to § 28-401 (now found at § 28-303), the only alternative to sentences of death are sentences of life imprisonment. See § 28-105. Where the defendant has been convicted of first degree murder and where the district court erroneously imposed a death sentence, the appellate remedy for an incorrectly imposed death sentence based on a nonunanimous vote of the sentencing panel is, by operation of law, the vacation of the death sentence imposed on the defendant, thereby resulting in imposition of a sentence of life imprisonment. Accordingly, we vacate the sentences of death in these cases, reverse in part the judgments, and remand the causes to the district court with directions to resentence Anderson and Hochstein to life imprisonment. See §§ 28-303, 28-105, and 29-2522.

Nonsentencing Assignments of Error

[10] The majority of Anderson's and Hochstein's remaining assignments of error relate to the manner of the imposition of the death penalty. Having vacated the sentences of death and determined that Anderson and Hochstein are to be sentenced by the district court to life imprisonment, we need not consider further assignments of error relating to imposition of the death penalty. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000); *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000).

In addition to their assignments of error relating to imposition of the death penalty, Anderson and Hochstein make certain

assignments of error relating to the validity of their original convictions. Such assignments of error, including a claim that the district court erred in denying their motions for new trial, are based on their claim that the original trial court erred by failing to instruct the jury on the lesser-included forms of homicide. In its order of November 5, 1999, the district court denied various motions including the motions for new trial. The district court in these cases stated several reasons for such denial, including that neither the sentencing panel nor the presiding judge had authority to grant the relief sought, including a new trial.

We agree with the district court's conclusion that in the instant proceedings, it was without authority to order the nonsentencing relief sought by Anderson and Hochstein. The resentencing in the instant cases was the result of Anderson's and Hochstein's petitions for habeas corpus relief in the federal courts. The U.S. District Court and the Court of Appeals for the Eighth Circuit concluded that error existed in Anderson's and Hochstein's sentencing because an invalid aggravating circumstance had been considered. The federal courts therefore ordered specific relief limited to and designed to remedy such sentencing error. The U.S. District Court in its memorandum opinions noted that the error in sentencing did not require a retrial, and in 1997, the Court of Appeals for the Eighth Circuit, in affirming, limited the relief granted to the orders that the sentences be reduced to life imprisonment unless this court took one of three actions: (1) reweighed the aggravating and mitigating circumstances, (2) conducted independent harmless error reviews, or (3) remanded the causes to the sentencing court for resentencing. Upon the State's motion, this court entered an order remanding the causes to the district court for resentencing.

[11] When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998); *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997); *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986).

The district court's authority in these cases was limited by the remand from this court, and this court's authority was in turn limited by the relief granted by the federal courts. Such relief was limited to the sentencing aspect of the cases and did not provide an avenue for Anderson and Hochstein to move for a new trial or seek nonsentencing relief. We therefore conclude that due to the limited nature of the relief granted by the federal courts and this court, upon remand, the district court in these cases was without authority to grant the motions for new trial or other nonsentencing-related relief. The district court properly denied such motions, and we affirm this order.

CONCLUSION

Anderson and Hochstein were each convicted of first degree murder. Pursuant to the 1997 mandate of the Court of Appeals for the Eighth Circuit, three-judge sentencing panels were designated pursuant to § 29-2520(3). In each case, the sentencing panel did not vote unanimously to impose the death penalty: two judges determined that the death penalty should be imposed, and one judge voted against imposition of the death penalty. Notwithstanding the fact that the three-judge sentencing panel did not vote unanimously for imposition of the death penalty, on November 5, 1999, the district court imposed a sentence of death rather than a sentence of life imprisonment in each case. The issue of the propriety of the imposition of the death penalty based on a nonunanimous vote of the sentencing panel thus arose for the first time in these cases in 1999. Given the provisions of the "Special Procedure in Cases of Homicide," §§ 29-2519 through 29-2546, for the reasons outlined above, we conclude that the impositions of sentences of death based on nonunanimous determinations of the three-judge sentencing panels designated under § 29-2520(3) were error.

The Legislature has provided for a "Special Procedure in Cases of Homicide." §§ 29-2519 through 29-2546. Section 29-2521.01 therein acknowledges the "enormity and finality" of the death penalty, § 29-2521.01(2), and provides that "[l]ife is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity," § 29-2521.01(1). Although § 29-2520(3)

provides for the designation of three-judge sentencing panels to determine whether the death penalty should be imposed, it is silent as to whether unanimity is required or whether two votes are sufficient to properly impose the death penalty.

At the trial level, unanimity in criminal cases in the guilt phase is the rule in Nebraska and elsewhere. Unanimity in capital sentencing is the rule elsewhere. Our review of the law in other jurisdictions shows that other state statutes which provide for three-judge sentencing panels require unanimity in the imposition of the death penalty. The U.S. Supreme Court has observed that the penalty of death is qualitatively different from a sentence of imprisonment and that its imposition must be accompanied by unique safeguards.

Given the legislatively recognized "enormity and finality" of the death penalty, § 29-2521.01(2), and the legislative directive to apply "scrupulous standards of fairness" in imposing sentences of death, § 29-2521.01(1), we decline to endorse sentences of death based on speculation that the Legislature, which has not specified what number of votes is required of a three-judge sentencing panel, would find a nonunanimous vote of a three-judge sentencing panel sufficient to impose the death penalty. We therefore hold that a three-judge panel designated under § 29-2520(3) must vote unanimously for a sentence of death before the death penalty can be properly imposed.

A conviction for murder in the first degree is punishable by either a life sentence or the death penalty. §§ 28-303, 28-105, and 29-2522. The office of a three-judge sentencing panel designated under § 29-2520(3) is to determine whether the death penalty should be imposed. The nonunanimous determinations of the three-judge panel acquitted Anderson and Hochstein of the death penalty. Where, as here, the defendants have been acquitted of the death penalty by the determinations of the three-judge panel, sentences of life imprisonment will be imposed by operation of law. The sentences of death imposed by the district court were error as a matter of law. Accordingly, the sentence of death imposed on Hochstein in case No. S-99-1344 and the sentence of death imposed on Anderson in case No. S-99-1345 are each vacated, the judgments are reversed, and the causes are remanded to the district court with directions to impose sentences of life

imprisonment in each case. In all other respects, the orders of the district court appealed from are affirmed.

SENTENCES VACATED, JUDGMENTS AFFIRMED IN PART AND IN PART REVERSED, AND CAUSES REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DAVID L. DUNSTER, APPELLANT.

631 N.W. 2d 879

Filed August 3, 2001. No. S-00-106.

1. **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 of the court below.
2. **Effectiveness of Counsel: Records: Appeal and Error.** Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not require dismissal ipso facto. The determining factor is whether the record is sufficient to adequately review the question presented.
3. **Effectiveness of Counsel: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a conviction must be overturned, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
4. **Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death on appeal, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. This court must also determine whether the imposition of the death penalty is excessive or disproportionate to the penalty imposed in similar cases.
5. **Criminal Law: Appeal and Error.** A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit.
6. **Effectiveness of Counsel: Conflict of Interest.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard for another or where a lawyer's representation of one client is rendered less effective by reason of his representation of another client. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
7. **Effectiveness of Counsel: Conflict of Interest: Proof.** The defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, but such conflict of interest must be shown to have resulted in conduct by counsel that was detrimental to the defense.

8. **Courts: Notice: Conflict of Interest.** A hearing must take place when the requisite special circumstances putting the trial court on notice of a possible conflict of interest arise.
9. **Constitutional Law: Right to Counsel: Waiver.** A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently.
10. **Right to Counsel.** When a defendant becomes dissatisfied with court-appointed counsel, unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so.
11. ____. The right of an indigent defendant to have counsel does not give the defendant the right to be represented by counsel of his or her own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
12. ____. A defendant may not use his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.
13. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has the right under U.S. Const. amend. VI and XIV, and Neb. Const. art. I, § 11, to be represented by an attorney in all critical stages of a criminal prosecution. However, this same constitutional right also guarantees the right of a defendant to represent himself or herself.
14. **Courts: Sentences: Death Penalty.** A defendant cannot "choose" the death penalty. Under our statutory system, the sentencing decision rests with the court alone.
15. **Right to Counsel.** A criminal defendant's right to self-representation plainly encompasses certain specific rights to have his or her voice heard. The pro se defendant must be allowed to control the organization and content of his or her own defense.
16. **Death Penalty: Aggravating and Mitigating Circumstances: Waiver.** A criminal defendant in a capital case may lawfully waive his or her right to present mitigating evidence during sentencing.
17. **Due Process: Death Penalty.** The Due Process Clause does not allow a sentence of death to be imposed on the basis of information which the defendant had no opportunity to deny or explain.
18. **Due Process: Criminal Law: Notice.** In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself.
19. **Criminal Law: Statutes: Words and Phrases.** In construing Chapter 29 of the Nebraska Revised Statutes, the singular number includes the plural, and the plural the singular.
20. **Death Penalty: Aggravating and Mitigating Circumstances.** Under Neb. Rev. Stat. § 29-2523 (Reissue 1995), the balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting, but, rather, requires a careful weighing and examination of the various factors.
21. **Sentences: Death Penalty.** Where the record reveals that the sentence of death was the result of reasoned judgment and the careful weighing and examination of the various circumstances and factors in light of the totality of the circumstances present, one aggravating circumstance may be sufficient under our statutory system for the sentencing court to conclude that imposition of the death penalty is appropriate.
22. **Due Process: Evidence: Prosecuting Attorneys.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.

23. **Sentences: Death Penalty: Homicide: Aggravating and Mitigating Circumstances.** Under Neb. Rev. Stat. § 29-2522 (Reissue 1995), the sentencing determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination. The court in its sentencing order must specify the factors it relied upon in reaching its decision, and focus on the individual circumstances of each homicide and each defendant.
24. **Records: Appeal and Error.** Generally speaking, the party bringing the appeal has the responsibility to include within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. The appellee may then request to supplement the record and add additional evidence to the bill of exceptions.
25. **Death Penalty: Records: Appeal and Error.** An appeal pursuant to Neb. Rev. Stat. § 29-2525 (Reissue 1995) does not place the burden of creating the record upon either party to the appeal. Instead, pursuant to Neb. Rev. Stat. § 29-2521.04 (Reissue 1995), the district court must provide all records required by the Nebraska Supreme Court in order to conduct its review and analysis.
26. ____: ____: ____. The Nebraska Supreme Court has the authority and the obligation to enforce the requirement that all records for any automatic appeal under Neb. Rev. Stat. § 29-2525 (Reissue 1995) are filed with the Clerk of the Supreme Court.
27. **Records: Death Penalty: Appeal and Error.** The submission of a less complete record to the reviewing court than the record on which the trial judge based his or her decision to sentence the defendant to death is not justifiable in a capital case.

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

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

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

HENDRY, C.J.

I. INTRODUCTION

David L. Dunster, proceeding pro se, pled guilty to the first degree murder of Larry R. Witt and to the use of a weapon to commit a felony. The trial court sentenced Dunster to death for Witt's murder and to not less than nor more than 20 years' imprisonment for use of a weapon. Pursuant to Neb. Rev. Stat. § 29-2525 (Reissue 1995), Dunster's automatic appeal was then docketed with this court.

II. FACTUAL BACKGROUND

Sometime in the early morning hours of May 10, 1997, Dunster strangled his cellmate, Witt, with an electrical cord. Witt's body was discovered later that day.

On July 2, 1997, the district court appointed the Lancaster County public defender's office to represent Dunster. Attorney Michael Gooch from that office then appeared on Dunster's behalf. On November 18, 1998, an arraignment was conducted in the district court. Dunster stood mute at the arraignment, and the court entered pleas of not guilty.

On June 8, 1999, the trial judge received a letter dated June 6, 1999, from Dunster. In this letter, Dunster pointed out that the State's list of potential trial witnesses included Lancaster County Deputy Sheriff Joseph Gehr. Gehr's mother was employed as the office manager for the public defender's office. Dunster expressed concern that because of this relationship, Gooch might not vigorously cross-examine Gehr at trial, and that confidential information regarding Dunster's case might have been shared between Gehr and his mother. Dunster requested that the public defender's office be disqualified as his counsel.

In this letter, Dunster also expressed dissatisfaction with the handling of his case by the public defender's office. Dunster claimed the public defender's office was investigating the existence of mitigating factors which could be presented in the event of a sentencing hearing. Dunster asserted that he did not want to present any mitigating evidence at sentencing and that investigating mitigating evidence was contrary to Dunster's instructions to the public defender's office.

On June 17, 1999, the court held a hearing on the issues raised by Dunster's letter. The prosecution, Dunster, and Gooch were present. At the court's request, Dennis Keefe, the elected Lancaster County public defender, testified regarding the confidentiality procedures at the public defender's office. In response to the court's questions, Keefe testified:

> MR. KEEFE: . . . [W]e have a written office policy about confidentiality, which goes beyond statutory attorney/client privilege and statutory secrets. And Ms. Gehr not only understands that policy, but is responsible for educating all of the other employees in the office when they're first

> employed. And it is a policy that we strictly enforce. And if anyone violates the policy, it's written into the policy that it is grounds for immediate dismissal. We have never had a problem with that in any way, shape or form, and we will not in this case. . . .
>
> THE COURT: When you say you have a policy, I presume the policy is that people are not allowed to disclose anything from within the office to anybody outside the office, paraphrasing?
>
> MR. KEEFE: Exactly.

The prosecution also called Gehr. Gehr testified that he had been employed by the Lancaster County sheriff's office for approximately 9 years, during which time his mother had been employed as the office manager for the public defender's office. Gehr testified that the extent of his involvement in Dunster's case was limited to his being present at Witt's autopsy and writing a supplemental report on the autopsy. Regarding the possible conflict of interest, Gehr testified as follows:

> [Prosecutor:] Have you at any time discussed your attendance at [Witt's] autopsy or anything else you may know about this case with your mother?
>
> [Gehr:] No.
>
> Q Prior to this afternoon, did you know that the Public Defender's Office was involved with this particular case?
>
> A No.
>
> Q Has your mother had any conversation with you about this case?
>
> A No.

After Gehr's testimony, Dunster reiterated his concern that he had "no assurance" that Gehr and his mother might not exchange information about the case. The court took the issue under advisement.

The court then considered the other issue in Dunster's letter, wherein Dunster stated, " 'I have instructed them [the public defender's office] not to investigate or present any mitigating evidence at the sentencing phase' . . . . 'I've told my attorneys I do not want them investigating these issues, but they tell me that, notwithstanding my desires, they're going to investigate them anyway.' " The court stated to Dunster, "[Y]our feeling is

that they're not following your directions, therefore you want them discharged." Dunster responded, "Exactly."

The court then began discussing this issue with Gooch. During this discussion, Dunster interjected, saying:

> [Dunster]: I think I can solve this whole thing.
>
> THE COURT: That would be nice.
>
> [Dunster]: Okay. Disqualify the public defenders; let me withdraw my plea of not guilty; I plead guilty and then you sentence me to death. That's what I'm requesting, because I'd rather have that than live the rest of my life in a cell. Okay?
>
> . . . .
>
> THE COURT: . . . Mr. Dunster, I would not unilaterally discharge the Public Defender's Office. You obviously have a right to fire whomever you want to, and then I would have to make a decision whether — and if you tell me, "I'm going to go ahead and represent myself," then I would have to make a decision on whether you're aware of certain things and whether your decision is freely, voluntarily, knowingly and intelligently made on proceeding to represent yourself.
>
> . . . I want you to have an opportunity to sit down and talk with Mr. Gooch . . . .
>
> . . . .
>
> [Dunster]: I will not discuss anything further with the Public Defender's Office.

The court then told Dunster that it would appoint another attorney to talk with him about the ramifications of discharging the public defender's office and representing himself. Dunster responded, "Well, common sense tells me that's stupid to represent myself. I mean, I don't know enough about the law, but I know what I want and then that's it."

The court then appointed the Nebraska Commission on Public Advocacy (NCPA) to advise Dunster on the ramifications of discharging the public defender's office and representing himself. The hearing was continued to allow Dunster time to consult with the NCPA.

The hearing resumed on July 2, 1999. The prosecution, Gooch, Dunster, and counsel from the NCPA were present.

During the hearing, Dunster stated he had been advised by the NCPA regarding his desire to discharge the public defender's office and to proceed pro se. Dunster then requested to withdraw "without prejudice" the issues raised in the June 8 letter. The court granted this request, and the public defender's office continued to represent Dunster.

On July 12, 1999, a pretrial hearing commenced regarding 33 motions Gooch had filed on Dunster's behalf. At the start of the hearing, Gooch informed the court that he would shortly be leaving the public defender's office and would not be available when Dunster's case came to trial. Dunster then requested that the NCPA immediately be appointed as his counsel. The court denied Dunster's request and determined that Dunster's case would be reassigned to a different public defender after the conclusion of the present hearing. Dunster responded, "It's a merry-go-round with attorneys . . . I don't get along with the Public Defender's Office." The court then reminded Dunster that the issue was not whether Dunster liked the public defender's office, but whether "the attorney can afford you effective counsel."

Various witnesses were then called to testify with respect to the 33 pretrial motions. The last witness called on July 12, 1999, was Investigator Kevin Knorr, who testified on behalf of the State regarding his investigation of Witt's murder. The hearing was then continued until July 13.

When the hearing resumed on the morning of July 13, 1999, the prosecutor disclosed to the court that after Knorr had finished his testimony on July 12, the prosecutor overheard Dunster say to Knorr, " 'If I could get out of these mother-fucking cuffs, I would break your mother-fucking neck.' " The prosecutor was concerned about the reoccurrence of such an outburst, the jury's security, and the possible need to shackle Dunster during trial.

After the prosecutor related this information to the court, the following exchange took place:

> MR. GOOCH: Your Honor, it strikes me that what the prosecutor is describing could be charged as felony terroristic threats. Pursuant to the code of professional responsibility, I believe that I should withdraw from the case because I think that I'm a potential witness.
>
> THE COURT: Not until anything's filed, are you?

> MR. GOOCH: Oh, I think so.
>
> . . . .
>
> THE COURT: The request of Mr. Gooch to withdraw is denied.

After the court denied Gooch's motion to withdraw, Dunster presented the court with two motions, both prepared by Dunster. The first, a typed motion, requested that the public defender's office be discharged and that Dunster be allowed to proceed pro se. The second, a handwritten motion, requested the court to allow Dunster to withdraw his not guilty pleas and plead guilty to first degree murder and use of a weapon to commit a felony. The court spent the rest of the morning and a portion of the afternoon advising and questioning Dunster regarding his motions.

The court questioned Dunster concerning his reasons for discharging the public defender's office and advised Dunster of his right to counsel and of the possible consequences of any decision to forgo the aid of counsel. The court also advised Dunster of the nature of the charges against him and the possible penalties, including the possible imposition of the death penalty if his guilty plea to first degree murder was accepted. Dunster responded that he was aware of his rights, the charges, and possible penalties for his crimes. The court then explained to Dunster what would occur during trial.

The court further questioned Dunster as follows:

> THE COURT: . . . Are you now under the influence of any alcohol, drugs, narcotics or other pills?
>
> [Dunster]: Yeah, medication.
>
> . . . .
>
> [Q.] Does the medication affect your ability to understand what's going on around you?
>
> [A.] No.
>
> [Q.] Does it make you groggy or anything like that?
>
> [A.] No.
>
> [Q.] What effect does it have on you?
>
> [A.] None.
>
> [Q.] None?
>
> [A.] None.
>
> [Q.] None that you're aware of, at least?
>
> [A.] None that I'm aware of.

Dunster stated that he was taking "mega-doses" of Prozac, "Depitol" (Depakote), and Librium. Dunster explained: "I weigh 300 pounds, so I — when I say mega-doses, they would be different than what they give her [the prosecutor] and what they give me." The court then asked, "What effect do those have on you?" Dunster responded, "None." The court further asked, "Do they affect your ability to understand what's going on around you?" Dunster responded, "No."

The court then questioned Dunster concerning his June 8, 1999, letter in which Dunster expressed concern regarding a possible conflict of interest in the public defender's office:

> THE COURT: On July 2nd, 1999, we had another hearing. . . . It was my understanding, during that hearing, that you in fact withdrew the letter of June 6th, 1999, and those issues were not before me anymore, is that correct?
>
> [Dunster]: At that time.
>
> [Q.] At that time. And still are not before me, is that correct?
>
> [A.] That letter is not before you.
>
> [Q.] Okay.
>
> [A.] The motions that I filed today are before you.
>
> [Q.] That you filed today.
>
> [A.] Yes.
>
> [Q.] And the two motions you filed today were the motion to discharge the public defender and proceed to represent yourself, and the motion to change your plea.
>
> [A.] Yes.

The court, after finding that Dunster's motion to discharge the public defender's office was made knowingly, intelligently, and voluntarily, granted the motion. The public defender's office was thereafter appointed as standby counsel.

The court then explained to Dunster that if he pled guilty to the charges filed against him, he would be waiving his right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. Dunster indicated that he understood these rights and wanted to plead guilty.

The court then read aloud the charges against Dunster which accused Dunster of murdering Witt with an electric cord. The court then asked Dunster, "Did this happen on or about May

10th, 1997?" Dunster responded, "Yes. . . . I used an extension cord, wrapped it around his neck, squeezed him until shit run down his leg." The State then presented evidence to support the factual basis for Dunster's guilty plea. At the conclusion of the hearing on July 14, 1999, the court accepted Dunster's pleas and found Dunster guilty of first degree murder and use of a weapon to commit a felony.

The court next explained that the proceedings would now move to the sentencing phase and how the sentencing hearing would proceed. The court stated, "Mr. Dunster, we've gone from phase 1 of this case, that is the guilt/innocence phase, now to the sentencing phase. I strongly urge you to have an attorney, to step aside and let the public defender represent you with respect to this phase." Dunster responded, "No." The court also explained that Dunster would have the right at the sentencing hearing to present any mitigating evidence. Dunster stated, "I'm not going to present any evidence." Dunster also expressed his impatience with the time involved before sentencing, stating:

> And I'm really getting pissed that you keep wanting to drag this out over and over, you know.
>
> . . . .
>
> . . . I can't believe that it's so hard. I mean, you have suicide by cop, and I'm trying to commit suicide by state, and it is difficult. I could — it is really a pain in the ass to get you people to kill me.

Thereafter, over Dunster's objections, the court stated that it would order a presentence report for purposes of sentencing. The hearing was then concluded.

On July 28, 1999, the trial court wrote to the probation officer who was compiling the presentence report, stating:

> [I]t is my understanding the Department of Correctional Services has information in its possession it is willing to release to you for inclusion as part of the presentence investigation report you are preparing in [State v. Dunster]; however, the Department is concerned about access to the information.
>
> I have reviewed NEB. REV. STAT. § 83-178(2) (Reissue 1994) and have decided to have you obtain the information and make it a separate attachment to your report. The

> attachment will only be accessible to me, without written order of the court, after notice to the parties in this case and the Department. If a final decision is appealed, the attachment . . . is not to be released without authorization from the appellate court.

The letter indicates that a copy of this correspondence was also sent to Dunster, Gooch, and the prosecutor.

During the week of August 6, 1999, prior to the sentencing hearing, Dunster indicated to standby counsel that he would like the public defender's office reappointed as his attorney. On August 6, a hearing was held to consider Dunster's request. Dunster stated at this hearing that his former decision to proceed pro se and plead guilty had been impaired by the medications he was taking. The court reappointed the public defender's office to represent Dunster and continued any further proceedings until August 10.

On August 10, 1999, attorney Robert Hays from the public defender's office appeared on Dunster's behalf. Hays informed the court that he had been assigned to Dunster's case and had filed a motion on Dunster's behalf requesting a competency examination. This motion was granted, and on September 7, the competency hearing was held.

At the start of this hearing, Dunster made an oral motion to once again discharge the public defender's office. The court took the motion under advisement, pending the result of the competency hearing.

Dr. Y. Scott Moore, a psychiatrist, testified at the hearing. Moore testified that he had conducted a 2-hour interview with Dunster and had reviewed Dunster's medical records. Moore then testified that Dunster was "quite well oriented" and that "[h]e knows . . . what the charge is [and] the possibilities of consequences if he should go to trial." Moore further stated, "I found absolutely no spot in which Mr. Dunster is not in contact with reality. . . . Mr. Dunster . . . can come up with a defense if he wishes. I believe that he can confer with his attorney if he chooses to do so."

The court then asked Moore about the medications Dunster was taking. Moore testified that Dunster was taking Depakote "for smoothing a mood," Prozac "to help smooth mood in people who seem to be quite volatile," and Librium "to help Mr. Dunster

sleep in the evenings." Regarding these medications, Moore testified that he "saw absolutely no effect on [Dunster] of being able to interfere with his ability to answer questions or to deal with the realities of the moment." Moore also noted that Dunster was receiving a low dosage of these medications.

Hays did not ask Moore any questions.

At the conclusion of the evidence, the court determined that Dunster was competent. The court then considered Dunster's oral motion to proceed pro se, questioning Dunster about his reasons for wanting to discharge the public defender's office a second time. Dunster advised the court that he was dissatisfied with the public defender's office because it wanted him to withdraw his guilty plea and go to trial, while Dunster wanted to proceed to sentencing. Dunster also stated that he preferred being able to speak for himself, rather than having counsel speak on his behalf. After informing Dunster of his rights, the court found that Dunster's second waiver of counsel was made knowingly, intelligently, and voluntarily. The court then granted Dunster's second motion to discharge the public defender's office and reappointed that office as standby counsel. The court concluded the hearing, indicating that it would issue an order within 7 days setting the date for the sentencing hearing.

Previously, on July 16, 1999, the trial court entered an order setting the date for the sentencing hearing and determining that the sentence would be imposed by the trial court, without the use of a three-judge panel.

Dunster's sentencing hearing was conducted on November 22, 1999. Dunster appeared pro se, with Hays present as standby counsel. In accordance with Neb. Rev. Stat. § 29-2521 (Reissue 1995), the court first set out the general order of procedure for the sentencing hearing. The court explained that the State would first present its evidence of aggravating circumstances. Dunster then would have the opportunity to present any evidence regarding mitigating circumstances. In response, the State could present more evidence to rebut Dunster's evidence, and "we'll go back and forth until everybody is done."

The court then discussed the information it had received which it would consider for purposes of sentencing. The court stated it would consider Dunster's presentence investigation report

contained in three bound notebooks. The court informed the parties that the presentence investigation report included confidential mental health information from the Department of Correctional Services (DCS). The court noted that because access to this type of information is restricted, see Neb. Rev. Stat. § 83-178(2) (Reissue 1999), this mental health information would not be released to anyone unless a motion was made and a hearing held. The court also stated that it would consider exhibit 67, the report prepared by Moore regarding Dunster's competency.

The court concluded, "Now, that's my plan on how the sentencing phase should be conducted and the matters that will be considered. Do you have any comments or recommendations or suggestions . . . ? [Prosecutor]: No, Your Honor. THE COURT: Mr. Dunster? [Dunster]: No, Your Honor."

Before the State began presenting evidence, the court again urged Dunster to reconsider his decision to proceed pro se, stating:

> THE COURT: Mr. Dunster, I have previously advised you on numerous occasions, and I know you think, probably, too many, of your right to be represented by counsel. I'm aware that, at least in my opinion, you understand that right. I strongly urge you again, sir, at this time, to accept representation by the Public Defender's Office to represent you in this sentencing phase. Do you understand that?
>
> [Dunster]: Yes.
>
> [Q.]: Do you wish to have that done?
>
> [A.]: No.
>
> [Q.]: You still want to go on your own behalf?
>
> [A.]: Yes.

The State then presented evidence in support of the single aggravating circumstance asserted by the State, that "[t]he offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity." Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1995).

The evidence presented by the State showed that in 1972, in the State of Oregon, Dunster murdered Della Marie Brockamp, a 36-year-old mother of eight, while attempting to collect a debt from her husband. Brockamp died as the result of a single gunshot

wound to the head after she had been bound, gagged, and blindfolded. There were also indications that Brockamp had been sexually assaulted, although Dunster was charged only with murder. Dunster pled guilty and was sentenced to life imprisonment for his crime. The evidence also showed that in 1979, while housed at the Montana State Penitentiary, Dunster murdered inmate Milton Rozier. Rozier was found in his cell with his hands and feet bound, and a large gaping wound to his neck. Dunster eventually confessed to murdering Rozier.

At the conclusion of the State's evidence, the court asked Dunster if he had any evidence to present.

> [Dunster]: No.
>
> THE COURT: Has Mr. Hays been available to you so that you could discuss that issue with him if you wanted to?
>
> [A.] Yes.
>
> [Q.] Are you sure you don't want to present any evidence with respect to mitigating circumstances?
>
> [A.] The last letter I wrote to you was — spelled it out.

In that letter, dated September 14, 1999, and addressed to the trial court, Dunster wrote that he was looking forward to the sentencing hearing and saw the possibility of a death sentence as "my parole & pardon all in one."

The court then made the three bound notebooks of the presentence report available for the prosecution and Dunster to look over. After this, the prosecution and Dunster made closing statements. Dunster told the court, "The position I'm in today is — I put myself there. I take full responsibility for it. . . . I'd rather just be executed than spend another day in prison."

The court issued its sentencing order on January 26, 2000. In the order, the court sentenced Dunster to death for the first degree murder of Witt and to not less than nor more than 20 years' imprisonment for use of a weapon to commit a felony. Regarding the imposition of the death penalty, the court found that the aggravating circumstance found in § 29-2523(1)(a) existed beyond a reasonable doubt in that Dunster had twice previously been convicted of first degree murder.

In addition, the court found that the mitigating circumstance set out in § 29-2523(2)(g) existed in that Dunster suffers from antisocial personality disorder. Mitigating circumstance (2)(g)

exists when "[a]t the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

The court also discussed the mitigating circumstance set out at § 29-2523(2)(c), which exists when the "crime was committed while the offender was under the influence of extreme mental or emotional disturbance." The court noted that Dunster had been prescribed medication used to treat bipolar manic depressive conditions and that Dunster suffered from an ongoing "mental and/or emotional condition," which was being treated with medication at the time of Witt's murder. However, the court concluded that Dunster's mental condition did not constitute an " 'extreme' " disturbance and that therefore mitigating circumstance (2)(c) did not exist. The court further considered other nonstatutory mitigating factors including, but not limited to, "Dunster's general conduct during his numerous years of incarceration."

The court then determined that the weight of the mitigating circumstance and any nonstatutory mitigating factors did not approach or exceed the weight of the aggravating circumstance and that accordingly, imposition of the death penalty was appropriate and not disproportionate.

Dunster's appeal was automatically filed with this court, pursuant to § 29-2525, and the NCPA was appointed to represent Dunster on appeal. During the pendency of the appeal, Dunster wrote a letter to this court indicating that he no longer wanted to be executed.

After the appeal was docketed in the Supreme Court, but before oral argument, it was discovered that the confidential portion of the presentence report containing the mental health information from DCS was not included with the rest of the presentence report materials this court originally received from the district court on February 16, 2000. This court then requested that the district six probation office, which originally compiled the report, forward the omitted portion of the presentence report to this court. The confidential portion of the presentence report was received by this court on March 19, 2001. The parties were then notified that the complete presentence report was now on file in the office of the Clerk of the Supreme Court.

In response, Dunster filed a motion with this court. In the motion, Dunster objected to this court's actions in requesting the omitted portion of the presentence report. Dunster also requested, if the objection was overruled, that he be granted access to the confidential portion of the presentence report. The objection was overruled, and the parties were granted access to the confidential information. On April 6, 2001, the parties were ordered to submit supplemental briefs on "any and all related issues or questions which may be raised by the 'confidential attachment' or the Court's action in seeking its filing as part of the record in this appeal."

III. ASSIGNMENTS OF ERROR

Dunster asserts, rephrased and renumbered, that the following errors occurred during the guilt phase of the proceedings: Dunster argues the trial court violated Dunster's constitutional rights in (1) failing to grant Dunster's June 8, 1999, request to disqualify the public defender's office, (2) failing to grant the public defender's July 13, 1999, request to withdraw and in failing to hold an evidentiary hearing prior to denying the July 13 request, (3) granting Dunster's request to proceed pro se during the guilt phase, (4) accepting Dunster's guilty pleas, and (5) improperly advising Dunster before accepting his pleas of guilty.

Dunster further contends the public defender's office violated Dunster's constitutional rights in (6) failing to ask a single question, raise a single objection, or make a single argument on Dunster's behalf during the competency hearing. Dunster alleges the trial court further violated his constitutional rights during the sentencing phase of the proceedings in (7) failing to appoint counsel to argue against the death penalty; (8) considering, in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), the confidential mental health information included in the presentence report; (9) imposing a death sentence where only aggravating circumstance (1)(a) was present; and (10) placing too much weight on aggravating circumstance (1)(a).

Regarding the presentence investigation report, Dunster asserts that (11) the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), in failing to disclose to Dunster the mitigating information contained in DCS records;

(12) the trial court failed to properly consider or discuss all of the mitigating evidence in its sentencing order; and (13) this court erred in directing the probation office to forward the omitted portion of the presentence report to the Clerk of the Supreme Court.

For the sake of completeness, we note that in various assignments of error, Dunster asserts possible violations of the Eighth Amendment. However, because Dunster fails to argue any such violations in his brief, we do not address the Eighth Amendment. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Caddy, ante* p. 38, 628 N.W.2d 251 (2001).

IV. STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000); *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

[2] Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not "require dismissal ipso facto." *State v. Bennett*, 256 Neb. 747, 751, 591 N.W.2d 779, 782 (1999). The determining factor is whether the record is sufficient to adequately review the question presented. *Id.*

[3] Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a conviction must be overturned, the 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. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. *Id.*

[4] In reviewing a sentence of death on appeal, this court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). See, also, Neb. Rev. Stat. § 29-2522 (Reissue

1995). This court must also determine whether the imposition of the death penalty is excessive or disproportionate to the penalty imposed in similar cases. *Id.*

V. ANALYSIS

1. Disqualification of Public Defender's Office

(a) June 8, 1999, Letter Regarding Conflict of Interest

Dunster first argues that his Sixth Amendment right to effective assistance of counsel was violated when the trial court failed to grant Dunster's June 8, 1999, request to disqualify the public defender's office due to an alleged conflict of interest. Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not "require dismissal ipso facto." *State v. Bennett*, 256 Neb. 747, 751, 591 N.W.2d 779 (1999). The determining factor is whether the record on appeal is sufficient to adequately review the question presented. *Id.* We conclude that the record is sufficient to adequately review this issue.

[5] The record shows that on July 2, 1999, Dunster withdrew his June 8 request to disqualify the public defender's office without prejudice. On July 13, when Dunster requested to proceed pro se, the court specifically asked Dunster again about the conflict of interest issues raised in his June 8 letter. Dunster responded that his June 8 letter had been withdrawn and that the only issues now before the court were his motion to proceed pro se and his motion to plead guilty. Because the record clearly shows that Dunster withdrew the June 8 letter from the court's consideration, the court could not have erred in failing to grant Dunster's June 8 request to disqualify the public defender's office. Dunster cannot assert that the trial court erred in refusing to grant the June 8 request for disqualification when it was Dunster's decision to withdraw that issue from the trial court's consideration. A defendant in a criminal case may not take advantage of an alleged error which the defendant invited the trial court to commit. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

(b) June 17, 1999, Conflict of Interest

Dunster next argues that the public defender's office should have been disqualified in any event because the hearing on June

17, 1999, itself created a conflict of interest in that "the public defender [Keefe] appeared and gave evidence against Mr. Dunster." Brief for appellant at 30. Dunster asserts that "Mr. Keefe's position was contrary to that of Mr. Dunster . . . ." Brief for appellant at 32. Dunster contends the trial court's failure to disqualify the public defender's office, based on what occurred at the June 17 hearing, violated Dunster's constitutional right to effective assistance of counsel. Again, we determine that the record is sufficient to adequately address this issue.

[6,7] Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a defendant's conviction must be overturned, the defendant must show that his counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. See *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). The right to effective assistance of counsel generally requires that the defendant's attorney be free from any conflict of interest. U.S. Const. amend. VI; Neb. Const. art. I, § 11; *Narcisse, supra*. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard for another or where a lawyer's representation of one client is rendered less effective by reason of his representation of another client. *Narcisse, supra*. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. *Id*. See, also, *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). The defendant who shows that a conflict of interest actually affected the adequacy of his or her representation need not demonstrate prejudice, but such conflict of interest must be shown to have resulted in conduct by counsel that was detrimental to the defense. *Narcisse, supra*.

The threshold question presented by Dunster's assertions regarding Keefe's testimony is whether an actual conflict of interest was created at the June 17, 1999, hearing. We find the record does not show that Keefe's testimony created any conflict of interest. Keefe testified about the policy in the public defender's office regarding confidentiality. This is not testimony "against" Dunster, but simply information about the internal policies of the public defender's office. Both the public defender's office and Dunster

share the same interest, that is, to provide Dunster with legal representation free from any conflicts of interest.

While Dunster distrusted the assertion that no information had been or would be exchanged between Gehr and his mother, this distrust does not create a conflict of interest within the public defender's office. See *State v. Bjorklund*, 258 Neb. 432, 450, 604 N.W.2d 169, 194 (2000) ("mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel"). Additionally, the record was sufficient for the trial court to conclude that no conflict of interest actually existed and that Dunster's distrust was unfounded. This assignment of error is without merit.

2. July 13, 1999, Motion to Withdraw

In his second assignment of error, Dunster argues that the trial court erred in failing to grant Gooch's July 13, 1999, request to withdraw and in failing to hold an evidentiary hearing prior to denying the request. Dunster contends the trial court's actions deprived him of his Sixth Amendment right to effective assistance of counsel.

[8] We first determine that the court did not err in failing to hold an evidentiary hearing. We stated in *State v. Marchese*, 245 Neb. 975, 980, 515 N.W.2d 670, 674 (1994), that "a hearing must take place when the requisite ' " 'special circumstances' " ' putting the trial court on notice of a possible conflict of interest arise." See, also, *State v. Hudson and Maeberry*, 208 Neb. 649, 305 N.W.2d 359 (1981). However, in the present case, there are no special circumstances putting the trial court on notice of a possible conflict of interest. Gooch was not a witness against Dunster. The hypothetical possibility that Gooch might be called to testify in some future proceeding against Dunster was simply speculation on Gooch's part. The court did not err in failing to conduct an evidentiary hearing on the request to withdraw.

Dunster however asserts that the trial court's denial of Gooch's motion to withdraw deprived him of his Sixth Amendment right to effective assistance of counsel because allowing Gooch to continue as Dunster's attorney placed Gooch "in the position of being an advocate for Mr. Dunster, while at the same time being a witness before a court or jury." Brief for

appellant at 35. These asserted dual positions, Dunster argues, created an unacceptable conflict of interest.

As previously noted, in order to overturn a conviction or sentence based on ineffective assistance of counsel due to a conflict of interest, the asserted conflict of interest must be actual, rather than speculative or hypothetical. *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000). The standard for prevailing on an ineffective assistance of counsel claim is the same whether such claim is raised on direct appeal or in a postconviction proceeding. *Narcisse, supra*; *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

The record shows that there was no conflict of interest at the time Gooch requested permission to withdraw. Gooch's assertion that he might be called as a witness was purely speculative and hypothetical. There were no pending charges against Dunster regarding the incident. Dunster's second assignment of error is without merit.

3. Dunster's Request to Proceed Pro Se During Guilt Phase

In his third assignment of error, Dunster asserts that the trial court erred in granting his July 13, 1999, motion to discharge his counsel and proceed pro se.

[9] A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently. See, *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). See, also, generally, *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). In *State v. Wilson*, 252 Neb. at 649-50, 564 N.W.2d at 251, we set forth the standard for determining when a defendant's waiver of counsel is effective, stating:

> In order to exercise the right of self-representation, a defendant must first make a knowing and intelligent waiver of the right to counsel. . . .
>
> In determining whether there has been a knowing and voluntary waiver of the right to counsel, the key inquiry is whether the defendant was sufficiently aware of the right

> to have counsel and of the possible consequences of a decision to forgo the aid of counsel. . . . A knowing and intelligent waiver can be inferred from conduct. Consideration may also be given to a defendant's familiarity with the criminal justice system. . . . At a minimum, the determination of whether a waiver is knowing and intelligent requires that the accused be made sufficiently aware of the right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel. . . . We have held that a "trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but that the warning is not required."

(Citations omitted.) See, also, *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942).

Before granting Dunster's request to discharge the public defender's office, the court determined that Dunster was competent and advised Dunster of the nature of the charges against him and the possible penalties, including the possible imposition of the death penalty. The trial court also questioned and advised Dunster on various issues as follows:

> THE COURT: Okay. Sir, as I am aware in this case, the public defender is court appointed to represent you. You need to understand that if I accept your discharge or your request to discharge the public defender, I will in all likelihood not appoint another attorney to represent you and you would be required to represent yourself, do you understand that?
>
> [Dunster]: Yes.
>
> . . . .
>
> [Q.] Okay. And do you understand that as a lay person, and I'm not saying anything bad about lay persons or people, but we in the legal field have these little rules that we do that are — they don't compare to anything else in daily life.
>
> [A.] Exactly.
>
> [Q.] And that you would not have that expertise, do you understand that?
>
> [A.] Exactly.

[Q.] And you understand that would be a concern —

[A.] Well —

[Q.] — potentially —

[A.] For you.

[Q.] — of you representing yourself, the State could object to something and you wouldn't be able to figure out how to get around it, but if you had an attorney, he or she would figure out — would be able to figure out what needed to be done to meet the concern.

[A.] Doesn't — It doesn't matter.

[Q.] But you understand that?

[A.] I understand it.

. . . .

[Q.] [I]f I allow you to discharge the public defender, you will not be entitled to special privileges, such as additional access to legal materials and/or facilities, solely because you're representing yourself, do you understand that?

[A.] Yes.

. . . .

[Q.] Mr. Dunster, I want you to understand I think you're making a terrible mistake in electing to represent yourself. There's an old adage that a person who represents himself has a fool for an attorney and a fool for a client. This has nothing to do with your mental capacity or anything like that, but rather addresses the complexity of representing a client in a case.

Not only does representation require knowledge of the law and of procedures, it requires an emotional detachment that at times is difficult to achieve even — excuse me — if you're acting as you're [sic] own attorney. In fact, even attorneys in cases sometimes have trouble with the emotional detachment that's required, do you understand that?

[A.] Yes.

. . . .

[Q.] Okay. You've had attorneys to discuss self representation with, two different attorneys?

[A.] Yeah.

. . . .

> [Q.] Do you waive, do away with and give up your right to be represented by counsel in this case?
>
> [A.] Yes.
>
> . . . .
>
> [Q.] Has anyone made any threats — any threat, in any manner whatsoever, or used any force or held out any inducement or promise to get you to give up your right to be represented by counsel?
>
> [A.] No.
>
> [Q.] Are you giving up this right freely and voluntarily?
>
> [A.] Yes.
>
> . . . .
>
> [Q.] And you understand that I believe, I strongly believe, that this is an error on your part?
>
> [A.] Exactly, but it's my life.

The record shows that Dunster had previously been advised of his right to counsel and in fact had been so represented by the public defender's office to this point in the proceedings. The record shows that Dunster's waiver of counsel was made knowingly.

The record also shows that Dunster's waiver was made intelligently. The trial court painstakingly explained the trial process and how that process could be impacted if Dunster waived his right to counsel. The court further explained that Dunster's lack of legal knowledge could affect his ability to effectively represent himself and that Dunster could be sentenced to death for his crimes if found guilty. Dunster was also given the opportunity to discuss his decision to proceed pro se with both the public defender's office and with the NCPA.

The record further shows that Dunster's waiver was made voluntarily. No promises or threats were made to encourage Dunster to forgo his right to counsel. Dunster prepared and offered his own written motion to the court to discharge counsel and admitted that he was doing this on his own accord, over the advice of counsel, because "I just want to just get it over with."

Dunster now asserts on appeal, however, that his request to discharge counsel during the guilt phase was not voluntary because his "request to proceed *pro se* was forced on him by the conduct of the public defender" in violation of Dunster's right to effective counsel. Brief for appellant at 38.

[10-12] "When a defendant becomes dissatisfied with court-appointed counsel, unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so." *State v. Bjorklund*, 258 Neb. 432, 450, 604 N.W.2d 169, 194 (2000), citing *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988). "The right of an indigent defendant to have counsel does not give the defendant the right to be represented by counsel of his or her own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel." *Id.* Furthermore, as we stated in *State v. Wilson*, 252 Neb. 637, 651, 564 N.W.2d 241, 252 (1997): "A defendant may not use 'his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.' " Quoting *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). Accord *State v. Denbeck*, 219 Neb. 672, 365 N.W.2d 469 (1985).

Dunster relies on *Gilbert v. Lockhart*, 930 F.2d 1356 (8th Cir. 1991), to support his assertion that he was "forced" to proceed pro se. In *Gilbert*, the defendant was given the choice of proceeding to trial with unprepared counsel or pro se. However, this record reveals a quite different explanation for Dunster's request to discharge counsel.

Before granting Dunster's request to discharge the public defender's office, the court further questioned Dunster:

> THE COURT: Why do you wish to discharge the Public Defender's Office?
>
> [Dunster]: I'm not satisfied with them.
>
> [Q.] Okay. So it's dissatisfaction with this service with which you've been provided, is that it?
>
> [A.] Yes.
>
> . . . .
>
> [Q.] . . . What is your dissatisfaction with the Public Defender's Office, that you wish to have it discharged?
>
> [A.] I just want to get it over with.
>
> [Q.] They weren't doing what you wanted?
>
> [A.] Basically. I'm guilty.
>
> [Q.] And you were dissatisfied that they were not getting the goal that you wanted to get, is that it?

> [A.] True.
>
> [Q.] It's not that you thought they were incompetent and you wanted to have other attorneys represent you or anything like that? It's just that you had a goal, they weren't getting you to where you wanted to get, and you wanted to do it yourself?
>
> [A.] Like I said, your electric chair doesn't scare me. I'm ready to go. Are you ready to pull the switch? That's the bottom line.
>
> [Q.] Okay.
>
> [A.] If they want to pussy foot around over here and drag their feet, that's on them. I'm ready to go. Let's do it.
>
> . . . .
>
> [Q.] . . . So now I understand what your dissatisfaction was. It was that you weren't getting — you wanted to get this behind you and plead guilty and that's it, and that wasn't getting done with the PD's Office, right?
>
> [A.] No.
>
> [Q.] Is that correct?
>
> [A.] That's true.

The record shows that Dunster was dissatisfied with the public defender's office because Dunster was impatient with the process and thought that counsel from the public defender's office were "drag[ging] their feet." Dunster believed that dismissing counsel and proceeding pro se would expedite the proceedings against him. Dunster voluntarily chose to exercise his constitutional right to proceed pro se during the guilt phase of his trial, based on his own statements, because he wanted "to get it over with."

[13] A defendant has the right under U.S. Const. amend. VI and XIV, and Neb. Const. art. I, § 11, to be represented by an attorney in all critical stages of a criminal prosecution. However, this same constitutional right also guarantees the right of a defendant to represent himself or herself. *State v. Green, supra*. See, also, *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The record clearly shows that Dunster's decision to discharge the public defender's office and proceed pro se was not involuntary or "forced" upon him.

Finally, Dunster asserts that his request to proceed pro se was constitutionally flawed because his mental health was impaired

by the medications he was taking. However, this claim is refuted by Moore's testimony as set forth elsewhere in this opinion that Dunster's three medications had "no effect" on Dunster's competency. Consistent with Moore's testimony, Dunster stated during the hearing in response to the court's questions:

> THE COURT: Does the medication affect your ability to understand what's going on around you?
>
> [Dunster]: No.
>
> [Q.] Does it make you groggy or anything like that?
>
> [A.] No.
>
> [Q.] What effect does it have on you?
>
> [A.] None.
>
> [Q.] None?
>
> [A.] None.
>
> . . . .
>
> [Q.] Do they affect your ability to understand what's going on around you?
>
> [A.] No.
>
> . . . .
>
> [Q.] . . . Have you been diagnosed as suffering from any mental disorder?
>
> [A.] Bipo- —
>
> [Q.] Bipolar?
>
> [A.] Yeah.
>
> . . . .
>
> [Q.] . . . This bipolar disorder from which you suffer, and the medication, has that affected your ability to interact with your attorneys that have represented you up until today?
>
> [A.] No.
>
> [Q.] Has it affected your ability to understand what they've been telling you?
>
> [A.] No.
>
> . . . .
>
> [Q.] . . . Does it affect your ability to understand what's going on here today?
>
> [A.] It has no effect at all.

The record shows that Dunster was competent and his request to discharge counsel was made knowingly, intelligently, and voluntarily. The trial court did not err in granting Dunster's July

13, 1999, request to discharge the public defender's office and proceed pro se. This assignment of error is without merit.

4. Accepting Guilty Pleas

In his fourth assignment of error, Dunster argues that the court erred in accepting his pleas of guilty because Dunster stated during the proceedings that he was pleading guilty because he wanted to be executed.

Before accepting a guilty plea, the court must find that the plea of guilty has been entered freely, intelligently, voluntarily, and understandingly by the defendant. This requires the court to inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999), citing *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). See, also, *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (Fifth Amendment requires record affirmatively show guilty plea was knowing, intelligent, and voluntary).

[14] Dunster argues that even though the requirements under *Irish, supra*, and *Boykin, supra*, have been met, a guilty plea cannot be accepted if the defendant expresses a desire to be executed. This contention has been rejected by a number of courts. See, e.g., *Gilmore v. Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L. Ed. 2d 632 (1976), *rehearing denied* 429 U.S. 1030, 97 S. Ct. 655, 50 L. Ed. 2d 636; *Colwell v. State*, 273 Ga. 634, 639-40, 544 S.E.2d 120, 127 (2001) (stating defendant was "sentenced to death because of the nature of his crimes, not because of his own desire to die"); *People v. Bloom*, 48 Cal. 3d 1194, 774 P.2d 698, 259 Cal. Rptr. 669 (1989). We determine that Dunster's expressed preference for a particular punishment did not render his guilty pleas constitutionally flawed. A defendant cannot "choose" the death penalty. Under our statutory system, the sentencing decision rests with the court alone. See, Neb. Rev. Stat. § 29-2520 (Reissue 1995); § 29-2522.

Dunster further asserts that his guilty pleas were constitutionally flawed because his mental health was impaired by the medications he was taking. As discussed previously, the record does not support Dunster's contention. Dunster's fourth assignment of error is without merit.

5. Court's Advice

Dunster asserts in his fifth assignment of error that his guilty pleas are invalid because the court provided Dunster with erroneous advice before accepting his guilty pleas. Dunster contends that the court incorrectly advised him that by entering his pleas of guilty, he was giving up any opportunity at sentencing or on appeal to argue that the death penalty in Nebraska is unconstitutional or to have the court determine whether Dunster's statements to officials were freely, voluntarily, knowingly, and intelligently made. In effect, Dunster asserts that the trial court instructed him that his guilty pleas would have a more onerous result than was true under the law. Dunster argues that this invalidates his guilty pleas because the pleas were based on erroneous advice from the court. See *State v. Paul, supra.*

Prior to accepting Dunster's guilty pleas, the court explained that the guilt phase and the sentencing phase were two distinct parts of the trial and that Dunster's pleas addressed only the guilt phase of the proceedings. The court stated:

> THE COURT: Sir, do you understand that due to the fact that this is a death penalty case, that if, in fact, you are found guilty of first degree murder, there is then what's called a bifurcated, that is a separate hearing, that relates to the issue of whether the death penalty should or should not be imposed in this case, do you understand that?
>
> [Dunster]: Yes.
>
> . . . .
>
> [Dunster]: Can I waive a presentence investigation and be sentenced today?
>
> THE COURT: No. . . .
>
> . . . .
>
> [Dunster]: . . . I want to waive presentence.
>
> THE COURT: I understand that, but there's more to it in this type of a case than just getting the completion of a

> presentence investigation. There's also the sentencing phase in this type of a case. . . .
>
> . . . .
>
> THE COURT: Okay. Since the State will be seeking the death penalty in this case, sir, if I do accept your plea and I find you guilty of first degree murder, a Class 1 or 1A felony, then I am required by statute within seven days from today's date to set the matter down for a penalty phase hearing.

The court then advised Dunster that by pleading guilty, he would be giving up his right to the presumption of innocence, his right to a trial to determine his guilt, and his right to confront his accusers at trial. The court also informed Dunster of the possible penalties if he were found guilty of the charges against him. The court then discussed the 33 pretrial motions filed by Gooch on Dunster's behalf:

> THE COURT: . . . I just want to go down the [pretrial] motions that are actually filed in this case. Mr. Gooch filed, as I mentioned, I think, yesterday, 33 motions in this case. Some of these [motions] involve whether in fact the death penalty provisions in the state of Nebraska are unconstitutional. Do you understand that?
>
> [Dunster]: Yes.
>
> [Q.] Do you understand that by entering a plea of guilty in this case, you are giving up your right to make these challenges?
>
> [A.] Yes.
>
> . . . .
>
> [Q.] Mr. Gooch has also filed [motions] requesting that any statements you made be suppressed. Do you understand that?
>
> [A.] Yes.
>
> [Q.] Sir, if I accept your plea and find you guilty, you are giving up your right to have me make a determination as to whether those statements were freely, voluntarily, knowingly and intelligently made. Do you understand that?
>
> [A.] Yes.
>
> [Q.] Sir, do you understand that if I found that any one of those items was missing, any such statement, admission or confession could not be used against you at the time of trial?
>
> [A.] Yes.

The court also explained to Dunster: "Mr. Gooch has also made challenges with respect to the sentencing phase of any — of this case, and do you understand that unless you renew them yourself, that you're giving up your right to have those matters pursued also? Do you understand that? [A.] Yes."

Dunster's assertion that the court provided him with erroneous advice is not supported by the record. The two statements by the trial court which Dunster contends were erroneous occurred during the above-quoted discussion regarding the 33 motions. We find that the record shows the court correctly advised Dunster that by pleading guilty, Dunster was waiving any issues raised in the 33 motions which might have had an impact on the determination of Dunster's guilt. A valid guilty plea waives all defenses to a criminal charge. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). The court further advised Dunster that any issues in the 33 motions related to the sentencing phase of the proceedings, which would include any challenge to the constitutionality of Nebraska's death penalty statutes, would also be waived unless Dunster renewed the motions himself. Dunster's assertion that the trial court advised him that by pleading guilty, Dunster would forever waive the issues raised in the 33 motions related to sentencing, is not supported by the record. The trial court specifically advised Dunster that he could renew any challenges related to sentencing raised in the 33 motions. This assignment of error is without merit.

6. Competency Hearing

In his sixth assignment of error, Dunster asserts that he received ineffective assistance of counsel during the competency hearing on September 7, 1999, when he was represented by the public defender's office. As with Dunster's other ineffective assistance of counsel claims, we determine the record sufficient to adequately address this assignment of error.

Dunster contends that Hays' performance was deficient during the hearing in that counsel "did not ask a single question, present any evidence, make any objections, or present any argument regarding his client's competency to enter a guilty plea." Brief for appellant at 39. Dunster also asserts that Hays failed to

develop "the necessary evidence regarding competency," *id*. at 41, and that the advocacy provided to Dunster was "absolutely zero," *id*. at 39.

Dunster asserts that he was prejudiced by Hays' inaction because there were "no questions . . . concerning the synergistic effects," *id*., or possible " 'paradoxical' side effects" of Dunster's three medications, Depakote, Prozac, and Librium, when taken in combination, supplemental brief for appellant at 28.

As noted previously, to prevail on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). That is, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of the test stated in *Strickland, supra*, may be addressed in either order. If it is appropriate to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

While Dunster asserts that there was no discussion of the synergistic effects of his medications during the competency hearing, the record shows that Moore was questioned on this specific issue by the court:

> [Court:] What happens when a person takes all three of these at a time? I mean, what effect does it have on an individual?
>
> [Moore:] Well, mostly, none. On occasion, someone might say it might make them slightly drowsy.
>
> Q Does it have an ability to interfere with their ability to understand what's going on around them?
>
> A It could in some people on an individual basis. I found no evidence that it was affecting Mr. Dunster in that fashion.
>
> . . . .
>
> Q Did you believe that those medications, presuming he was taking them regularly, were in any way affecting his ability to understand what was going on in the session you had with him?

> A Absolutely not. That was one of the things I was particularly looking at. In fact, the doses are all quite low.
>
> . . . .
>
> [N]ot only are they low doses, but I saw absolutely no effect on him of being able to interfere with his ability to answer questions or to deal with the realities of the moment.

The fact that Hays chose not to question Moore about the combined effect of the three medications resulted in no prejudice to Dunster because Moore was questioned on that issue by the court. Moore stated that the combined medications had no effect on Dunster's ability to answer questions or deal with the realities of the moment. Dunster has failed to assert or demonstrate any reasonable probability that the outcome of the competency hearing would have been different if Hays had questioned Moore about the combined effect of the three medications. See *Marshall, supra*. This assignment of error is without merit.

7. Appointing Amicus Counsel

In his seventh assignment of error, Dunster contends the trial court erred in failing to appoint amicus counsel to advocate against the imposition of the death penalty. Although Dunster chose not to present any mitigating evidence at the sentencing hearing, he now contends on appeal that amicus counsel should have been appointed in any event to present such evidence and "argue for life." Brief for appellant at 54.

[15] " 'A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense . . . .' " *State v. Wilson*, 252 Neb. 637, 649, 564 N.W.2d 241, 251 (1997), quoting *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). Dunster in effect urges this court to override a defendant's constitutional right to control the organization and content of his or her own defense during sentencing. We decline to do so.

[16] Dunster elected not to present any mitigating evidence at the sentencing hearing. A defendant may lawfully waive his or her right to present mitigating evidence during sentencing. See, e.g., *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999); *Brecheen*

v. Reynolds, 41 F.3d 1343 (10th Cir. 1994); *Snell v. Lockhart,* 14 F.3d 1289 (8th Cir. 1994); *Singleton v. Lockhart*, 962 F.2d 1315 (8th Cir. 1992); *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990). Dunster's assertion that the trial court erred in failing to appoint amicus counsel is without merit.

8. Presentence Investigation Report

In his eighth assignment of error, Dunster asserts that the sentencing court committed error under *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), in considering a confidential portion of Dunster's presentence investigation report for purposes of sentencing.

On July 28, 1999, the sentencing court wrote a letter to the probation officer preparing Dunster's presentence report, instructing the officer to include information in the possession of DCS "for inclusion as part of the presentence investigation report." Copies of this letter were sent to Dunster, standby counsel, and the prosecution. The court noted in the letter that access to this information was restricted by § 83-178(2) and that the information would not be released to anyone other than the court, except upon "written order." Section 83-178(2) states that "[t]he content of the [inmate's] file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department."

At the August 6, 1999, hearing reappointing the public defender's office, the court discussed this confidential information, referring to the July 28 letter. The court noted that Dunster had received a copy of the letter, which dealt with "some issues with respect to the PSI and matters that are in the possession of the Department of Correctional Services."

At the sentencing hearing on November 22, 1999, the court made the presentence investigation report available to Dunster, standby counsel, and the prosecution. The court stated:

> I also have received a confidential part of the presentence investigation which relates to mental health information. That will not be disclosed to anyone, unless somebody makes a motion, so that there's an ample opportunity for hearing by the Department of Correctional Services

> with respect to that. That's under — there's a statute relating to release of confidential information to a person who is incarcerated. I will consider that information also.

Dunster argues that the court committed reversible error under *Gardner, supra*, in considering the confidential mental health information provided by DCS.

[17] In *Gardner*, 430 U.S. at 362, the U.S. Supreme Court held that the Due Process Clause does not allow a sentence of death to be imposed on the basis of information which the defendant had "no opportunity to deny or explain." In *Gardner*, the defendant was convicted of first degree murder. During the jury's sentencing deliberations, the court ordered a presentence investigation report on the defendant. The jury, without seeing the report, found that the mitigating circumstances outweighed aggravating circumstances and recommended a life sentence.

The trial court then received the presentence report. The trial court made a portion of the presentence report available to defense counsel, but did not disclose to counsel the existence or contents of a confidential portion of the presentence report. A few weeks later, the trial court issued its order. The court found that no mitigating circumstances existed and sentenced the defendant to death. On appeal to the state supreme court, the confidential portion of the presentence report was not included in the record. Nevertheless, the trial court's imposition of the death penalty was affirmed.

The defendant then appealed to the U.S. Supreme Court. The Supreme Court determined that given the trial court's conclusion that death was the appropriate penalty, and not life in prison as recommended by the jury, the information contained in the presentence report contributed to the imposition of the death penalty. As such, the defendant's right to due process was violated because he was sentenced, at least in part, on the basis of confidential information which he had no opportunity to deny or explain. The Court went on to note that "if it were permissible to withhold a portion of the report from a defendant, and even from defense counsel, pursuant to an express finding of good cause for nondisclosure, it would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal." *Gardner v. Florida*, 430 U.S. 349, 360-61, 97 S. Ct.

1197, 51 L. Ed. 2d 393 (1977). The defendant's death sentence was reversed, and the cause was remanded.

[18] In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself. *Gray v. Netherland*, 518 U.S. 152, 181, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996) (" '[c]ommon justice requires that no man shall be condemned in his person or property without . . . an opportunity to make his defence.' *Baldwin v. Hale*, 1 Wall. 223, 233 (1864)"). See, also, *State v. Schaeffer*, 218 Neb. 786, 359 N.W.2d 106 (1984).

However, unlike the defendant in *Gardner, supra*, Dunster had notice and ample opportunity to obtain access to the confidential information. The July 28, 1999, letter notified Dunster that information from DCS would be included in his presentence report and that access to this information was limited. The court reminded Dunster of these facts at the hearing on August 6. Dunster was notified a third time at the sentencing hearing. Dunster was aware of the existence of the confidential information and the type of confidential information (mental health information) prior to being sentenced.

The court specifically informed Dunster at the sentencing hearing that it would consider the confidential information for purposes of sentencing. The court also noted at the sentencing hearing that this information was confidential, but that Dunster could seek access to the confidential information, by "mak[ing] a motion." The court further explained that if such a motion was filed, the court would hold a hearing on the matter. After explaining this at the sentencing hearing, the court asked Dunster if he had any comments, recommendations, or suggestions on "how the sentencing phase should be conducted." Dunster responded, "No, Your Honor."

The record shows that Dunster was given notice well in advance of the sentencing hearing that confidential DCS information would be included in the presentence report. It is also clear from the record that Dunster understood how to exercise his opportunity to obtain the confidential information by making a motion. Dunster had drafted and presented motions to the court previously when he requested to proceed pro se and when he changed his pleas to guilty. However, from July 1999 until

January 26, 2000, when the court issued its sentencing order, Dunster did not request access to this confidential information. Instead, Dunster consistently indicated that he did not want a presentence report prepared, nor did he desire to present any mitigating evidence at sentencing.

Dunster's case does not present the due process concerns of *Gardner, supra*. The record clearly shows that Dunster had the opportunity to "deny or explain," see *Gardner*, 430 U.S. at 362, the mental health information provided by DCS, and simply chose not to avail himself of the opportunity.

In *Gardner, supra*, there was also the separate concern that the confidential information was not a part of the record on appeal, thus precluding meaningful appellate review. Here, the full presentence investigation report, including the confidential portion, has been reviewed by this court.

We determine that Dunster's eighth assignment of error is without merit. Dunster's due process rights have not been violated by the sentencing court's consideration of the confidential portion of the presentence report.

9. Sentence Imposed

Dunster argues in his next two assignments of error that the trial court erred in imposing a death sentence where only one aggravating circumstance was present and in placing too much weight on that aggravating circumstance.

[19] Dunster does not dispute that the existence of aggravating circumstance (1)(a), "[t]he offender was previously convicted of another murder," was proved beyond a reasonable doubt at sentencing. See § 29-2523(1)(a). Dunster instead argues that more than one aggravating circumstance is required for the death penalty to be imposed. First, Dunster argues that because the term "aggravating circumstances" is stated in the plural in § 29-2523, the court is required to find at least two aggravating circumstances before imposing a death penalty. This argument is without merit. In construing Chapter 29, "[t]he singular number includes the plural and the plural the singular." Neb. Rev. Stat. § 29-101 (Reissue 1995).

[20,21] Second, Dunster argues that no one has been sentenced to death in Nebraska where only one aggravating circumstance

was present. However, the balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting, but, rather, requires a careful weighing and examination of the various factors. See, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). As we stated in *State v. Stewart*, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986):

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present."

We determine that where the record reveals that the sentence of death was the result of reasoned judgment and the careful weighing and examination of the various circumstances and factors in light of the totality of the circumstances present, one aggravating circumstance may be sufficient under our statutory system for the sentencing court to conclude that imposition of the death penalty is appropriate. This assignment of error is without merit.

Dunster further asserts that the sentencing court erred by placing too much weight on aggravating circumstance (1)(a). In reviewing a sentence of death on appeal, this court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. This court must also determine whether the imposition of the death penalty is excessive or disproportionate to the penalty imposed in similar cases. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). See, also, § 29-2522.

After de novo review, we conclude that the requirements of Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1995 & Cum. Supp. 1996) have been met. The record shows that aggravating circumstance § 29-2523(1)(a), which was proved beyond a reasonable doubt, is sufficient to "justify the imposition of death." The record indicates that in 1972, Dunster murdered Brockamp with a single gunshot wound to the head after he had bound,

gagged, and blindfolded her. In 1979, Dunster bound and murdered inmate Rozier. Based upon our de novo review of the record, we determine that these two previous murders, which were proved beyond a reasonable doubt at the sentencing hearing, are sufficient under aggravating circumstance (1)(a) to justify imposition of the death penalty.

We next turn to consideration of the mitigating circumstances. We find that the evidence supports the existence of mitigating circumstance (2)(g). The record shows that at the time of the crime, Dunster's capacity "to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness [or] mental defect." We have also considered all evidence of nonstatutory mitigating factors. However, based upon our de novo review of the record, we determine that the statutory and nonstatutory mitigating circumstances together do not approach or exceed the aggravating circumstance in this case.

Finally, we turn to the proportionality review required under §§ 29-2522 and 29-2521.03. We recognize that the application of § 29-2521.03 has been criticized by some members of this court, see *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (Connolly, J., concurring; Gerrard, J., concurring, joined by Stephan, J.), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), however, we need not revisit that issue in this case. Regardless of what kind of proportionality review is conducted, we conclude that Dunster would still be eligible for the death penalty. See *Bjorklund, supra*.

We determine that Dunster's death sentence was not excessive or disproportionate.

10. *Brady* Violation

[22] In his next assignment of error, Dunster argues that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. Dunster asserts that a *Brady* violation occurred in that the prosecution failed to disclose "mitigating evidence contained in the

Department of Correctional Services records." Supplemental brief for appellant at 33.

As support for his assertion, Dunster relies on *U.S. v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992). In *Spagnoulo*, the prosecution failed to disclose a mental evaluation which revealed that the defendant suffered from paranoid delusions. The evaluation was ordered after the defendant attacked another inmate and was performed during the defendant's trial on cocaine charges. The defense attorney discovered the mental health evaluation after the defendant had been convicted and sentenced on the cocaine charges.

The defense attorney then filed a motion for new trial, asserting that the prosecution violated standing discovery orders requiring the prosecution to produce the results of any physical or mental examinations. On appeal, the prosecution argued that although it suppressed the report, there was no prejudicial error requiring a new trial because the report would not have affected the outcome of the defendant's cocaine charges. The court disagreed, finding that suppression of the mental evaluation report was prejudicial error.

Spagnuolo, supra, is not applicable to this case. In *Spagnuolo*, the prosecution possessed a mental evaluation report which it failed to disclose to the defendant, despite a discovery order requiring them to disclose all such reports. In the present case, both the prosecution and Dunster were notified by the court's July 28, 1999, letter of the existence of DCS information relevant to sentencing. The trial court informed the parties of the confidential information at the hearing on August 6 and again at the sentencing hearing on November 22. The prosecution did not fail to disclose DCS information to Dunster. This assignment of error is without merit.

11. Consideration of All Mitigating Evidence

Dunster also contends that the contents of the confidential portion of the presentence report show that the trial court failed to properly "consider or discuss all of the mitigating information." Supplemental brief for appellant at 34.

[23] Under § 29-2522, the sentencing determination of the court "shall be in writing and shall be supported by written

findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination." The court in its sentencing order must also " 'specify the factors it relied upon in reaching its decision' " and " 'focus on the individual circumstances of each homicide and each defendant.' " *State v. Simants*, 197 Neb. 549, 563-64, 250 N.W.2d 881, 889-90 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). In the present case, the aggravating and mitigating circumstances and nonstatutory mitigating factors are set out with written findings of fact to support the court's determinations. We determine that the trial court's order satisfies § 29-2522.

Nevertheless, Dunster argues that the trial court's order is flawed because it does not adequately "consider or discuss" Dunster's bipolar disorder. Contrary to Dunster's assertions, the sentencing court did consider Dunster's bipolar disorder in considering mitigating circumstance (2)(c), noting specifically that in 1982, Dunster was prescribed Lithium, which "is used to treat manic-depressive (bipolar) disorder."

Mitigating circumstance (2)(c) exists when the "crime was committed while the offender was under the influence of extreme mental or emotional disturbance." § 25-2523. The disturbance must be "existing in the highest or the greatest possible degree, very great, intense, or most severe." *State v. Holtan*, 197 Neb. 544, 548, 250 N.W.2d 876, 880 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In determining that mitigating circumstance (2)(c) did not exist, the trial court stated:

> It is clear Dunster has suffered since the beginning of his incarceration and continues to suffer from a mental and/or emotional condition; however, the evidence is that such condition was being treated by medication at the time Witt was killed. There is no evidence indicating Dunster's condition was at an "extreme" level at the time he killed Witt.

Under our de novo review, we conclude that the sentencing court correctly found that mitigating circumstance (2)(c) did not exist.

Dunster also contends that other facts contained in the confidential portion of the presentence report, for example, the fact

that "Dunster was not receiving the primary medication (Depakote) during the period leading up to the homicide," should have been specifically discussed in the sentencing court's order. Supplemental brief for appellant at 25. We first note that there is no evidence in the record which shows that Depakote was Dunster's "primary" medication. Instead, the record shows that for many years, Dunster has been treated with various combinations of medications. The record also shows that the trial court considered Dunster's medications during sentencing, noting in its order that at the time of Witt's murder, Dunster was taking Prozac and Doxepin.

Dunster's contention that the sentencing court failed to properly consider all of the mitigating evidence is without merit. As previously noted, our de novo review of the entire record, including the confidential portion of the presentence report, reveals no mitigating circumstances or factors except those which the sentencing court considered in its order. Furthermore, we have concluded that considering the entire record, the sentencing court correctly determined that the weight of the mitigating circumstance and any nonstatutory mitigating factors does not approach or exceed the weight of the aggravating circumstance. Accordingly, this assignment of error is without merit.

12. Obtaining Presentence Report

Dunster contends this court erred in "seeking additional material not requested by the State" when it requested the omitted portion of the presentence report. Supplemental brief for appellant at 30.

[24] Dunster asserts that because the State failed to make a motion to supplement the record to include the confidential portion of the presentence report, it was improper for this court to obtain the omitted portion of the presentence report. Generally speaking, the party bringing the appeal has the responsibility to include within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. See, Neb. Rev. Stat. § 25-1140 (Reissue 1995); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); Neb. Ct. R. of Prac. 5B(1)a and b and (11) (rev. 2001). The appellee may then request to supplement the record and add additional evidence to the bill of exceptions. Neb. Ct. R. of Prac. 5B(1)c.

[25,26] However, this appeal was not brought by either of the parties to this case. This appeal was automatically lodged with this court by operation of law pursuant to § 29-2525. An appeal pursuant to § 29-2525 does not place the burden of creating the record upon either party to the appeal. Instead, pursuant to § 29-2521.04, the district court must "provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2522 and 29-2524." Therefore, in a capital case, neither party to the appeal has the authority to restrict the record on appeal, either intentionally or through inadvertence. "All records" must be forwarded to the Clerk of the Supreme Court. This court has the authority and the obligation to require the district court to meet the statutory requirement that "all records" for any automatic appeal under § 29-2525 be filed with the Clerk of the Supreme Court.

Dunster, however, further argues that this court may not consider any portion of the presentence report because the report is not a part of the bill of exceptions. Dunster relies on *State v. Williams*, 253 Neb. 111, 123, 568 N.W.2d 246, 254 (1997), in which we stated that "evidence which is not made a part of the bill of exceptions may not be considered." In *Williams*, the petitioner brought a motion for postconviction relief and attached a supporting juror affidavit to the motion. We concluded that the affidavit could not be considered on appeal even though it was included in the transcript because the affidavit had never been offered, received, or considered by the court during the hearing.

Unlike the affidavit at issue in *Williams, supra*, presentence reports are not evidence offered by a party to a case. These reports are, pursuant to Neb. Rev. Stat. § 29-2261 (Reissue 1995), investigative tools ordered by the court for its use and consideration prior to sentencing. This court has never held that presentence reports must be offered and received into evidence and be made part of the bill of exceptions in order to be considered by the trial or appellate court in a criminal case. See *State v. Behrens*, 204 Neb. 785, 285 N.W.2d 513 (1979) (despite no bill of exceptions having been filed on appeal, Supreme Court examined presentence report on file to consider assigned error and affirm lower court's sentence). While a presentence report may be included as an exhibit in the bill of exceptions, it need not be

in order to be considered on appeal. *Williams* is inapposite to the facts of this case and does not support Dunster's assertion that this court is precluded from reviewing the entire presentence report which was ordered, submitted to, and considered by the sentencing court below.

When Dunster's presentence report was filed with the Clerk of the Supreme Court, the confidential portion of the report was omitted. In requesting the probation office to supply the omitted portion of the report, this court simply rectified an oversight in order to review "all records" required under "29-2521.01 to 29-2522 and 29-2524." See § 29-2521.04.

Finally, Dunster further contends that this court's actions violated *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). In *Willman*, the appellant asserted that the trial court erred in failing to recuse itself after the court encouraged one of the parties to file a motion for summary judgment and indicated in advance how the court would rule on such a motion. We concluded that the trial judge in *Willman* should have recused himself. However, in the present case, this court's request for the omitted portion of the presentence report was not an indication as to how this court might rule on a particular issue. This court simply fulfilled its responsibilities in conformity with the requirements of §§ 29-2521.01 through 29-2525. Accordingly, *Willman* has no application here.

[27] This court's request for the omitted portion of the presentence report honors the intent of the Legislature to provide "the most scrupulous standards of fairness and uniformity" in imposing a sentence of death. See § 29-2521.01(1). As the Supreme Court noted in *Gardner v. Florida*, 430 U.S. 349, 361, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), "the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death" is not justifiable in a capital case. This final assignment of error is also without merit.

VI. CONCLUSION

Dunster's convictions and sentences are affirmed.

AFFIRMED.

ALBERT A. WORKMAN, JR., APPELLEE, V. DEBRA D. WORKMAN, APPELLANT.

632 N.W. 2d 286

Filed August 10, 2001. No. S-99-710.

1. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained.
2. **Appeal and Error.** An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief.
3. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, 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.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Child Support: Rules of the Supreme Court: Pensions.** The Nebraska Child Support Guidelines do not allow a deduction for contributions to voluntary retirement plans in arriving at net income for purposes of calculating child support.
6. **Child Support: Pensions.** For purposes of determining whether retirement plan contributions are deductible from gross monthly income for purposes of child support calculations, the proper inquiry is whether the contribution is required by the applicable retirement plan in effect at the time of the calculation, not whether the parent could have selected another type of plan at some prior time.
7. **Child Support: Rules of the Supreme Court: Pensions.** If, under the circumstances of a particular case, the deduction of individual contributions required by a retirement plan results in a child support obligation which is unjust or inappropriate, the trial court has discretionary authority to deviate from the Nebraska Child Support Guidelines in determining a parent's obligation.
8. **Child Support: Rules of the Supreme Court: Presumptions.** If the moving party, i.e., the party seeking to have a particular source of support included as income under the Nebraska Child Support Guidelines, shows that the nonmoving party earns or can reasonably expect to earn a certain amount of income on a regular basis, a rebuttable presumption of including such income arises under the guidelines.
9. **Child Support: Rules of the Supreme Court.** The Nebraska Supreme Court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be presented in child support cases.
10. ____: ____. The reasonable contributions of a parent's cohabitant to household expenses should not be included in the parent's gross income for purposes of determining child support, but may be considered in determining whether the circumstances warrant a deviation from the Nebraska Child Support Guidelines.

11. **Child Support: Child Custody.** In determining the effect of a parent's cohabitation on his or her child support obligation, the court must consider, among other things, the living conditions of the parties and the minor child, whether the cohabitant resides with the custodial or noncustodial parent, the extent to which the presence of the cohabitant and the reasonable economic choices of the parties have increased household expenses, and whether it would be fair and equitable to all concerned to determine child support based, in part, on those factors.
12. **Child Support: Rules of the Supreme Court.** An appropriate inquiry into the effect of a cohabitant on child support requires that such an inquiry be conducted, not mathematically, but in the context of determining whether a deviation from the Nebraska Child Support Guidelines is appropriate.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jon A. Sedlacek for appellant.

Joseph A. Jordano and Carla Heathershaw Risko, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellee.

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

PER CURIAM.

PROCEDURAL BACKGROUND

Debra D. Workman and Albert A. Workman, Jr., were divorced in 1992. Albert was ordered to pay child support in the amount of $250 per month for the support of the parties' minor child. On January 21, 1998, Debra filed a petition to modify the decree, alleging that a material change in circumstances had occurred and seeking to have Albert's child support obligation increased.

It has not been contested, in the district court or on appeal, that there has been a material change in circumstances since the entry of the decree that justifies modification of the child support award. The issue at the hearing on Debra's petition, held on April 20, 1999, was the calculation of the parties' gross and net incomes, and specifically whether to include Albert's retirement plan contributions or the money given to Debra by her cohabitant to pay household expenses.

In a written order filed May 19, 1999, the district court determined that Albert's retirement plan contributions were mandatory contributions within the meaning of the Nebraska Child Support

Guidelines (Guidelines). The district court further appears to have concluded that the $400 monthly contribution of Debra's cohabitant should be included in her income for purposes of calculating child support. The district court increased Albert's child support obligation to $300.04 per month, to commence on June 1.

FACTUAL BACKGROUND

Albert's Income and Retirement Plan

Albert is self-employed as an independent insurance agent, contracting through, among others, Farm Bureau Insurance Company of Nebraska and Farm Bureau Insurance Company of Iowa (collectively Farm Bureau). Albert sells insurance and receives commissions from different companies, including Farm Bureau. Albert started his business in 1993.

Farm Bureau established a "matching program" in 1996. The matching program provided that if Farm Bureau agents established a qualified retirement plan and committed up to 7 percent of their commissions to the plan, Farm Bureau would match the agents' contributions. There would be no matching funds from Farm Bureau unless the agent established a plan. Roland Schobert, vice president of marketing for Farm Bureau Insurance Company of Nebraska, testified that no yearly retirement plan contribution is required by Farm Bureau from its agents. Schobert explained that the matching program required a "qualified retirement vehicle."

Albert, as an employer, established a plan in 1996 for himself and his employees; specifically, a "money purchase pension plan" offered through Farm Bureau. The Farm Bureau matching program did not require the particular use of a money purchase pension plan, and Albert testified that his decision to establish the plan was voluntary.

The plan requires, as relevant, annual contributions in the amount of 14 percent of Albert's commissions from the sale of property casualty and new life insurance policies. Once such a plan is established, the participant employer has no discretion as to the amount of money that must be contributed to the plan. The employer's contributions are required for continued participation in the plan. The plan, as established by Albert, requires 2 years of service, at 1,000 hours per year, for employees to be eligible

to participate in the plan. At the time of the hearing, none of Albert's employees, other than himself, had qualified to participate in the plan.

Daniel Wintz, executive vice president and head of retirement plans for the SilverStone Group, defined a money purchase pension plan as a defined contribution plan where the annual contribution requirement of the employer is set forth in the document. Albert testified that Social Security taxes are paid on contributions to the plan, but no income taxes are paid on contributions until money is withdrawn from the plan. Wintz explained that the employer's contribution is required for the plan to be a qualified pension plan under the Internal Revenue Code and that a failure to make the required employer's contribution would jeopardize the tax-qualified status of the plan.

In 1998, $6,552 was contributed to Albert's retirement plan, one-half of which was Albert's contribution and one-half of which was Farm Bureau's matching contribution. In calculating his proposed child support obligation, using figures for 1998, Albert began with the net profit from his business, subtracted self-employment taxes, subtracted both his contribution and Farm Bureau's matching contribution to the retirement plan, and reached an annual income of $23,724, resulting in a gross monthly income for child support purposes of $1,977. The district court accepted this figure for purposes of calculating child support.

Debra's Income and Cohabitant Contributions

Debra was, at the time of hearing, working as a registered nurse at a local hospital. Debra was earning an hourly wage of $22.66 and was working 16 to 18 hours per week. Debra's income for 1998 was $47,013. Debra testified that she was diagnosed with renal disease in November 1998. Debra explained that her work hours had decreased due to the effects of the renal disease and that she was receiving dialysis treatment and was on a transplant list.

Debra testified that at the time of hearing, she was living with her daughter from her marriage to Albert, and her "significant other," whom we will refer to as her "cohabitant." Debra testified that her cohabitant paid $400 per month of household

expenses. Debra explained that the $400 per month was not rent, but simply an amount that her cohabitant had agreed to give Debra to help pay expenses. Albert testified that at the time of hearing, he was married, and that his wife contributed to household expenses.

Debra's proposed child support calculation, taking into account the income reduction resulting from her renal disease, proposed a gross monthly income for Debra of $1,525. The district court apparently used this figure, but added $400 to account for the contributions of Debra's cohabitant.

ASSIGNMENTS OF ERROR

Debra assigns that the district court erred (1) in finding Albert's contribution toward his retirement was mandatory and therefore not considered income for purposes of calculating child support and (2) in including, as income for purposes of calculating child support, the $400 per month Debra's cohabitant contributes to household expenses.

[1,2] In addition, Albert argues that the district court "erred by not calculating [Debra's] contribution to child support based on her earning capacity as if she were fully employed." Brief for appellee at 14. However, Albert did not assign this as error, nor does Albert's brief set forth a cross-appeal pursuant to the rules of this court. A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained. *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000); *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief. *McDonald v. DeCamp Legal Servs., supra*. Because Albert has not perfected a cross-appeal from the district court's ruling, we do not consider Albert's allegation of error.

STANDARD OF REVIEW

[3] Modification of the amount of child support payments is entrusted to the discretion of the trial court, 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. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001); *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

[4] Interpretation of the Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. See *Riggs v. Riggs, supra*.

ANALYSIS

Retirement Plan Contributions

[5] Paragraph E of the Guidelines, entitled "Deductions," provides in pertinent part: "The following deductions should be annualized to arrive at monthly net income: . . . . 4. Mandatory Retirement. Individual contributions, in a minimum amount required by the plan." The Guidelines do not, however, allow a deduction for contributions to voluntary retirement plans in arriving at net income for purposes of calculating child support. See *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995).

The record reflects that the money purchase pension plan at issue in this case requires annual contributions. Mandatory retirement plan contributions are specifically defined by the Guidelines as "a minimum amount *required by the plan.*" (Emphasis supplied.) Guidelines, paragraph E(4). A trial court should examine the applicable retirement plan documents utilizing this simple objective standard to determine whether a participating parent's individual contributions thereto are mandatory or voluntary.

The contrary rule urged by Debra is inconsistent with the plain language of the Guidelines. Under Debra's rationale, the owner of a business who adopted a money purchase plan for legitimate business reasons could be found to make "voluntary contributions" to the plan for purposes of child support computation, while an employee of the business who was not involved in the selection of the plan would be making mandatory contributions to the same plan. There would be no logic or equity in this result.

[6] For purposes of determining whether retirement plan contributions are deductible from gross monthly income for purposes of child support calculations, we hold that the proper inquiry is whether the contribution is required by the applicable retirement plan in effect at the time of the calculation, not

whether the parent could have selected another type of plan at some prior time. See *Marriage of Mull*, 61 Wash. App. 715, 812 P.2d 125 (1991) (payments made to voluntary pension plan may be deducted from income if plan becomes mandatory upon election). When we apply this inquiry to the plan at issue in the instant case, it is clear that the terms of the plan require annual contributions by Albert and that under the Guidelines, Albert is entitled to deduct from his income the minimum contribution required by the plan. See Guidelines, paragraph E(4).

[7] We note, however, that the issue presented to us in this appeal is whether Albert's retirement plan contributions are "mandatory" within the meaning of paragraph E of the Guidelines. If, under the circumstances of a particular case, the deduction of individual contributions required by a retirement plan results in a child support obligation which is unjust or inappropriate, the trial court has discretionary authority to deviate from the Guidelines in determining a parent's obligation. See, Guidelines, paragraph C(5); *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). Whether a parent has acted in bad faith, to evade child support obligations, may be relevant to such an inquiry. See, e.g., *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991); *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992). The district court did not address, and Debra did not assign as error, whether the district court should have deviated from the Guidelines in the instant case.

We, therefore, determine that the district court did not abuse its discretion insofar as it deducted Albert's minimum individual contribution required by the retirement plan. Debra's first assignment of error is without merit.

Cohabitant Contribution to Expenses

[8] Debra argues that the district court erred by including in her net income the contributions of her cohabitant to household expenses. Generally, if the moving party, i.e., the party seeking to have a particular source of support included as income under the Guidelines, shows that the nonmoving party earns or can reasonably expect to earn a certain amount of income on a regular basis, a rebuttable presumption of including such income arises under the Guidelines. See *Noonan v. Noonan*, 261 Neb. 552, 624

N.W.2d 314 (2001). Thus, the question for this court is whether Albert met his burden of proving that the contributions of Debra's cohabitant were "income" within the meaning of the Guidelines.

[9] This court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be presented in child support cases. Other courts, in addressing the income of a subsequent spouse or cohabitant, have generally held that the income of the subsequent spouse or cohabitant will not be considered unless such income is directly used to reduce the expenses of the parent. See, generally, Laura W. Morgan, Child Support Guidelines: Interpretation and Application § 2.03[e][15] (Supp. 2000) (citing cases). The reasoning is that if the cohabitant's income is used to decrease the parent's expenses, then the parent's income is necessarily of greater value. *Id.*

Those courts have taken various approaches, however, when determining the appropriate procedure for analyzing cohabitant contributions to household expenses. Some courts have held that such contributions are to be included in the parent's income. *Cook v. Eggers*, 593 N.W.2d 781 (N.D. 1999). See *Fee v. Fee*, 344 Pa. Super. 276, 496 A.2d 793 (1985). See, also, *Elkin v. Sabo*, 310 N.J. Super. 462, 708 A.2d 1225 (1998) (stating that contributions for expenses may be included in gross income, but trial court did not abuse discretion in finding that benefits were offset by increased expenses resulting from cohabitant's presence in home). See, also, e.g., La. Rev. Stat. Ann. § 9:315(6)(c) (West 2000) (court may also include as income benefits party derives from expense sharing); Indiana Child Support Rules and Guidelines, guideline 3, commentary 2(d) (Lexis 2001) (regular and continuing payments made by roommate that reduce parent's costs may be basis for imputing income).

Other courts have concluded, however, that contributions made by a cohabitant are not to be considered income under the child support guidelines, but may form a basis for deviation from the guidelines under appropriate circumstances. See, *Allred v. Allred*, 130 Md. App. 13, 744 A.2d 70 (2000); *State ex rel. Horne v. Horne*, 127 N.C. App. 387, 489 S.E.2d 431 (1997); *Inscoe v. Inscoe*, 121 Ohio App. 3d 396, 700 N.E.2d 70 (1997); *Elliott v.*

Elliott, 920 S.W.2d 570 (Mo. App. 1996). See, also, *Haessly v. Haessly*, 203 A.D.2d 700, 611 N.Y.S.2d 928 (1994); *In re Marriage of Keopke*, 483 N.W.2d 612 (Iowa App. 1992) (rejecting contributions as income under guidelines without discussing deviation from guidelines). See, also, e.g., Conn. Agencies Regs. §§ 46b-215a-1(11)(B)(iv) and 46b-215a-3(b)(1)(D) (2001) (cohabitant contributions excluded from income but may form basis of deviation if parent has reduced income or experienced "extraordinary reduction" of living expenses).

Finally, some courts have stated that a reduction in expenses resulting from a cohabitant's contribution may be considered by the court in setting or modifying child support, but did not specify how the contributions were to be included in the calculations. See, *Jackson v. Jackson*, 111 Nev. 1551, 907 P.2d 990 (1995); *Harris v. Superior Court (Smets)*, 3 Cal. App. 4th 661, 4 Cal. Rptr. 2d 564 (1992); *Campanali v. Campanali*, 695 S.W.2d 193 (Tenn. App. 1985); *Silvia v. Silvia*, 9 Mass. App. 339, 400 N.E.2d 1330 (1980).

[10] We conclude that the better rule is that the reasonable contributions of a parent's cohabitant to household expenses should not be included in the parent's gross income for purposes of determining child support, but may be considered in determining whether the circumstances warrant a deviation from the Guidelines. To include such contributions in the parent's income, as did the district court, is both unfair and unwieldy.

In the first place, the inclusion of cohabitant contributions in a parent's income, while recognizing that such contributions may enhance a parent's disposable income, does not account for the fact that household expenses may be greater because of the cohabitant. The cohabitant's contributions to the payment of household expenses would be attributed as income to the parent, without reference to whether those expenses are greater due to the presence of the cohabitant, or to the economic choices made by the parent and cohabitant as a result of their cohabitation. This inequity is particularly pronounced where the custodial parent shares a residence with the cohabitant; in that situation, the child has already benefited from the improved living conditions provided by the combined resources of the parent and cohabitant, yet that benefit will be eroded because of the reduction in child

support that will be forthcoming—in essence, transferring the benefit of expense sharing from the child and custodial parent to the noncustodial parent.

It should also be remembered that expense-sharing arrangements are entered into voluntarily by parents. Parents may, consequently, choose to forgo those arrangements once they understand the impact of such arrangements on child support and perceive expense sharing as counterproductive. See Sue Nations, *Louisiana's Child Support Guidelines: A Preliminary Analysis*, 50 La. L. Rev. 1057 (1990). It seems rather imprudent that good faith attempts at reducing expenses should be discouraged rather than encouraged by the law. See *id.* Furthermore, the choice to reside with a cohabitant is not of unmitigated benefit to the parent. The reduced expenses to the parent are offset by the parent's surrender of an unfettered right to possession of the premises.

[11,12] In short, while it may be appropriate to consider the parent's changed living conditions in determining child support obligations, this consideration requires a more inclusive inquiry than is permitted by simply counting a cohabitant's contributions as income. The court must consider, among other things, the living conditions of the parties and the minor child, whether the cohabitant resides with the custodial or noncustodial parent, the extent to which the presence of the cohabitant and the reasonable economic choices of the parties have increased household expenses, and whether it would be fair and equitable to all concerned to determine child support based, in part, on those factors. In other words, an appropriate inquiry into the effect of a cohabitant on child support requires that such an inquiry be conducted, not mathematically, but in the context of determining whether a deviation from the Guidelines is appropriate.

This is not to suggest, however, that income may not be imputed to a parent under the Guidelines where a cohabitant's contribution exceeds his or her fair share of household expenses or where a parent relies on the cohabitant's contributions for support instead of reaching his or her earning capacity. Income for the purpose of child support is not necessarily synonymous with taxable income. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). It is well established that the provision of "in-kind" benefits, from an employer or other third party, may

be included in a party's income for child support purposes. See, *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998) (military housing benefit and subsistence allowance included as income); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994) (free food and rent provided by employers, who were also petitioner's parents, included as income); *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998) (use of home on farm included as income); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995) (value of food and drink provided by employer included in income). See, also, *Unkelbach v. McNary*, 244 Conn. 350, 710 A.2d 717 (1998) (one-half of household expenses attributed to parent's income as gifts where cohabitant paid all household expenses without reimbursement). Compare *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994) (earning capacity imputed to parent where parent chose to stay home with children and subsequent spouse paid all household expenses).

The Court of Special Appeals of Maryland set forth a cogent analysis of circumstances similar to the instant case in *Allred v. Allred*, 130 Md. App. 13, 744 A.2d 70 (2000). In that case, the court addressed whether the contributions of the mother's cohabitant were to be included in the mother's income for child support purposes. The court determined that they were not. Under Maryland law, "actual income" is defined as "income from any source." See *id.* The court noted that the mother did not sublet to the cohabitant and that his payments to her were not salary or wages. The court further noted that there was no indication that the payments were gifts to the mother, as they were not made gratuitously or without consideration. Instead, the cohabitant and his son made use of the apartment and its amenities, and the payments were for the cohabitant's use and that of his son. See *id.*

While the court concluded that the payments were not "actual income" within the meaning of Maryland law, the court also stated:

> We are not suggesting that in the proper case, a court could not impute as gift income to a parent the parent's roommate's payment of a portion of rent and expenses. If, for example, the payments exceeded the roommate's fair share of the rent, they may confer a benefit of the excess on

> the parent. Also, we are not suggesting that the court could not consider a parent's roommate's payment of a portion of rent and expenses in determining . . . whether application of the guidelines would be unjust or inappropriate.

Id. at 21 n.4, 744 A.2d at 74 n.4.

For the reasons set forth above, we agree with the reasoning of the Maryland court. In an analysis of the instant case, there is no evidence that Debra's cohabitant was paying more than a fair share of monthly expenses, nor is there any evidence suggesting that Debra was not working to her present earning capacity. There was no evidence supporting a conclusion that Debra's cohabitant was making contributions gratuitously or without consideration such that the contributions might be considered gifts.

Our de novo review reveals no evidence in the present record to support a finding that the cohabitant's contributions constituted gift income, that income should be imputed to Debra based upon her earning capacity, or that application of the Guidelines would be unjust or inappropriate. In other words, Albert failed to meet his burden of proving that Debra's cohabitant's contributions should be included in her income under the Guidelines or that a deviation from the Guidelines was warranted. The district court's determination is reversed to that extent.

Other Issues

In addition, we note that there are deficiencies in the record that have made it difficult to conduct our de novo review and analyze the issues presented. The district court's order modifying the decree specifically finds that Albert's contributions to his retirement plan are mandatory and then states that the court considered evidence "relating to [Debra's] health, her present employment and other income received" and "Section D of the Nebraska Child Support Guidelines relating to computation of total monthly income." The district court stated that a deviation from the Guidelines should be permitted because application of the Guidelines would be unjust and inappropriate and set Albert's child support obligation at $300.04 per month.

The record, however, does not contain worksheet 5, "Deviations to Child Support Guidelines," nor does it state how much child support Albert would have paid had the Guidelines

been applied. See, Guidelines, paragraph C; *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). Instead, the record contains a completed worksheet 1, "Basic Net Income and Support Calculation," upon which the district court relied in setting Albert's support obligation. Despite the language in the district court's order stating that a deviation would be permitted, it does not appear that a deviation was actually included in the calculations underlying the district court's support award. Instead, the district court appears to have accepted Albert's calculation of his own income, including the deduction for his retirement plan contributions, and then accepted Debra's calculation of her income, but added $400 per month to include the compensation for expenses by Debra's cohabitant. This process does not include a deviation from the Guidelines, but instead resolves the issues presented within the Guidelines by applying the Guidelines to the incomes determined for each of the parties. It is under this assumption that we have analyzed the issues presented.

Furthermore, the district court admitted into evidence, without objection from either party, two different documents which each purport to be Albert's 1998 Schedule C, but which set forth different figures for Albert's expense deductions. We also note that the figure set forth for Albert's self-employment tax on what purports to be his 1998 Schedule SE is not consistent with the self-employment tax figure that Albert used in the calculation of his gross income for child support purposes, upon which the district court relied. A copy of Albert's 1998 Form 1040 is not in the record.

Exacerbating the confusion is the fact that the record does not indicate the source of some of the information set forth on the completed worksheet 1. For instance, the record does not show a basis for the deductions taken from Albert's gross income for federal and state taxes and FICA contributions. This is particularly perplexing because the record indicates that the district court's figure for Albert's income was calculated by subtracting retirement plan contributions and self-employment tax from the net income of Albert's business. From this figure, the district court subtracted FICA taxes, despite the fact that self-employment taxes are generally paid in lieu of FICA contributions. See, generally, *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537

(1999). The basis for deducting both self-employment and FICA taxes from Albert's income cannot be determined from the record.

Also troubling is the fact that the calculation of Albert's income deducted both his own contribution to his retirement plan, as well as Farm Bureau's matching contribution to the plan. Albert testified that this was because Farm Bureau's contribution to the plan was included in the gross income of his business upon which the subsequent calculations were based. Schobert agreed, and testified that Farm Bureau's contributions to the retirement plan were made by sending the money to the agent and including that money on the agent's Form 1099.

This does not appear to be consistent, however, with the testimony that Albert's retirement plan was tax deferred, because the figure from which Albert's income was calculated for child support purposes was taken from one version of his 1998 Schedule C, and no deduction for pension contributions appears on either of those documents in the record. No other document in the record shows that the contributions to Albert's retirement plan were deducted from his income for income tax purposes. Based on the record before this court, it appears that Albert may have voluntarily paid income taxes on a contribution to his retirement plan that should have been tax deferred or that Albert's retirement plan contributions may have been subtracted twice from his income in calculating his child support. Again, the record does not permit this court to resolve the ambiguity, given that Albert's 1998 Form 1040 is not in the record.

We do not find that plain error has occurred or that these questions presented by the record are themselves a basis for reversal. Indeed, the very problem is that the record is sufficient only to pose these questions, but not to resolve them. We suggest, however, as the cause must be remanded in any event, that the parties and the district court consider and resolve these questions after remand.

CONCLUSION

The district court did not err in deducting Albert's individual contributions to his retirement plan when determining his net income for purposes of calculating child support, but did err in its inclusion of the contributions of Debra's cohabitant in

Debra's income. Consequently, the cause is remanded for a redetermination of Albert's child support obligation.

Upon remand, Albert's child support obligation should be modified based upon the principles set forth in this opinion, and absent equities to the contrary, the modification should be retroactive to the date that Debra's petition to modify was filed. See *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). In addition, the applicable worksheets required by the Guidelines should be completed so that the record reflects the basic computation under the Guidelines (worksheet 1) and any deviation therefrom (worksheet 5). The judgment of the district court is affirmed in part and in part reversed, and the cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

C. PATRICIA SKINNER, APPELLEE, V. OGALLALA PUBLIC SCHOOL DISTRICT NO. 1, APPELLANT.

631 N.W. 2d 510

Filed August 10, 2001. No. S-99-1287.

1. **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.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. **Summary Judgment: 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. ____: ____. After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
5. **Workers' Compensation: Judgments: Appeal and Error.** Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.

6. **Invitor-Invitee: Licensee: Trial.** In regard to the trial court's judgment upon trial, the determination as to whether a plaintiff is an invitee or licensee is a question of fact.
7. **Negligence.** The question of whether contributory negligence is present in a particular case is a question for the trier of fact.
8. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to 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 judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
9. **Workers' Compensation: Employer and Employee.** Pursuant to Neb. Rev. Stat. § 48-148 (Reissue 1998), if any employee of any employer subject to the Nebraska Workers' Compensation Act files any claim with or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.
10. **Workers' Compensation.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment.
11. **Workers' Compensation: Employer and Employee: Negligence.** An employee cannot normally maintain a negligence suit against his or her employer regarding an injury arising out of and in the course of employment; his or her sole remedy is a claim for workers' compensation.
12. **Workers' Compensation: Claims: Words and Phrases.** The language in Neb. Rev. Stat. § 48-148 (Reissue 1998), in specifying an employee who is "subject to the Nebraska Workers' Compensation Act files any claim," means that the statute covers only claims arising out of and in the course of employment, i.e., claims to which the Nebraska Workers' Compensation Act applies.
13. **Workers' Compensation.** Pursuant to Neb. Rev. Stat. § 48-101 (Reissue 1998), when personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.
14. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1998) are conjunctive; thus, both must be established by a preponderance of the evidence.
15. **Workers' Compensation: Words and Phrases.** The phrase "arising out of" as used in Neb. Rev. Stat. § 48-101 (Reissue 1998), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of" refers to the time, place, and circumstances surrounding the accident.
16. ____: ____. The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 1998) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.

17. ____: ____. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.
18. **Employer and Employee.** An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly.
19. ____. An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment.
20. ____. If an employee's activity aids a coemployee in a matter entirely personal to the coemployee, then it is outside the course of employment, unless the deviation is insubstantial.
21. ____. Acts that are nothing more than the discharge of a person's duties as a good citizen or member of the community are not within the course of employment.
22. **Invitor-Invitee: Licensee: Trespass: Words and Phrases.** The law places those who come upon the premises of another in three classes: Invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter.
23. **Licensee: Words and Phrases.** A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.
24. ____: ____. A licensee is on the premises of another for the licensee's own interest or gratification. Such person is exercising the privilege solely for that person's own convenience or benefit and does not stand in any contractual relation with the owner or occupant of the premises.
25. **Invitor-Invitee: Words and Phrases.** An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.
26. ____: ____. The "economic benefit" test is used for determining an entrant's status, whereby a business visitor or invitee is defined as one who is expressly or impliedly invited or permitted to enter or remain on the premises in the possession of another for a purpose directly or indirectly connected with the business of the possessor or with business dealings between them. If the invitation relates to the business of the one who gives it, or is given for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee.
27. ____: ____. An invitation to a business visitor need not be express, as an invitation is inferred where there is a common interest or mutual advantage. An "invitation," as a layperson might use the term in ordinary affairs of life, is not required for one to be an invitee as the term is used in law.
28. **Invitor-Invitee: Property.** Business visitors include those who come onto the land for a purpose connected with their own business, so long as that purpose is connected with any purpose, business or otherwise, for which the possessor uses the land.
29. ____: ____. It is not necessary that the visitor shall be upon the land for the purposes of the possessor's business at all, if the visit is for the convenience or arises out of the necessities of others who are themselves upon the land for such a purpose.
30. **Negligence: Proximate Cause: Words and Phrases.** Contributory negligence is conduct on the part of the plaintiff amounting to a breach of the duty which the law

imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury complained of as a proximate cause.

31. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
32. **Political Subdivisions Tort Claims Act: Damages: Appeal and Error.** In a negligence action brought under the Political Subdivisions Tort Claims Act, a court's award of damages will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Affirmed.

Terrance O. Waite and Keith A. Harvat, of Murphy, Pederson, Waite & McWha, for appellant.

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

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

PER CURIAM.

I. NATURE OF CASE

This is a negligence action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1994). Appellee, C. Patricia Skinner, sued appellant, Ogallala Public School District No. 1 (District), for injuries she suffered when she fell through a trapdoor in the floor that had been left open at the school. Both parties filed motions for summary judgment on the workers' compensation issue, and the trial court granted summary judgment in favor of Skinner on the issue of whether the Nebraska Workers' Compensation Act applies. After trial on the merits, the trial court entered a judgment for Skinner in the amount of $194,910.50. The District appeals on various grounds.

II. BACKGROUND

Skinner has been teaching special education at the school since 1983 and has served as the special education coordinator since 1987, a position she held at the time of the hearing. During the summer of 1996, the District had undertaken a project to

string computer cable throughout the school. Occasionally, this meant opening various trapdoors around the school that led to tunnels underneath the building.

Sometime between 7:30 and 8 p.m. on July 16, 1996, Skinner and her husband, who is the band director at the school, went to the school to return some computer equipment he had borrowed that belonged in the band room office. Skinner's husband opened the band room door, and Skinner walked inside carrying a printer and some envelopes. There were no lights on in the room.

Skinner proceeded to the middle of the band room where she turned on the bank of lights that lighted the middle part of the main band room. She then walked to her husband's office in the opposite corner of the band room.

When Skinner entered the office, she set the box of envelopes down on her husband's desk. She then took one step toward the cabinet where the printer usually sits, holding the printer under her left arm. On her second step, however, she fell down through an open trapdoor into a 4-foot-deep tunnel below. She landed feet first and then fell backward. Skinner was stunned at first and did not realize she was hurt until she tried to get up and out of the hole. Her knee was bent, and she could not straighten her leg. The trapdoor apparently had been left open in order to dry out the tunnel below as part of the project to string computer cable throughout the building.

On prior occasions when Skinner had been in her husband's office, a shelved cart had been placed over the trapdoor. On this occasion, however, the lid to the trapdoor was leaning against the wall. Skinner and her husband testified that no warnings had been posted by the opening in the floor, although Skinner said she was aware at the time that a cabling crew was stringing cable during that summer.

As a result of the fall, Skinner broke her leg and required extensive medical treatment. Skinner worked from home through the month of August 1996. During that time, she was able to hold meetings in her house. She missed 1 day of inservice meetings and partial days for physical therapy and doctors' appointments. Skinner started physical therapy soon after the injury and continued her therapy until April 1997. She said she experienced severe pain as a result of the injury and took pain medication daily.

III. ASSIGNMENTS OF ERROR

The District assigns, restated, the following errors:

(1) The trial court erred in granting Skinner's motion for summary judgment and in denying the District's motion for summary judgment regarding the applicability of the Nebraska Workers' Compensation Act.

(2) The trial court erred in determining that Skinner was a business invitee as opposed to a licensee.

(3) The trial court erred in determining that Skinner was not contributorily negligent in proceeding into the office without turning on the office light and erred in failing to reduce her recovery in proportion to her negligence.

(4) The trial court erred in its determination that the alleged negligence of the District was a proximate cause of the injuries to Skinner.

(5) The trial court erred in its determination of damages.

(6) The trial court's ruling is not supported by the evidence.

(7) The trial court's decision is contrary to law.

(8) The trial court erred in denying the District's motion for directed verdict and its motion for new trial and/or motion to set aside the verdict/judgment notwithstanding the verdict.

(9) The trial court erred in denying the District's motion to compel.

IV. STANDARD OF REVIEW

[1,2] 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. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Id.*

[3,4] 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. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment. *Id.*

[5] Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996).

[6-8] In regard to the trial court's judgment upon trial, the determination as to whether a plaintiff is an invitee or licensee is a question of fact. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996). Likewise, the question of whether contributory negligence is present in a particular case is a question for the trier of fact. *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994).

> In actions brought pursuant to 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 judgment, it must be considered in the light most favorable to the successful party. . . . Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

(Citation omitted.) *McIntosh*, 249 Neb. at 531, 544 N.W.2d at 504-05.

V. ANALYSIS

1. Summary Judgment on Workers' Compensation Issue

The District first assigns as error the trial court's grant of partial summary judgment for Skinner on the issue of whether the Nebraska Workers' Compensation Act applied.

(a) Employer Release

[9] The District first argues that Skinner's exclusive remedy against the District is under the Nebraska Workers' Compensation Act and that under the act, the District has been

released from all claims arising from Skinner's injury. For this argument, the District cites Neb. Rev. Stat. § 48-148 (Reissue 1998), which states:

> If any employee . . . of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

The District argues that because Skinner submitted an "Employee's Report" to the District's insurance company and because she received and cashed four out of five workers' compensation checks from the insurer, the District is released under § 48-148 and that Skinner therefore cannot proceed in tort against the District.

[10-12] Indeed, the Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Levander v. Benevolent and Protective Order of Elks*, 257 Neb. 283, 596 N.W.2d 705 (1999). An employee cannot normally maintain a negligence suit against his or her employer regarding an injury arising out of and in the course of employment; his or her sole remedy is a claim for workers' compensation. *Id.* However, the District's argument begs the question whether the act applies at all. The language in § 48-148, in specifying an employee who is "subject to the Nebraska Workers' Compensation Act files any claim," means that the statute covers only claims arising out of and in the course of employment, i.e., claims to which the Nebraska Workers' Compensation Act applies. See *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975) (construing similar language contained in predecessor to § 48-148 to cover only claims to which act applies). Thus, before we can determine that the District is released under § 48-148, we must determine whether the act applies.

We note that the trial court stated in its order on summary judgment that the workers' compensation payments made to

Skinner in the weeks following the injury could be set off against the judgment for damages in the negligence case. The payments were not made by the District; rather, they were made by the District's workers' compensation insurer. While the insurer may have a subrogation claim to recover the payments from Skinner, the payments may not be set off against the judgment in the negligence action.

(b) Applicability of Nebraska Workers' Compensation Act

The District argues that the Nebraska Workers' Compensation Act applies to Skinner's injuries because the injury arose out of and in the course of her employment. The trial court found that there was no dispute in the evidence that Skinner was acting "in the status of the wife of Rockney D. Skinner and not as an employee of the [District]." The trial court found that as a result, the injury did not arise out of or in the course of her employment.

[13] Under Neb. Rev. Stat. § 48-101 (Reissue 1998):

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

[14,15] The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; thus, both must be established by a preponderance of the evidence. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The phrase "arising out of" as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of" refers to the time, place, and circumstances surrounding the accident. *Id.*

[16,17] The "in the course of" requirement has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). See 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law

§ 12.01 (2001). The general rule is: "An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto." *Id.*, § 12.00 at 12-1. "A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment." 2 Larson & Larson, *supra*, § 20.00 at 20-1. We need only consider whether Skinner was engaged in an employment-related activity at the time of the injury, because our determination in that regard is dispositive of the issue concerning the applicability of the act.

[18] "An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly." *Id*. at 20-1. "[W]ork-connected activity goes beyond the direct services performed for the employer and includes at least some ministration to the personal comfort and human wants of the employee." *Id.*, § 20.01 at 20-2. The difficulty is in drawing the line. *Id.*

[19,20] In the specific context regarding acts that benefit coworkers, Larson states, "An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." *Id.*, § 27.00 at 27-1. The reason for the rule is that it would be contrary to human nature as well as the employer's interest to forbid employees from helping each other at pain of losing benefits should an injury occur. *Id.*, § 27.01[2]. By contrast, if the employee's activity aids a coemployee in a matter entirely personal to the coemployee, then it is outside the course of employment, unless the deviation is insubstantial. *Id.*, § 27.01[5].

The question is most difficult where the employee helps a coemployee and simultaneously advances the employer's work, but does so *not* primarily to help the employer, but to accommodate the coemployee. *Id.*, § 27.01[5]. The case at bar can be characterized as such a case.

In resolving the question we are guided by our prior cases, particularly *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983), and *Levander v. Benevolent and Protective*

Order of Elks, 257 Neb. 283, 596 N.W.2d 705 (1999). In *Brown v. Leavitt Lane Farm, supra*, the claimant was employed as a farmworker. On the day of the accident, the claimant went to the residence of one of the partners in the business to see if there was any work. *Id.* He was told there was no work, so he asked if he could get his paycheck. *Id.* He then told the partner that he was going over to help some of his coworkers while the check was being drawn. *Id.* He tried to assist his coworkers in digging some postholes for a corral, but was injured almost immediately when his arm got caught in the auger of a posthole digger. *Id.* Because the case was on appeal from a Workers' Compensation Court determination in favor of the claimant, we resolved the dispute in the evidence regarding the employer's authorization of the claimant's actions in favor of the claimant. *Id.* We declared:

> We affirm the finding of the Workmen's Compensation Court that appellee was within the course of his employment because, although he was a volunteer, he was in the process of helping coemployees perform work for appellant, and the labor done by plaintiff in his good faith attempt to assist fellow employees was being done with the authorization of appellant.

Id. at 524, 340 N.W.2d at 6-7.

In *Levander v. Benevolent and Protective Order of Elks, supra*, the plaintiff was employed at the Elks lodge, and her duties included opening the clubhouse, bartending, accepting green fees from golfers, and cleaning. *Id.* She, as a member of the lodge, also performed various volunteer activities for the lodge, as did other members, including grilling hamburgers for golf tournaments (a common volunteer activity for lodge members), working during " 'beer and burger nights,' " and cleaning up after the men's meetings. *Id.* at 285, 596 N.W.2d at 708. Neither she nor anyone else had been paid to grill hamburgers at the lodge's tournaments. *Id*. On the day of the accident, the plaintiff opened the clubhouse and tended bar. *Id.* Sometime after 12:30 p.m., the plaintiff went outside and started grilling hamburgers for a tournament, filling in for another lodge employee who did not come to work that day. *Id.* The grill somehow caught fire, and she was injured. *Id.* The plaintiff did not receive any workers' compensation benefits as a result of the accident. *Id.*

We noted that the plaintiff was grilling hamburgers after her shift was over; the grilling was not part of her duties as an employee; the grilling took place on the golf course, outside her regular place of work in the clubhouse; and the grilling of hamburgers had always been a part of her volunteer activities. *Id.* We distinguished *Brown v. Leavitt Lane Farm, supra*, because of three facts:

> (1) Levander was not physically assisting a coworker, but, apparently, filling in for someone who was not there; (2) grilling hamburgers had never been a part of the scope of Levander's employment with the Elks; and (3) there is evidence to indicate that the job Levander was doing was strictly understood to be part of her volunteer work as a member of the Elks lodge, as opposed to the assistance of coworkers.

Levander v. Benevolent and Protective Order of Elks, 257 Neb. 283, 289, 596 N.W.2d 705, 710 (1999). We concluded that there existed an issue of fact as to whether the plaintiff "was an employee acting in the scope of employment." *Id.*

The facts we used in *Levander* to distinguish *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983), show that our paramount consideration was that the plaintiff in *Levander* was not acting in her capacity as an employee, but, rather, as a member of the lodge volunteering her time and efforts. In other words, the plaintiff's activity in *Levander* was related to her membership at the lodge, not her employment. In contrast, the claimant in *Brown* was acting in his capacity as an employee, despite the fact that he was not on the clock at the time of the injury, because he had no other involvement with the company or its employees.

[21] In the case at bar, Skinner's duties concern only special education and have nothing to do with the band program. She does, however, as a part of her employment, assist coworkers in doing other tasks on occasion. Despite this fact, her assistance of coworkers has historically been confined to helping them during regular working hours during the school year. The injury in question occurred late in the evening in the middle of the summer when school was not in session. Skinner testified that she would not have made such a special trip to the school to assist a

coworker but for the fact that the coworker was her husband. Helping her husband in such circumstances would not be considered a part of her employment because giving help in those circumstances was not the general custom of Skinner or the employees at the school. The instant case is therefore more analogous to *Levander* and is distinguishable from *Brown*. In *Levander*, we stated, "acts that are nothing more than the discharge of a person's duties as a good citizen or member of the community are not within the course of employment." 257 Neb. at 288-89, 596 N.W.2d at 710. In the instant case, Skinner was assisting her husband for a purely personal reason, namely, that she wanted to expedite their departure for a vacation, so the injuries she sustained while giving such assistance did not arise in the course of employment.

As stated above, the phrases "arising out of" and "in the course of" in § 48-101 are not synonymous and must both be established in order for the Nebraska Workers' Compensation Act to apply. See *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). Because we have concluded that the injury in this case did not arise "in the course of" employment, we need not address whether the injury arose out of employment.

2. Skinner's Status

Given our determination that the Nebraska Workers' Compensation Act does not apply to the instant case, it becomes necessary to determine the duty the District owed to Skinner. We begin our analysis by noting that the accident in this case occurred before *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), which abrogated the distinction between invitees and licensees. Because *Heins* was prospective in effect, it is necessary to determine whether Skinner was an invitee or a licensee at the time of the accident in question.

[22] The law places those who come upon the premises of another in three classes: Invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter. *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962). This case deals with the distinction between the former two

classes. The District argues that the trial court was clearly wrong in finding that Skinner was an invitee and that, instead, she should have been considered a licensee.

[23,24] A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. See, *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996). A licensee is on the premises of another for the licensee's own interest or gratification. Such person is exercising the privilege solely for that person's own convenience or benefit and does not stand in any contractual relation with the owner or occupant of the premises. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

[25,26] An invitee, on the other hand, is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. See *Derr v. Columbus Convention Ctr., supra*. This court has used the "economic benefit" test for determining an entrant's status, whereby a business visitor or invitee is defined as one who is expressly or impliedly invited or permitted to enter or remain on the premises in the possession of another for a purpose directly or indirectly connected with the business of the possessor or with business dealings between them. *Palmtag v. Gartner Constr. Co., supra*. See, also, Restatement (Second) of Torts § 332(3) (1965). If the invitation relates to the business of the one who gives it, or is given for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee. See *Palmtag v. Gartner Constr. Co., supra*. See, also, *McIntosh v. Omaha Public Schools, supra*.

The economic benefit theory proceeds on the assumption that affirmative obligations are imposed on people only in return for some consideration or benefit. Any obligation to discover latent dangerous conditions of the premises is regarded as an affirmative one, and the consideration for imposing it is sought in the economic advantage—actual or potential—of the plaintiff's visit to the occupier's own interest. 5 Fowler V. Harper et al., The Law of Torts § 27.12 (2d ed. 1986).

[27] An invitation to a business visitor need not be express, as an invitation is *inferred* where there is a common interest or mutual advantage. See, *Palmtag v. Gartner Constr. Co., supra*; *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962). An "invitation," as a layperson might use the term in ordinary affairs of life, is not required for one to be an invitee as the term is used in law. See *Lindelow v. Peter Kiewit Sons', Inc., supra*.

[28,29] The District emphasizes that Skinner's subjective intent or purpose in visiting the school was to help her husband return the computer equipment so they both could leave town for a vacation the next day. The proper inquiry, however, is not whether Skinner intended for her visit to benefit the possessor of the premises, but simply whether the visit inures to their mutual advantage. See Restatement, *supra*, comment *e*. Business visitors include those who come onto the land for a purpose connected with their own business, so long as that purpose is connected with any purpose, business or otherwise, for which the possessor uses the land. *Id.* In fact, it is not necessary that the visitor shall be upon the land for the purposes of the possessor's business at all, if the visit is for the convenience or arises out of the necessities of others who are themselves upon the land for such a purpose. See *id.*, comment *g*.

These principles are illustrated in decisions made by appellate courts in other jurisdictions. For instance, in *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979), the plaintiff was assisting an employee of a college into the dormitory where the employee worked, when the plaintiff slipped and fell on an icy road. The defendant college argued that the plaintiff was not a business invitee, because he was gratuitously aiding the employee and was not on the campus for any business purpose of his own. The Supreme Judicial Court of Maine, however, affirmed the trial court's determination that the plaintiff was an invitee. *Id.* The court stated that "[b]y his conduct, plaintiff enabled one of defendant's employees to reach her place of employment, thereby conferring, at least to some degree, an economic benefit upon defendant. An invitation for plaintiff to enter upon defendant's premises is reasonably implied from such circumstances." *Id.* at 849.

Similarly, in *Harter v. Ozark-Kenworth, Inc.*, 904 S.W.2d 317 (Mo. App. 1995), the plaintiff was injured while helping his father, an employee of a truck manufacturer, in unloading truck cabs that were being delivered for purchase and resale by the father's employer. The Missouri Court of Appeals stated:

> While there was evidence in the record that [the plaintiff's] participation in the delivery of truck cabs was solely for his own purposes, insofar as he was motivated by his desire to be helpful to a parent who was supporting him, there was also evidence in the record that his presence at the [employer's premises] was of benefit to [the employer], since he was assisting in the delivery and undecking of truck cabs, which was a prerequisite to their resale by [the employer]. Viewing the evidence in the light most favorable to [the plaintiff], there was sufficient evidence in the record from which a jury could find that [the plaintiff's] presence on the premises was "connected with the business dealings of the owner" in a way that was "for the mutual benefit of himself and the owner" and that [the plaintiff] was thus a business invitee . . . .

Id. at 321 n.1. See, also, e.g., *Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992) (sufficient evidence for jury to find plaintiff was invitee where plaintiff was, for his own purposes, helping friend perform friend's duties as farmhand); *Newton v. Pennsylvania Iron & Coal, Inc.*, 85 Ohio App. 3d 353, 619 N.E.2d 1081 (1993) (evidence supported finding that wife was invitee when injured while picking up husband's paycheck); *Mullins et al. v. Easton et al.*, 176 Ind. App. 590, 376 N.E.2d 1178 (1978) (voluntary helper of repairman was business invitee when injured carrying "roto rooter" machine into defendant's residence).

In other words, in order to determine if a business invitation is implied, the inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance. Indeed, such a standard would make analysis of status distinctions even more logically convoluted than it already is. Instead, the initial question is simply whether the visit is objectively related to the business of the possessor of the premises, such that the visit is to the mutual advantage of the possessor and the plaintiff, and an invitation to the plaintiff is implied.

Thus, in the instant case, it does not matter whether the evidence shows that the District expressly invited Skinner to visit, because an invitation is implied so long as the visit was to the mutual advantage of Skinner and the District. Similarly, Skinner's intent in visiting is irrelevant, because the advantage of the visit to her need not be the same as the advantage to the District.

The record in this case supports the trial court's finding that Skinner's visit to the school was to the mutual advantage of Skinner and the District. Both Skinner and her husband testified that the purpose of their visit to the school was to return a computer, printer, and supplies that Skinner's husband had taken to a band director's meeting. Skinner's husband specifically testified that returning the property was a part of his duties as an educator. While Skinner agreed that she was assisting her husband for her own convenience and that she had not been asked by the District to assist, both Skinner and her husband testified that Skinner's assistance in returning school property was in furtherance of the interests of the District. Furthermore, the superintendent of the school testified that a teacher in the school building over the summer, helping a coemployee return school property, would be furthering the educational process.

In short, the record contains substantial evidence to support the trial court's finding that Skinner's visit to the school was to the mutual advantage of Skinner and the District and, thus, that a business invitation was implied. Skinner was not within the scope of her own employment for workers' compensation purposes, as she was assisting her husband with his job rather than performing her own duties, but this assistance was nonetheless of mutual advantage to Skinner and the District, and this advantage implies an invitation under the economic benefit test. Giving Skinner all reasonable inferences from the evidence, as required by our standard of review, we cannot say that the trial court was clearly wrong in finding that Skinner had the status of an invitee when injured.

3. Contributory Negligence

[30] The District next argues that Skinner failed to exercise ordinary care and was thus contributorily negligent. The District

asserts that if the office was too dimly lit to see the hole, Skinner should have turned on the lights, but if the office was not too dimly lit, she should have seen the hole. Skinner argues that she acted as a reasonable person would have on the night of the accident; thus, she was not contributorily negligent.

> "Contributory negligence is conduct on the part of the plaintiff amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury complained of as a proximate cause."

Grote v. Meyers Land & Cattle Co., 240 Neb. 959, 969, 485 N.W.2d 748, 757 (1992).

Skinner testified that the light in the band room offered enough illumination for her to accomplish her task but not enough to light up a black hole on a floor with dark carpeting. We must keep in mind that in actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong. *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000). While the trial court could have reasonably concluded that Skinner was contributorily negligent, the trial court was not clearly erroneous in making the opposite conclusion. It appears from the evidence that reasonable minds could differ as to whether Skinner was contributorily negligent. Thus, the ruling of the trial court will be upheld as to this question.

4. Proximate Cause

[31] The District next assigns as error the trial court's determination that the alleged negligence of the District was a proximate cause of the injuries to Skinner. The District assigned this error but did not argue this in its brief. Errors assigned but not argued will not be addressed on appeal. *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

5. Excessive Damages

[32] Because we conclude that the trial court was not clearly wrong in finding Skinner to be an invitee, we therefore reach the District's next assignment of error, namely, that the damages awarded were excessive. In a negligence action brought under

the Political Subdivisions Tort Claims Act, a court's award of damages will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law. See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

Skinner testified that after her initial injury, she suffered great pain. Her injury required surgery to place on her leg a fixator, which she wore for almost 3 months. Skinner testified that the fixator was uncomfortable and that if the pins were ever bumped, she would feel severe pain. After the fixator was removed, Skinner continued to experience aching, pain, stiffness, and swelling in her leg.

Following the injury, Skinner used a wheelchair for about 3 months at home and for a longer period at work. She could not get in and out of the wheelchair without assistance for 3 to 4 weeks after the accident. After December 1996, she began using either the walker or a cane. Skinner was not able to drive a car until May 1997 because of problems associated with injuries to the muscles and tendons in her leg.

Skinner testified at trial that her leg continues to tire easily and becomes stiff occasionally. Her ankle swells and gets stiff when she puts weight on it for extended periods or when the weather is cold and windy. She has difficulty walking across the yard or maneuvering across ice and snow, and she can only walk about one block without getting stiff. Skinner further testified that as a result of the injury, she can no longer enjoy the activities in which she participated before the accident, including camping, hiking, visiting the mountains, gardening, remodeling, and redecorating. At the time of trial, Skinner was still taking over-the-counter analgesics each day to quell her daily pain. She testified that once a week, she suffers what she calls excruciating pain.

In connection with the loss of consortium claim, Skinner said she was unable to be physically intimate with her husband for the entire 3 months during which she had the fixator on her leg.

Skinner testified that as a result of the injury, she incurred medical expenses of $34,784.50. Further, she underwent extensive physical therapy, and her permanent physical impairment has been estimated at 14 percent of the use of her right leg. The

trial court awarded Skinner her medical expenses, plus $150,000 for pain and suffering and permanent disability, and $10,000 for the loss of consortium claim assigned to her by her husband.

We conclude that the record contains substantial evidence regarding the pain and suffering caused by Skinner's accident as well as the persistent limitations on her activities resulting from her injuries. Therefore, given our standard of review on this issue and the record we have before us, we conclude that the District's assignment of error regarding damages is without merit.

6. Motion to Compel

The District assigns as error the trial court's denial of its motion to compel. After the trial court decided on summary judgment that the Nebraska Workers' Compensation Act does not apply to this case, the District filed a motion to compel, the object of which was to compel Skinner to answer requests for admissions, interrogatories, and requests for production concerning the workers' compensation issue. The District argues that the trial court should have granted its motion and allowed discovery of matters related to the workers' compensation issue. In light of our holding regarding the applicability of the Nebraska Workers' Compensation Act, it is not necessary to address this assignment of error.

VI. CONCLUSION

We conclude that Skinner's injuries did not arise in the course of her employment by the District, and therefore, the provisions of the Nebraska Workers' Compensation Act do not bar her from bringing this tort action against the District. We further conclude that the trial court properly found Skinner to be an invitee. The remaining assignments of error by the District are without merit.

Affirmed.

Stephan, J., concurring.

I am in full agreement with the majority opinion, but I write separately to address the issue raised by the dissent. While it may seem incongruous to hold that Skinner, an employee of the District, is not subject to the Nebraska Workers' Compensation Act even though her presence on school property at the time of her injury was at least in part for the benefit of the school, thus giving her the status of an invitee, I am satisfied that this is a

correct application of established legal principles to the unique facts of this case.

Under the Nebraska Workers' Compensation Act, a compensable injury is one "arising out of and in the course of" employment. Neb. Rev. Stat. § 48-101 (Reissue 1998); *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000); *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). The "arising out of" employment requirement is primarily concerned with causation of an injury. *Id.* The "in the course of" requirement, the requirement at issue in this case, tests the " 'work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, *and* in the course of an activity whose purpose is related to the employment.' " (Emphasis supplied.) *Id.* at 682, 545 N.W.2d at 85, quoting *Moore v. The Sisk Co.*, 216 Neb. 451, 343 N.W.2d 767 (1984). As the dissent notes, an injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 12.00 (2001).

At the time of her injury, Skinner was assisting another school employee, her husband, with an activity directly related to his job duties. As the majority notes, her activities were therefore of some benefit to the District, and the trial court's finding that she occupied the status of an invitee is not clearly erroneous. The dissent argues, however, that this invitee status precludes Skinner from falling outside the provisions of the Nebraska Workers' Compensation Act. Specifically, the dissent contends that Skinner's actions occurred in the course of her employment because teachers routinely help other teachers and the activity Skinner was assisting was not a matter entirely personal to her husband.

I agree that the return of the band property was not a matter personal to Skinner's husband. It is precisely because she was

assisting him in the performance of a task related to his job duties that her actions were of benefit to the District so as to confer upon her the status of an invitee. However, the fact that Skinner's actions benefited the District does not automatically lead to the conclusion that her injury occurred "in the course of" her employment. When asked in her deposition about her practice of assisting other teachers, Skinner testified as follows:

> Q Okay. Teachers are usually fairly close-knit and help one another on a regular basis; is that right?
>
> A I don't think I could answer that.
>
> Q Well, the teachers you know?
>
> A Not all of them.
>
> Q How about you? Do you feel that you go out of your way to help other teachers?
>
> A Yes, I do.
>
> Q Okay. And that's what you were doing on July 16, 1996?
>
> A I was helping my husband.
>
> Q Okay. Who was a teacher — a fellow teacher?
>
> A Who taught at the high school building, yes.
>
> Q Okay. You would help him the same way you would have helped any other teacher; is that correct?
>
> A Not at that time of day on July 16th, no.
>
> Q You've never turned down another teacher during your 30 years, though, have you?
>
> A Not if I was at the building prior to. I wouldn't go there specifically to help them do that.

The evidence in this case thus establishes that it was not incidental to Skinner's employment to assist other teachers at times when Skinner was not present at the school building in conjunction with her own duties. Furthermore, the record establishes that Skinner came to the school building on the evening of her injury solely for the personal reason of expediting preparations for a family vacation. Thus, although I recognize that the job duties of teachers do not fit neatly within precise boundaries, the evidence in this case clearly demonstrates that Skinner's actions in assisting her husband were not incidental to her employment and were so removed from the time and space boundaries of that employment so as to not occur "in the course of" her employment. Compare *Cox v.*

Fagen Inc., 249 Neb. 677, 545 N.W.2d 80 (1996) (determining employee's injury sustained while putting on coveralls *during work hours* occurred in course of employment).

In summary, because Skinner's activities in the school building immediately prior to her injury were of some benefit to the District as the owner of the premises, she occupied the status of an invitee under the law then in effect. However, because the evidence presented reveals that Skinner's injury occurred at a time when she was acting in a purely personal capacity, the injury did not occur "in the course of" her employment.

WRIGHT, J., dissenting.

C. Patricia Skinner sued Ogallala Public School District No. 1 (District) for injuries sustained when she fell through an open trapdoor into a 4-foot-deep tunnel. The accident occurred between 7:30 and 8 p.m. on July 16, 1996, when Skinner, a teacher for the District, was helping her husband, the District's band director, return some equipment her husband had borrowed.

The trial court found as a matter of law that Skinner's injury did not occur in the course and scope of her employment. This court has affirmed the judgment of the trial court. I respectfully dissent.

An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 12.00 (2001). Skinner was at the school for the purpose of helping her husband, who was there on school business. Skinner, by helping her husband, was doing something incidental to her employment, as teachers routinely help other teachers.

An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. 2 Larson & Larson, *supra*, § 20.00. An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment. *Id.*, § 27.00.

If an employee's activity aids a coemployee in a matter entirely personal to the coemployee, then it is outside the course of employment, unless the deviation is insubstantial. See *id.*, § 27.01[5]. The activity undertaken by Skinner's husband was not a matter entirely personal to him. He was at the school to return school property. Therefore, Skinner's activity in helping her husband was not outside the course of her employment. Skinner was in the process of helping a coworker perform work for the District, and the work was done in a good faith attempt to assist a coworker with the implied authorization of the District. See *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983).

Whether Skinner was an invitee or a licensee is a question of fact. See *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996). The trial court found that Skinner was an invitee. An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. See *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000). If the invitation relates to the business of the one who gives it, or is given for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee. See *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). An invitation to a business visitor need not be express, as an invitation is inferred where there is a common interest or mutual advantage. See *id*. An "invitation," as a layperson might use the term in ordinary affairs of life, is not required for one to be an invitee as the term is used in law. See *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962).

In my opinion, Skinner cannot be an invitee and also be excluded from the provisions of the Nebraska Workers' Compensation Act. When the trial court determined that Skinner was an invitee, it had to conclude that Skinner was on the premises for the mutual benefit of Skinner and the District. In fact, the majority concludes that the record supports the trial court's finding that Skinner's visit to the school was to the mutual advantage of Skinner and the District.

Skinner, as an employee of the District, was injured in the course and scope of her employment with the District. The

purpose of her visit to the school was to return school property, which was a part of her husband's duties as the District's band director, and the return of the property was in furtherance of the interests of the District. Since Skinner was assisting her husband in this endeavor, I would conclude that she was in fact covered under the Nebraska Workers' Compensation Act and that the act is her exclusive remedy.

On the other hand, a licensee is on the premises of another for the licensee's own interest or gratification. Such person is exercising the privilege solely for that person's own convenience and benefit and does not stand in any contractual relation with the owner of the premises. See *Malolepszy v. Central Market*, 143 Neb. 356, 9 N.W.2d 474 (1943). Skinner was not found to be a licensee.

I would reverse the judgment of the district court and remand the cause with directions to dismiss.

CONNOLLY, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
STEVEN REDMOND, APPELLANT.

631 N.W. 2d 501

Filed August 10, 2001. No. S-99-1456.

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. **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 of the court below.
3. **Judgments: Constitutional Law: Criminal Law.** The U.S. Constitution does not require that retroactive judicial decisions be analyzed with reference to the Ex Post Facto Clause.
4. **Judgments: Statutes: Due Process.** A judicial decision interpreting a statute may be applied retroactively unless the decision denies due process by being both unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.
5. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.

6. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there, nor read anything direct and plain out of a statute.
7. **Statutes: Homicide: Intent.** The interpretation of Neb. Rev. Stat. § 28-304 (Reissue 1995) in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), may be applied retroactively to a criminal act that occurred before *Burlison* was decided.

Appeal from the District Court for Kimball County: RANDALL L. LIPPSTREU, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

CONNOLLY, J.

Following the fatal shooting of Mark B. Clinton—a maintenance worker at the Kimball County Courthouse—Steven Redmond was charged with first degree murder. The killing took place before our decision in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), which held that malice was not an essential element of second degree murder and which overruled previous cases that held otherwise. While Redmond's case was pending, *Burlison* was decided. Following a bench trial, the district court made a factual finding that the State had failed to prove premeditated malice. The district court then found Redmond guilty of second degree murder. In reaching its determination, the district court discussed the effect of *Burlison* on its decision and determined that *Burlison* applied to the case.

On appeal, Redmond argues that the retroactive application of *Burlison* denied him due process under the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, § 3, because the State failed to prove malice beyond a reasonable doubt. Thus, if *Burlison* had not been retroactively applied to his case, under the law before *Burlison*, Redmond would have been convicted of manslaughter instead of second degree murder. We determine that Redmond was not denied due process, and we affirm.

ASSIGNMENTS OF ERROR

Redmond assigns that the district court erred in (1) failing to include malice as an element of second degree murder when the offense occurred before *State v. Burlison, supra*, was decided and (2) finding there was sufficient evidence to convict him of second degree murder and use of a deadly weapon to commit a felony.

BACKGROUND

On August 21, 1998, an information was filed charging Redmond with count I, murder in the first degree under Neb. Rev. Stat. § 28-303(1) (Reissue 1995), and count II, using a deadly weapon to commit a felony pursuant to Neb. Rev. Stat. § 28-1205 (Reissue 1995). Under count I, the information stated that "STEVEN REDMOND, on or about the 5th day of August A.D. 1998, in the County of Kimball and State of Nebraska, then and there being, did kill another person, to-wit: Mark B. Clinton, purposely and with deliberate and premeditated malice." Under count II, the information stated that

> STEVEN REDMOND, on or about the 5th day of August A.D. 19998 [sic], in the County of Kimball and State of Nebraska, then and there being, did use a firearm, to commit a felony which may be prosecuted in a court of this state, to-wit: Murder in the First Degree, a Class I or IA Felony.

At trial, a Kimball police officer, Phillip L. Short, testified that at about 1:10 a.m. on August 5, 1998, an intoxicated Redmond was involved in an altercation with a bartender at a local bar. When the police arrived, Redmond began yelling that he wanted the Federal Bureau of Investigation (FBI) to be called and that the police in Kimball were selling drugs. As a result, Redmond was arrested and taken to the Kimball County Courthouse where the sheriff's office was located. While at the courthouse, Redmond requested an ambulance due to an injury to his face and past medical problems. An ambulance was called, and Redmond was taken to the hospital.

Short testified that Redmond had been behaving in a belligerent manner both before and during his arrest. While at the hospital, Redmond again became belligerent, started yelling at hospital personnel, and demanded to see Short's supervisor. The

chief of police, Billie L. Shank, was then called. Shank testified that when he arrived at the hospital, Redmond was acting irrationally. Due to previous medical problems Redmond had experienced and the fact that most of the charges against him would be misdemeanors, the police released Redmond to the care of his father instead of placing him in jail.

Amanda Colburn Stewart, the dispatcher on duty at the sheriff's office, testified that at approximately 3 a.m., Redmond called the sheriff's office and asked for the telephone number for the FBI. Stewart testified that at approximately 5:30 a.m., a motion sensor alerted her that a person was in the lobby of the building. Through a television monitor connected to a surveillance camera, Stewart saw a man, later identified as Redmond, standing in the doorway. Stewart placed a call to the telephone in the lobby. The telephone rang three times, and then Stewart saw the door open and Clinton emerge from inside the courthouse, so she hung up the telephone.

Stewart testified that Clinton and Redmond had a short conversation and that Clinton then grabbed Redmond's jacket and pushed him up against the wall. For a period of time, Clinton and Redmond were then partially in the "blackout area," an area of the lobby that could not be seen from the surveillance system. Stewart next observed Redmond's arms come up and saw that he had what she thought resembled a cane in his right hand. Stewart testified that Clinton then turned to his left and reached for the door with his right arm. Stewart stated that Clinton was not facing Redmond and had already turned toward the door. Stewart then realized that Redmond had a rifle instead of a cane. Stewart looked away from the monitor in order to call Short and, during that time, heard two gunshots. Stewart looked up at the monitor and could not see Clinton. Stewart observed Redmond fire a gun at the door and later observed him reach in through the glass, open the door, and go into the courthouse from the lobby. Stewart heard some shots fired inside the courthouse. Stewart then called for additional help, and Shank used the fire escape to reach the sheriff's office. Watching the monitor, Stewart and Shank then saw Redmond emerge in view of the camera. Stewart was unable to observe much more, and Redmond went out on the front porch and beyond the view of the cameras.

After Redmond went outside, he fired more shots, including shooting at a parked police cruiser. Redmond eventually surrendered to a deputy sheriff. Clinton's body was found in the lobby area, lying against the door. Authorities seized a rifle and a handgun from Redmond. It was later determined that a bullet from the handgun was the cause of Clinton's death. Autopsy photographs show a bullet wound in the bottom left of Clinton's right shoulder blade.

Following trial, the court found Redmond guilty on count I of second degree murder and guilty on count II of using a deadly weapon to commit a felony. In reaching this determination, the court determined that the State had not met its burden of proving premeditated malice beyond a reasonable doubt. Thus, the court found that the State had failed to prove that Redmond was guilty of first degree murder. The court then found Redmond guilty of second degree murder based on the factual finding that he intentionally shot Clinton but without premeditation. In reaching this determination, the court relied on Stewart's testimony and made a finding of fact that Clinton had been shot in the back, indicating that the shooting did not occur as part of the struggle between Redmond and Clinton. The court also reasoned that Redmond's intent was shown because, following the shooting, he fired more shots and entered the courthouse instead of tending to Clinton's wounds.

The district court then specifically addressed *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), stating the following:

> There was talk this morning about State versus Burlison and I had dug that case out some time ago myself. It's my opinion what that case has done is not changed the law as the statute still reads the same as it did before. State versus Burlison just said that the Supreme Court has changed its mind about how it was going to interpret the statute and did not say that from this point forward it will be interpreted implied, rather it reversed all of its prior opinions that had misread or misinterpreted as the court now feels the second degree murder statute reads.
>
> That being the case, the State has proved beyond a reasonable doubt that the defendant has committed an unlawful killing . . . .

Redmond was sentenced on count I for a period of 40 to 60 years' imprisonment and on count II to a period of 4 to 6 years' imprisonment, with the sentences to run consecutively. Redmond appealed. During the course of this appeal, the U.S. Supreme Court decided *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), a case involving the retroactive application of a judicial decision. Redmond filed a motion seeking to allow the parties to file supplemental briefs to address the effect of *Rogers* on this case. We granted Redmond's motion.

STANDARD OF REVIEW

[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. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[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 of the court below. *State v. Sanchez-Lahora*, 261 Neb. 192, 622 N.W.2d 612 (2001); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

ANALYSIS

Retroactive Application of *State v. Burlison*

Because Redmond killed Clinton before *State v. Burlison, supra*, was decided, he contends that *Burlison* cannot be applied to his case. Redmond argues that a retroactive application of *Burlison* to his case violates due process because the State failed to prove malice beyond a reasonable doubt at trial. Thus, if *Burlison* had not been retroactively applied to his case, under the law before *Burlison*, Redmond would have been convicted of manslaughter instead of second degree murder.

Since 1978, Neb. Rev. Stat. § 28-304 (Reissue 1995) has provided in part: "(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Before 1977, the second degree murder statute defined such a killing as one done "purposely and maliciously."

Neb. Rev. Stat. § 28-402 (Reissue 1975). Despite the statutory change in the definition of second degree murder, this court continued to include malice as a necessary element of second degree murder until 1998. See, e.g., *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); and *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996). These decisions, however, were not without disagreement. See, e.g., *State v. Ryan, supra* (Gerrard, J., dissenting; Connolly, J., dissenting; Wright, J., dissenting). In 1998, we overruled those cases which held that malice was a necessary element of second degree murder. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

In *State v. Burlison, supra*, the appellant sought postconviction relief on the basis that he pled guilty to second degree murder when the operative information failed to include the element of malice. We determined that malice is not a necessary element of second degree murder under § 28-304 and overruled those cases which held otherwise. In reaching the determination that malice is not a necessary element of second degree murder, we emphasized that under the plain and ordinary meaning of § 28-304, malice was not included as an element of the crime and had been removed from the statutory definition in 1977. See 1977 Neb. Laws, L.B. 38 (operative July 1, 1978). We further noted that there are no common-law crimes in Nebraska, and we then concluded that our prior decisions interpreting § 28-304 were clearly erroneous.

We did not apply our holding in *Burlison* in a solely prospective manner. Instead, we applied the holding of the case to the appellant and affirmed his conviction. We have also directed that the law as established in *Burlison* be applied to a crime that occurred before *Burlison* was decided. See *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999). But, Redmond contends that because a retroactive application of *Burlison* makes the killing of Clinton a greater crime than it was when committed, a retroactive application of *Burlison* denies him due process under *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), and the recent case of *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).

In *Bouie v. City of Columbia, supra*, the petitioners were sit-in demonstrators who refused to leave the premises after they were requested to do so. The petitioners were convicted under a criminal trespass statute providing that " '[e]very entry upon the lands of another . . . after notice . . . prohibiting such entry, shall be a misdemeanor . . . .' " 378 U.S. at 349 n.1. In affirming the convictions, the South Carolina Supreme Court construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises after receiving notice to leave. The U.S. Supreme court reversed, and stated:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates a crime*, or makes it *greater* than it was, when committed." . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. . . . If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect.

(Emphasis in original.) 378 U.S. at 353-54. The Court emphasized that the issue was whether the construction gave the petitioners fair warning that their conduct was a crime. The Court noted that the decision of the South Carolina Supreme Court had "not even the slightest support in prior South Carolina decisions," was inconsistent with the law in other states, and was inconsistent with the plain meaning of the criminal statute. 378 U.S. at 356. So, the Court reversed, finding that the petitioners' due process rights had been violated.

The U.S. Supreme Court clarified the holding of *Bouie* in *Rogers v. Tennessee, supra*. In *Rogers*, the petitioner was convicted under Tennessee's criminal homicide statute. Under the

common law of Tennessee, a "year and a day rule" provided that no defendant could be convicted of murder unless his or her victim had died by the defendant's act within a year and a day of that act. 532 U.S. at 453. The criminal homicide statute made no mention of the year-and-a-day rule. The petitioner appealed and contended that the year-and-a-day rule applied to his case. The Tennessee Supreme Court examined the year-and-a-day rule, determined that the original reasons for the rule no longer existed, and abolished it. *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The court then held that retroactive application of its decision abolishing the year-and-a-day rule did not violate due process. *Id.*

On appeal to the U.S. Supreme Court, the petitioner relied on *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), and argued that the Due Process and Ex Post Facto Clauses prohibited retroactive application of the judicial abolishment of the year-and-a-day rule. The Court disagreed with this contention and stated that to the extent the petitioner argued that the Due Process Clause incorporates the specific prohibitions of the Ex Post Facto Clause, he misread *Bouie*. The Court recognized that *Bouie* contained "some expansive language" that was suggestive of the broad interpretation for which the petitioner argued. *Rogers v. Tennessee*, 532 U.S. 451, 458, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). The Court then determined that language in *Bouie* stating that the Due Process Clause operated in the same manner as the Ex Post Facto Clause was dicta. The Court stressed that retroactive judicial decision-making is not analyzed by reference to the Ex Post Facto Clause, but is instead analyzed in accordance with the more basic and general principle of fair warning under the Due Process Clause. The Court then stated: "*Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.' " 532 U.S. at 461.

When examining the facts of the petitioner's case, the Court determined that the Tennessee Supreme Court's abolition of the year-and-a-day rule was not unexpected and indefensible. The Court noted that a majority of states had abolished the rule and that the rule had only a "tenuous foothold as part of the criminal

law of the State of Tennessee." 532 U.S. at 464. The rule had never served as a ground of decision in any prosecution for murder in the State and had only been mentioned in dicta in Tennessee cases.

[3,4] Under *Rogers*, the U.S. Constitution does not require that retroactive judicial decisions be analyzed with reference to the Ex Post Facto Clause. Instead, a judicial decision interpreting a statute may be applied retroactively unless the decision denies due process by being both unexpected *and* indefensible by reference to the law which had been expressed prior to the conduct in issue.

In this case, the change of law in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), cannot be said to be indefensible. Indefensible is defined as "incapable of being maintained as right or valid" or "incapable of being justified or excused." Webster's Third New International Dictionary, Unabridged 1147 (1993). Thus, in a case such as *Bouie*, where a court interprets a statute in a surprising manner that has little in the way of legal support, the interpretation could not be applied retroactively. Our decision in *Burlison* was not such a case.

[5,6] The basis of the *Burlison* decision was the plain language of § 28-304. We recognized in *Burlison* that it was improper to read the element of malice into that statute. In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so. *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). See *State v. Burlison, supra*. It is not within the province of the courts to read a meaning into a statute that is not there, nor read anything direct and plain out of a statute. *State v. Burlison, supra*; *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Thus, as we stated in *Burlison*, our prior decisions interpreting § 28-304 to include malice as a necessary element of the crime of second degree murder were clearly erroneous. Our decision in *Burlison* was in no manner indefensible.

Furthermore, our decision in *Burlison* was not entirely unexpected. Although *Burlison* overruled a line of cases, the prior cases were not without obvious disagreement. Further, this court's interpretation of § 28-304 before *Burlison* was in direct

contradiction to the plain meaning of the statute. But regardless of whether the *Burlison* decision was or was not unexpected, it certainly was not indefensible. Thus, under the test set out in *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), a retroactive application of *Burlison* does not violate due process.

[7] Redmond contends that we should continue to apply ex post facto principles to retroactive judicial interpretations of a statute. In particular, Redmond asks that we do this under the Nebraska Constitution. We decline to do so. We hold that our interpretation of § 28-304 in *Burlison* may be applied retroactively to a criminal act that occurred before *Burlison* was decided.

Sufficiency of Evidence for Second Degree Murder

Redmond contends that the evidence was insufficient to convict him of second degree murder because there was no evidence that he intentionally shot Clinton. In particular, Redmond argues that the location of the bullet wound in Clinton's right shoulder blade is consistent with the theory that Clinton was shot as he was throwing a punch at Redmond and when Redmond was holding the handgun in his left hand.

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. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

As a factual finding, the district court concluded that Clinton was shot in the back, indicating that the shooting did not occur as part of the struggle between Redmond and Clinton. The district court also found that Redmond's intent was evidenced by the fact that following the shooting, he fired more shots and entered the courthouse, instead of tending to Clinton's wounds. We further note that the bullet wound is located on the bottom left of the right shoulder blade. Thus, the wound is closer to the center of the back than it is to the right side. Further, the evidence at trial did not clearly establish that Redmond held the weapon in his left hand. Under these circumstances, a rational trier of fact could have found the element of intent beyond a

reasonable doubt. We determine that the evidence was sufficient to convict Redmond of second degree murder.

Sufficiency of Evidence for Use of Weapon to Commit Felony

Redmond next argues that the evidence was insufficient to convict him of use of a weapon to commit a felony when he was convicted of second degree murder but was charged with first degree murder.

The information stated that Redmond "did use a firearm, to commit a felony which may be prosecuted in a court of this state, to-wit: Murder in the First Degree." We read the reference to first degree murder to be an example of a felony upon which the use of a weapon charge might be based, and not as the exclusive felony providing the basis for the charge. The information charged Redmond with use of a weapon to commit a felony. Redmond was indeed convicted of a felony. We determine that this assignment of error is without merit.

CONCLUSION

We conclude that our interpretation of § 28-304 in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), may be applied retroactively to a criminal act that occurred before *Burlison* was decided. We further conclude that there was sufficient evidence to convict Redmond of second degree murder and use of a weapon to commit a felony. Accordingly, we affirm.

Affirmed.

Wright, J., concurring.

Redmond assigns as error that the district court erred in failing to include malice as an element of second degree murder and in finding there was sufficient evidence to convict him of second degree murder. Neither assignment of error has any merit.

Redmond was charged with first degree murder and was convicted by the district court of second degree murder. The district court found that Redmond shot Clinton intentionally but without premeditation. Redmond could not have been convicted of manslaughter because the killing was intentional. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

It makes no difference whether *State v. Burlison, supra*, is retroactively applied. For purposes of Redmond's argument, even if malice were an element of second degree murder, the State has proved malice beyond a reasonable doubt. Malice is defined as the intentional doing of an unlawful act without just cause or excuse. See, *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996) (Wright, J., dissenting), *overruled on other grounds, State v. Burlison, supra*; *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison, supra*. The unlawful act was the killing of Clinton. Because the district court found that Redmond killed Clinton intentionally but without premeditation, the only crime for which Redmond could have been convicted was second degree murder. The evidence was sufficient to support this conviction.

STATE OF NEBRASKA, APPELLEE, V.
WILMA L. CASTOR, APPELLANT.

632 N.W. 2d 298

Filed August 10, 2001. Nos. S-00-541, S-00-563.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. 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.
2. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
5. **Rules of Evidence: Hearsay.** Hearsay is not admissible except as provided by the rules of evidence.

6. **Rules of Evidence: Hearsay: Notice.** Neb. Rev. Stat. § 27-803(23) (Reissue 1995) provides that the hearsay rule does not exclude a statement not specifically covered by any of the exceptions listed in § 27-803 but having equivalent circumstantial guarantees of trustworthiness if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.
7. **Rules of Evidence: Hearsay.** In determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.
8. **Rules of Evidence: Hearsay: Notice: Intent.** It is not enough that the adverse party is aware of the unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his or her intentions to use the statement in order to take advantage of the hearsay exception in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995).
9. ____: ____: ____: ____. The giving of notice to the adverse party of the proponent's intentions to use a statement in order to take advantage of the hearsay exception is one of the requirements necessary to make such evidence admissible.
10. ____: ____: ____: ____. The notice provision in Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995) is mandatory.
11. ____: ____: ____: ____. It is error to overrule an objection to the introduction of evidence under the residual exception where the proponent of the evidence has not given notice to the adverse party.
12. **Forgery.** Neb. Rev. Stat. § 28-603(1) (Reissue 1995) provides that whoever, with intent to deceive or harm, falsely makes, completes, endorses, alters, or utters any written instrument which is or purports to be, or which is calculated to become or to represent if completed, a written instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status, commits forgery in the second degree.
13. **Convictions: Forgery: Proof.** To sustain a conviction for forgery, it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his or her authority.
14. **Criminal Law: Banks and Banking: Fraud.** Neb. Rev. Stat. § 28-620 (Reissue 1995) provides that a person commits the offense of unauthorized use of a financial transaction device if such person uses such device in an automated banking device, to imprint a sales form, or in any other manner when for any reason his or her use of the financial transaction device is unauthorized either by the issuer or by the account holder.
15. **Homicide.** Neb. Rev. Stat. § 28-303 (Reissue 1995) provides that a person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice.

Appeals from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

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

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Thomas E. Brown (Brown) was found dead outside Kearney, Nebraska, on December 10, 1996. His ex-wife, Wilma L. Castor, was arrested and charged with one count of first degree murder, one count of use of a weapon to commit a felony, three counts of forgery, one count of being a felon in possession of a firearm, and one count of unauthorized use of a financial transaction device in connection with the events surrounding Brown's death. Castor was separately charged with another count of forgery. The cases were consolidated for trial. Castor was convicted on all charges. Her convictions on all but the felon-in-possession charge were reversed in *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). Castor was then retried on all but the felon-in-possession charge and was convicted on all remaining counts. In these consolidated cases, Castor now appeals these convictions. We affirm.

BACKGROUND

Castor and Brown were married in 1967 and divorced in 1975. They had two sons, Tom Brown, Jr. (Tom, Jr.), and Edward Brown (Eddy). In July 1996, Castor came to live with Brown in Kearney because Castor needed money and Brown offered to pay her living expenses. Castor slept in a second-floor bedroom, and Brown usually slept on a sofa in the living room. Eddy, though he lived in Oregon with his girl friend, stayed at Brown's home for extended periods of time during 1996. Also living at the Brown residence until October 1996 was Todd Guider, Brown's stepson.

On October 9, 1996, Castor reported a burglary at the Brown home. The police officer investigating the burglary testified that he found 12-by-12-inch holes had been cut in the window screens in Castor's and Guider's bedrooms. Castor reported that she was missing her .22-caliber Ruger revolver and some change. No one was ever arrested for the burglary, and the investigation ended that same day.

Brown, who had worked for a railroad for approximately 28 years, took some time off during the week of Thanksgiving 1996. According to Castor and Eddy, they and Brown had Thanksgiving dinner together on November 28, 1996. While no one else claims to have seen Brown alive after Thanksgiving Day, Castor and Eddy maintain that they went shopping with him the next morning. Brown's Visa check card was used to make purchases at three stores in Kearney on Friday, November 29. Castor claims that Brown was present and authorized all the transactions. That same morning, Castor and Eddy deposited two $2,000 checks, dated November 27, 1996, and drawn on Brown's account, into their joint checking account and withdrew $300 cash. Castor claims that she wrote these checks as gifts at Brown's direction.

Castor and Eddy maintain that upon arriving back at the house, Brown walked out to the street and got into a brown and/or primer-colored pickup truck, saying he was going to work on another truck. Castor and Eddy claim that they did not see Brown alive again.

Castor went to work that evening, but got off early at about 11:50. She had been planning to move to Reno, Nevada, on December 6, 1996, but at some point, changed her plans and decided to go with Eddy to Oregon on November 30. After getting off work, Castor made several trips to a storage facility until about 2:30 or 3 a.m. She had paid for this facility with a check written on Brown's account, to which she had signed Brown's name. Castor and Eddy then drove to Grand Island, ostensibly to pay some insufficient funds checks before leaving for Oregon. The two stayed a few hours in a motel and then drove back to Kearney. They then loaded up their cars and left around noon, driving to North Platte, where they spent the night. They eventually arrived in Oregon on December 2.

Brown remained missing, but on December 10, 1996, he was found dead at the bottom of a roadside ditch in rural Buffalo County, northwest of Kearney. Brown had been shot twice in the chest and once in the neck. His body was dressed in a yellow shirt, sweatpants with jeans over them, and gray socks. He was lying on his back with his feet extended up toward the road. His head was lower than his legs because of the slope of the ditch. Brown's shirt was pulled up and twisted, causing his stomach to be exposed, and his jeans and sweatpants were pulled down to his thighs. There were no shoes or coat on the body. The police found Brown's glasses and several small spots of blood near the edge of the ditch.

After the discovery of Brown's body, officers from the Kearney Police Department and the Buffalo County Sheriff's Department conducted various searches of Brown's residence. They never found a certain blanket Brown always used when he slept on the sofa. They found no significant blood at Brown's residence.

A jury trial was held, and Castor was convicted on all counts, but this court reversed the judgment on all but the felon-in-possession charge and remanded the cause for a new trial because certain exculpatory evidence had been withheld from Castor. See *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). At the second trial, the State contended that Castor became angry that Brown had "cut her off" from getting his money and killed him on November 28, 1996, by shooting him three times while he was sleeping on the blanket on the sofa in his home. The State maintained that later, with Eddy's help, Castor hid Brown's body in the basement of the house until she and Eddy could dispose of it the following night. The State argued that Castor bought and installed a hinge hasp on the basement door on Friday, November 29, to prevent any visitors from going downstairs and finding Brown's body. The State contended that Castor used Brown's check card to make purchases on Friday and forged the two $2,000 checks drawn on Brown's account. The State also argued that Castor uncharacteristically volunteered to pay half of the motel bill of Todd Michalski, Brown's nephew, who had come to Kearney at Brown's invitation, in order to prevent him from going to Brown's house and discovering Brown's body. The State maintained that sometime

after Castor left work on November 29, she and Eddy took Brown's body out into the country, disposed of it in a ditch, and then prepared for their trip to Oregon.

The defense sought to contradict the State's theory with the testimony of Bruce Petersen and his son Josh Petersen, both of whom live on a farm near where Brown's body was found. They both testified that on either November 29 or 30, 1996, they heard three shots fired at dusk. The State rebutted their testimony with the testimony of Douglas Whicker, an acoustical consultant, who had performed an experiment to determine how far away a shot fired from the scene where Brown's body was found could have been heard on November 29 or 30. He concluded that based on his observations as well as the topography of the area and the weather on those nights, the maximum distance from which the shots could have been heard would have been 25,000 feet. The distance from the location of the body and the farmhouse is 26,000 feet. Thus, Whicker concluded that any shots fired from the location where the body was found could not have been heard at the Petersens' home.

Castor was again convicted on all counts, and from these convictions, she now appeals.

ASSIGNMENTS OF ERROR

Castor assigns two errors: (1) The trial court erroneously refused to allow the testimony of Mark Downey, who was in jail at the same time as Eddy, to be received on a substantive basis and incorrectly limited its admission to its impeachment value, in contravention of Neb. Rev. Stat. § 27-803(23) (Cum. Supp. 2000); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); the 6th and 14th Amendments to the U.S. Constitution; and Neb. Const. art. I, §§ 3 and 11, and (2) there is insufficient evidence to support each of the seven convictions.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. 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. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[2] A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001).

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

[4] Circumstantial evidence is not inherently less probative than direct evidence. *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

ANALYSIS

Downey's Testimony

Castor first argues that Downey's testimony should have been admitted in evidence for its truth, not merely for its impeachment value. Downey testified when called by the defense that Eddy told him while they were in jail together that he (Eddy) had shot Brown. The State, in rebuttal, called Officer Mike Young, who had interviewed Downey. Young testified that Downey had first said Eddy admitted to shooting Brown, but later, Downey changed his story and said that Eddy told Downey he did not shoot Brown but knew who did. Castor argues that this testimony was trustworthy and thus should have been admitted under § 27-803(23) despite the fact that Castor did not notify the State until after trial had begun that she was going to use this testimony. Castor urges this court to change its "unbending" adherence to the notice requirement under § 27-803(23) and argues for a more flexible approach. Brief for appellant at 18. Castor also claims that the State was not prejudiced by the lack of notice.

[5-7] Eddy's alleged confession in this case is clearly hearsay. See Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Hearsay is not admissible except as provided by the rules of evidence. See Neb. Rev. Stat. § 27-802 (Reissue 1995). Section 27-803(23) provides that the hearsay rule does not exclude:

> A statement not specifically covered by any of the . . . exceptions [listed in § 27-803] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.

Thus, in determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996) (analyzing Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995), which is identical to § 27-803(23) except that it requires declarant to be unavailable); *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993) (same).

We need address only the notice requirement issue here, as our decision on that issue is dispositive. As quoted above, § 27-803(23) requires that in order for a statement to be admitted under the residual exception, the statement's proponent must notify the adverse party of his or her intent to offer the statement, as well as the particulars of the statement, sufficiently in advance of trial to provide the adverse party with a fair opportunity to prepare to meet it. Castor notified the State on February 3, 2000, that

she intended to use Downey's testimony. However, the trial in this case actually began on February 1, so the notice Castor provided was during the trial, not "in advance of the trial" as the rule requires. The plain language of the statute states that notice must be given in advance of the trial, not during trial.

[8-11] Castor, however, argues that the State was not prejudiced because it knew of Eddy's statements to Downey and thus had sufficient notice of their possible use. We have previously rejected this argument in the context of § 27-804(2)(e), which is an identical residual exception applicable when the declarant is unavailable. In *State v. Boppre*, 234 Neb. 922, 952, 453 N.W.2d 406, 428 (1990), we stated that under § 27-804(2)(e):

> [I]t is not enough that the adverse party is aware of the unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his intentions to use the statement in order to take advantage of the hearsay exception in § 27-804(2)(e). Because [defendant] did not provide the necessary notice, he cannot take advantage of the exception.

Likewise, in *State v. Leisy*, 207 Neb. 118, 129, 295 N.W.2d 715, 723 (1980), we stated that "[t]he giving of such notice is one of the requirements necessary to make such evidence admissible" and held that the notice provision in § 27-804(2)(e) is mandatory. We find no principled ground for deciding differently under § 27-803(23). Indeed, we have previously found it to be error to overrule an objection to the introduction of evidence under this exception where the proponent of the evidence has not given notice to the adverse party. See *State v. Reed*, 201 Neb. 800, 272 N.W.2d 759 (1978).

Thus, based on the language of the statute and the prior decisions by this court, we conclude that Downey's testimony was properly excluded as substantive evidence because Castor failed to give the State notice before trial of her intent to use the testimony.

Castor argues, however, that under *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), failure to allow Downey's testimony for its truth violates her due process rights. In *Chambers*, the defendant sought to prove that a third party committed the murder for which the defendant was

charged. *Id.* Under Mississippi's "voucher" rule, the defendant was precluded from cross-examining the third party because the defendant himself had called the third party as a witness. *Id.* In addition, the defendant was precluded from calling witnesses to testify that the third party had confessed because the statements they would have relayed were hearsay. *Id.* The Court found that the combination of these circumstances denied the defendant a fair trial. *Id.*

In regard to the hearsay issue, the Court stated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." 410 U.S. at 302. The Court, reasoning that the hearsay rule may not be applied mechanistically to exclude evidence that bore persuasive assurances of trustworthiness and that was critical to the accused's defense, concluded that the exclusion of the third party's statements constituted a violation of "traditional and fundamental standards of due process." *Id.*

Given that the Court expressly stated that it was not announcing any new principles of constitutional law and that its holding was limited to the facts and circumstances of that case, there is some question whether *Chambers* mandates the admission of third-party confessions. We need not decide that question, however, because, in any event, the defendant here has not met the standards the Court used in *Chambers v. Mississippi, supra*. See *State v. West*, 437 So. 2d 256 (La. 1983).

In reaching its conclusion, the Court in *Chambers* stated, "In the exercise of this right [to present witnesses in one's defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." 410 U.S. at 302. Section 27-803(23) establishes that as a matter of procedure, the proponent of a statement must notify the adverse party of his or her intent to use the hearsay statement in advance of trial in order for the statement to be admitted under the residual exception. In this case, Castor did not notify the State in advance of trial. She therefore has not complied with the established rule of procedure and cannot now complain of the trial court's exclusion of the testimony as substantive evidence. See *Jackson v. State*, 284 Ark. 478, 683 S.W.2d 606 (1985) (affirming trial court's exclusion of evidence under

Chambers in part because defendant failed to follow established procedure for admitting evidence). The exclusion of the evidence here results from Castor's own failure to comply with a procedural rule, not from the "mechanistic" application of the rules of evidence. See *Chambers v. Mississippi, supra*. Because Castor is responsible for the inadmissibility of the evidence, it is difficult to understand how her due process rights could have been violated by the State. We conclude that the trial court did not abuse its discretion in admitting Downey's testimony only for its impeachment value.

Sufficiency of Evidence Regarding Financial Crimes

Castor next argues that the evidence is insufficient to support conviction of the fraud and unauthorized use of a financial transaction device charges. She claims that there is no direct evidence that she signed any check or debit card transaction slip without Brown's authority. She argues that Brown was generous and authorized the transactions in question.

The question, then, is whether the evidence, when viewed in the light most favorable to the State, supports convictions of the financial crimes discussed below. In reviewing this evidence, we must remember that circumstantial evidence is equally probative to direct evidence. *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

[12] Castor was charged with and convicted of four counts of forgery in the second degree in violation of Neb. Rev. Stat. § 28-603(1) (Reissue 1995), which provides:

> Whoever, with intent to deceive or harm, falsely makes, completes, endorses, alters, or utters any written instrument which is or purports to be, or which is calculated to become or to represent if completed, a written instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status, commits forgery in the second degree.

[13] To sustain a conviction for forgery, it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his or her authority. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). The forgery counts

involve two $2,000 checks, one made payable to Castor and one to Eddy; a check for $194.08 to Phillips 66; and a check for $140 to Self Store It, Inc.

[14] Castor was also charged with and convicted of one count of unauthorized use of a financial transaction device in violation of Neb. Rev. Stat. § 28-620 (Reissue 1995), which provides:

> (1) A person commits the offense of unauthorized use of a financial transaction device if such person uses such device in an automated banking device, to imprint a sales form, or in any other manner:
>
> . . .
>
> (d) When for any reason his or her use of the financial transaction device is unauthorized either by the issuer or by the account holder.

This count involves purchases made at Wal-Mart, Target, and K mart on November 29, 1996, with Brown's debit card, which purchases totaled $163.69.

The evidence shows that Castor indeed signed the checks and the sales slips. Castor admitted to having written the two $2,000 checks and having made the purchases at Wal-Mart. As to the check to Self Store It, Inc., Pam Zilly, a documents examiner for the Nebraska State Patrol Criminalistics Laboratory, testified she found that the check was filled out by Castor and that the signature was an attempted simulation of Brown's signature. As to the check to Phillips 66, Zilly found that the check was filled out by Castor and that the signature was an attempted simulation of Brown's signature, although Zilly could not identify the handwriting on the payee line. Finally, Zilly testified that the signatures on the sales slips from the November 29, 1996, transactions at Wal-Mart, Target, and K mart were attempts to simulate Brown's signature and were not his natural signatures. In addition, the police found a piece of paper containing Brown's actual signature at Brown's house, but with markings indicating that the signature had been traced a few times. A jury could conclude from this testimony that Castor indeed wrote all the checks and made the simulated signatures on the documents in question. Therefore, the issue in all the above-listed counts is whether Brown authorized Castor to engage in the transactions at issue.

The evidence, viewed in the light most favorable to the State, is sufficient to support the convictions. The jury found that Castor, either alone or with Eddy's assistance, murdered Brown on Thanksgiving Day, November 28, 1996. The financial transactions, however, occurred on November 29. If Brown was dead, it is a reasonable inference that he did not authorize the transactions in advance.

Moreover, Castor told Angela Lauby, a close friend and coworker of Castor's, that she hated Brown and that she was living with him because she wanted his money and because he was paying her living expenses. Lauby testified that one day in November 1996, Castor came to work furious because she had opened one of Brown's bank statements and discovered that Brown had a large amount of money in his account but that he would not give her any. She said she needed money to pay her bills, but Brown had "cut her off" from getting his money. Castor also told Lauby that Brown did not know about the existence of the Phillips 66 card.

Mary Sperry, a friend of Brown's, similarly testified that she had a conversation with Castor about a certain checking account Brown had. Castor told Sperry that she could not understand why Brown was so "tight" with his money when he had so much in his accounts. Sperry testified that on one occasion, Castor acted disgusted and said that she (Castor) did not think she should have to pay Brown back for money he loaned her for gas because he had so much money.

Sperry said that she (Sperry) had been a close friend of Brown's for years and that though he was largely illiterate, Brown knew how to write checks. She had never seen Brown allow anyone to write his checks for him, other than his wife, Diane, who died in 1993. Sperry testified that Brown was particular about his money and always said that he had worked hard for his money and that if other people wanted money, they could earn their own. She said Brown would loan people money if he trusted them, but he would not give them money outright. Sperry said it would have been out of character for Brown to have given Castor and Eddy $2,000 each.

An account analyst for Phillips 66 testified that an account was opened with her company in Brown's name on September

17, 1996, and that the billing address was promptly changed to Castor's post office box on September 30. On November 26, the account was past due, so she called Brown. Brown denied ever having opened the account and requested that the account analyst close it. He did not acknowledge having made any payments, despite the fact that a money order dated November 21, 1996, bearing his purported signature, had already been sent to Phillips 66. Later, a check, dated November 29 and written by Castor but bearing a simulation of Brown's signature, was sent to Phillips 66 to pay the remaining balance. The Phillips 66 card was found in Castor's car when it was searched in Nevada.

The evidence shows that Brown became aware of and was upset by Castor's activities. Brown's sister testified that when she called him on Tuesday, November 26, 1996, he seemed agitated. She got the impression that he had been fighting with Castor before the call. Castor made several statements describing Brown as "mad" on November 26 and "mad" or "still mad" on a number of other days during that week. A reasonable jury could infer that Brown was indeed mad that Castor had set up an account without his authorization.

We conclude that the evidence, taken in the light most favorable to the State, is such that a jury could find beyond a reasonable doubt that Brown did not authorize the transactions in question. We therefore affirm Castor's convictions on these counts.

Sufficiency of Evidence Regarding Murder

Castor finally argues that the evidence is insufficient to support her convictions for murder and use of a weapon to commit a felony. She contends that the evidence points to her son Eddy as the murderer. She argues that Eddy had no alibi for the early evening hours of Friday, November 29, 1996, when the Petersens heard the three shots near their farm.

As stated above, in reviewing a criminal conviction, an appellate court will affirm the conviction, absent prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[15] Neb. Rev. Stat. § 28-303 (Reissue 1995) provides: "A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ."

In discussing the sufficiency of the evidence, we will recount the evidence in the light most favorable to the State.

The State presented evidence that Castor falsely reported a burglary on October 9, 1996, in order to cover up her later use of her .22-caliber Ruger revolver in the murder of Brown. Castor told the police that she thought the burglar somehow gained entry to the house, then exited through a 12-by-12-inch hole the burglar cut in the window of a second-floor bedroom, and then reentered through a similar hole in a screen on Castor's bedroom window. Castor's bedroom had been ransacked, but it was the only room in the house that was in such condition.

The investigating officer said he suspected that the report was false because the only evidence of forced entry consisted in two small holes cut in the window screens in Castor's room and Guider's adjacent bedroom, both of which would have been too small for an adult to pass through. In addition, he also thought it suspicious that someone who was already inside the house would have gone outside the house in broad daylight to break into another room, as opposed to just breaking through the door to the room. There were also valuable items downstairs that were visible and yet were not taken, such as several "long guns," a couple of VCR's, and several televisions.

The State also presented evidence of Castor's possible motive for killing Brown. As stated above, Sperry, a friend of Brown's, testified that at some point in the weeks preceding Brown's murder, she had a conversation with Castor about Brown and his money in which Castor said she was angry with Brown because she knew Brown had a lot of money and was not generous with it.

Also as discussed above, Lauby testified that Castor told her in the weeks before Brown's murder that she (Castor) hated Brown. Castor told Lauby that she came to Kearney only because she needed money and that Brown was going to pay her living expenses. She told Lauby that she was "living off" of Brown and wanted his money. In her conversations with Lauby, Castor usually referred to Brown as "asshole" or "Mr. Asshole." Lauby said Castor was often upset with Brown and would say things like, "I wish that son-of-a-bitch would die."

The evidence shows that Castor also stood to profit from Brown's death. Brown had taken out an $18,000 life insurance

policy which named Castor as the sole beneficiary. A cellmate of Castor's after the murder testified that Castor wondered aloud whether she would still be able to get the money from the life insurance policy.

The State also offered evidence regarding the events of Thanksgiving week 1996 to show circumstantially that Castor had the motive and opportunity to kill Brown and that she did, in fact, kill Brown. As stated above, Brown's sister testified that on Tuesday, November 26, 1996, she called Brown on the telephone. She noticed he was agitated and got the impression that he and Castor had been fighting. This was the same day Brown learned of the Phillips 66 account Castor had opened in his name.

Regarding Thanksgiving Day, it is undisputed that the only people at Brown's house that day were Eddy, Castor, and Brown. The three had dinner in the late afternoon. Eddy testified that when he went to bed, Castor and Brown were sitting in the living room watching television. Eddy also testified that whenever he stayed at Brown's house, he would always wear headphones in bed to drown out the sound of the passing trains. The State's theory is that sometime later that night, as Brown was sleeping on the sofa with his usual blanket in the living room, Castor shot him with her .22-caliber revolver, but that Eddy did not hear it because of his headphones. The blanket was never found. No one, other than Eddy and Castor, claims to have seen Brown alive after Thanksgiving Day.

Eddy and Castor claim that Brown went shopping with them the next day at Brown's suggestion, even though Brown hated shopping. They first went to Wal-Mart, then to Target, then to a bank, and finally to K mart. According to the receipts from the three stores, they made purchases at Wal-Mart at 8:31 a.m., at Target at 9:21 a.m., and at K mart at 11:09 a.m. One of the items they bought at Target was a hinge hasp, which is the locking device that Eddy and Castor later installed on the basement door. At the bank, they deposited two $2,000 checks drawn on Brown's account, one written to Castor and one to Eddy. According to bank records, the deposit occurred at 10:25 a.m.

Castor's version of events is somewhat different than what is reflected by the receipts. She said the three of them went to the three stores first, then to the bank, and then back to Brown's

house. Castor's version also differs from Eddy's in regard to whether Brown was with them at the various stops they made that morning. Castor said that Brown was with them at all stops, whereas Eddy said that Brown accompanied them to Wal-Mart, Target, and the bank, but not to K mart. Castor said that when they arrived back at Brown's house between 10:30 and 11 a.m., Brown got out of the car and said, "I'll be a son of a bitch," and then walked out toward a brown pickup truck with primer on it. Castor and Eddy both said Brown then got into the pickup truck and left, saying he was going to work on another truck. Castor said Brown was still upset when he left.

At some point after Brown's alleged departure, Sperry came to Brown's house to pick up some cigarettes Brown had bought for her in Wyoming. While Sperry was there, Castor told Sperry of her plans to leave with Eddy the next day for Oregon and Nevada. She said that Brown had given her a couple thousand dollars to cover her traveling expenses. Sperry testified, however, that she was a good friend of Brown's and did not know of another occasion where Brown had given Castor money. Indeed, as stated above, she testified that it would have been out of character for Brown to give anyone $2,000. As we concluded above, the evidence is sufficient to show that Castor in fact forged these checks.

The testimony regarding the timing of events during the afternoon of November 29, 1996, is in conflict. It is undisputed that at some point in the afternoon, Eddy and Castor installed the hinge hasp on the basement door. Eddy testified that the purpose was to keep the dogs from getting dirty in the basement. However, he also said that Brown had never asked him to get a hinge hasp, nor had Brown expressed concern over the dogs going downstairs. Thus, although Brown had not requested that a hasp be installed, Castor and Eddy nonetheless installed one, albeit the day before they were to permanently leave town.

While Castor was at work the evening of November 29, 1996, Brown's nephew, Michalski, came to Castor's workplace looking for Brown. He and his family had planned to join Brown for Thanksgiving dinner but were unable to come to Kearney until November 29. They had just been to Brown's house, but no one was home. Castor told him that Brown had been out drinking and left with someone in a brown pickup truck with primer on

it. Michalski and several others, however, testified that Brown had actually given up drinking several years before his death.

Castor got off work early that night around 11:50. Upon arriving home, she began loading her car with items for storage. A neighbor of Brown's testified that she saw Castor's car backed up to the door late that night. Eddy placed a telephone call to Oregon at 12:09 a.m. Castor made several trips to the storage place, finishing around 2:30 or 3 a.m. on Saturday. At that time, she and Eddy then drove to Grand Island, allegedly to pay some insufficient funds checks she had written. She said she did not wait until late that morning because she was worried she would oversleep. Castor and Eddy stayed at a motel for a few hours in Grand Island. They then went to a store and paid the amounts she owed. After paying these, they drove back to Kearney so they could load the cars to leave for Oregon. The State's theory is that Castor and Eddy in fact took Brown's body out and dumped it during the early morning hours that day. They then went to Grand Island and disposed of the murder weapon, Brown's boots, and the blanket on which he had been sleeping when Castor shot him.

Between 7 and 8 a.m. on Saturday, November 30, 1996, Michalski called Brown's house several times, but no one answered. He and his family drove to Brown's house around 9 or 9:30 a.m. When they arrived, Castor and Eddy were there, and Castor's stationwagon was backed up to the front door so they could load it and leave. Michalski helped them load the car. He said that Eddy seemed calm, but Castor was nervous, like she was in a hurry to leave. While Michalski was at Brown's residence, Tom, Jr., called and spoke with Castor. Michalski heard Castor tell Tom, Jr., that she would leave a note for Brown that Tom, Jr., needed some money. Michalski testified that when she hung up the telephone, Castor turned to Eddy and said that she did not know where Tom, Jr., was going to get his money now.

After a few hours of helping Eddy and Castor pack, Michalski and his family left Brown's house, and Eddy and Castor then began their trip to Oregon. Castor had previously planned to leave for Nevada a week later, but she said she decided to leave early because she had heard that a storm was coming and that she was concerned that Eddy had not driven in

ice and snow before. Despite the purported concern about the storm and despite their hurry to leave, they traveled only from Kearney to North Platte that day. The next day (Sunday, December 1, 1996), they traveled to Idaho, and on Monday, they drove to Oregon.

The State presented certain other evidence to support its theory. Dr. Jerry W. Jones, the pathologist who performed the autopsy, testified that in his opinion, the body was moved from somewhere else to the location where it was found. He based this opinion on a number of factors. First, the lividity in the body, which is the settling of the blood after death in the lowest parts of the body, was relatively uniform on Brown's backside from head to heel. Jones testified that this indicates that when the lividity set in, the body was lying on a flat surface. Jones stated that the lividity in the body was not consistent with the incline on which the body was found. Second, the body was inappropriately dressed for that time of year. Brown was wearing no coat and was only wearing a T-shirt. Third, Brown was wearing no shoes, but his socks were not dirty, as they would have been if he had been walking around outside without shoes. Fourth, the sharp upward and downward angles of the bullets are not easily explained if Brown had been upright and alert when he was shot. Instead, they are more easily explained if he was in a supine position. Fifth, Jones found that for the holes in the shirt to match those in the body, the shirt would have to have been shifted over to the right. Jones testified that this would be consistent with what might happen when a person sleeps. Finally, Jones noted that there was not much blood at the scene where the body was found. If Brown had been shot there, there would have been much more blood, because, given that blood was entering the air passages, he would have been coughing up a large amount of blood. Based on these findings, Jones concluded that Brown was shot and killed, possibly while he was sleeping in a supine position, and was later moved to the location where his body was found. Jones also testified that these and other findings he made would be consistent with a time of death somewhere between November 27 and 30, 1996.

A Nebraska State Patrol officer testified that based on the gunshot residues on Brown's shirt, he concluded that the gun was fired from not more than an arm's length away. He also

examined the bullets extracted from Brown's body and testified that while the murder weapon had not been found, the bullets could have been fired from a .22-caliber Ruger revolver like the one Castor owned. An investigator for the Buffalo County Sheriff's Department testified that he searched Castor's car in Reno, Nevada, and found 13 unspent .22-caliber bullets (as well as a Phillips 66 card in Brown's name).

The police were never able to find the murder weapon, Brown's work boots, and the blanket Brown always used when he slept on the sofa. The theory, as stated above, is that Castor and Eddy destroyed these items when they went to Grand Island in the middle of the night on Saturday, November 30, 1996.

The defense attempted to contradict the State's theory by introducing testimony that shots were heard on November 29, 1996, in the vicinity of the scene where Brown's body was found. The State, however, introduced the testimony of Whicker, who conducted tests and determined that the sound of such gunshots, if fired from where the body was found, could not have been heard at the place where the Petersens said they heard shots.

We conclude that the evidence regarding the first degree murder charge is sufficient that a jury could find beyond reasonable doubt that Castor is guilty of the charge. The evidence, viewed in the light most favorable to the State, shows that Castor hated Brown and tolerated him only because she needed his money. When he "cut her off," her reason for tolerating him ceased. Indeed, given that Castor stood to benefit from Brown's life insurance policy, Brown became worth more to her dead than alive. Castor also had the opportunity to kill Brown, being alone with him Thanksgiving evening. The inconsistencies between Eddy's and Castor's accounts of the events of the next day, as well as their strange actions culminating in their trip to Oregon, also lend weight to the State's case. Perhaps most damning of all is her statement, after ending her telephone conversation with Tom, Jr., that she wondered where he would get his money now. We conclude that Castor's assignment of error regarding this issue is without merit.

In regard to the charge for use of a weapon to commit a felony, we find the evidence sufficient that a jury could find beyond reasonable doubt that Castor committed the crime.

Because the evidence is sufficient to support her murder conviction and because Brown was murdered with a gun, it follows that the evidence is sufficient to support her conviction of use of a weapon to commit a felony.

CONCLUSION

We, therefore, conclude that the trial court did not err in excluding Downey's testimony. We further conclude that the evidence is sufficient that a jury could find beyond a reasonable doubt that Castor is guilty of all counts charged.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
HAROLD JAY TROTTER, APPELLANT.

632 N.W. 2d 325

Filed August 17, 2001. No. S-00-487.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.
2. **Rules of Evidence: Other Acts: Appeal and Error.** Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Trial: Evidence.** Declarations made in opening statements cannot be used as evidence in deciding a case.
4. **Rules of Evidence.** A trial court is to state the specific purposes for admission of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
5. ____. The rule requiring a trial court to state the specific purpose for admission of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), is to be applied prospectively from the date of our decision in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).
6. **Rules of Evidence: Other Acts: Proof.** Before the prosecution may offer evidence of other crimes, wrongs, or acts pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it must first prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act.
7. ____: ____: ____. The admissibility of what has been described as "other crimes" or "similar acts" evidence is governed by Neb. Evid. R. 404(2), Neb. Rev. Stat.

§ 27-404(2) (Reissue 1995), which provides that 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.

8. **Evidence.** It is axiomatic that only relevant evidence is admissible.
9. **Evidence: Words and Phrases.** Evidence is relevant when it has 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.
10. **Rules of Evidence: Other Acts: Proof.** 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.
11. **Evidence: Other Acts.** The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.
12. **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.
13. **Evidence: Other Acts.** Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
14. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.
15. **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.
16. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
17. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Steven E. Achelpohl for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

GERRARD, J.

I. INTRODUCTION

Harold Jay Trotter was convicted of child abuse, child abuse resulting in death, and manslaughter of Christopher Churchill, the son of Tammy Churchill, Trotter's girl friend at the time of Christopher's death. The main issue on appeal is whether the trial court committed reversible error when it allowed evidence of prior bad acts relating to Trotter and his ex-spouses at trial. Trotter argues that such evidence is inadmissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), because the only purpose for such evidence was an improper purpose, i.e., to show Trotter's propensity to commit the crimes charged.

II. BACKGROUND

In September 1996, Tammy became acquainted with Trotter and began dating him. Tammy would sometimes stay at Trotter's home with Christopher, who was born on August 7, 1995, until Christopher's death on November 28 or 29, 1996.

Tammy testified that on one occasion, she and Christopher were spending the night at Trotter's apartment and that at approximately 3 a.m., she decided to go to her apartment because Christopher would not stop crying. Tammy was preparing to leave the apartment and had put Christopher on the bed next to Trotter. Tammy testified that Christopher began screaming louder and that when Tammy turned to look, Christopher was grabbing his face. Tammy stated that when she asked what happened, Trotter told her that he had rolled over, not realizing how close Christopher was to him, and had accidentally hit Christopher with his hand.

Between November 8 and 11, 1996, Christopher lost a tooth. Tammy testified that Trotter came downstairs from Christopher's room on that evening and told her that there was

blood in Christopher's crib. Trotter told Tammy that he had things under control and that she should not go upstairs to check on Christopher because Trotter was getting Christopher to calm down. Tammy said that when Trotter came down again, he had Christopher's tooth. Trotter later informed Tammy's mother that Christopher had lost his tooth; that it had bled, but Trotter had the bleeding under control; and that Trotter thought the tooth loss was due to Christopher's gritting his teeth.

In November 1996, Christopher developed an infection in the area of his mouth and was taken to see Dr. Jonathan Stalling on November 18 by Tammy and her mother. Christopher was admitted to the local hospital in Nebraska City and was treated for what Stalling described as a severe infection. During Christopher's hospital stay, Stalling noted various contusions and lesions over Christopher's body. Stalling testified that in his opinion, the infection around Christopher's mouth was secondary and caused by some other occurrence.

Paula Aldana, a nurse who interacted with the Churchills while Christopher was in the hospital, testified that at one point during Christopher's hospitalization, it was difficult to get Tammy to help take care of Christopher. Aldana said that Tammy was lying on a bed near Christopher's crib when Christopher was awakened to take his vital signs. Aldana said that Tammy continued lying on the bed and did nothing when Aldana asked her to help with Christopher.

Prior to Christopher's release from the hospital on November 21, 1996, Stalling contacted the then Department of Social Services (DSS) and a plan was worked out for DSS' involvement with Tammy and Christopher. Included in the plan was the requirement that Tammy would bring Christopher in to see Stalling the next week, Wednesday, November 27, for a checkup. On November 25, Darci Merk, a DSS caseworker, visited Tammy at Tammy's home. Merk testified that when she went to Tammy's home, Merk had somewhat of a confrontation with Tammy, that Tammy did not want Merk there, and that Tammy was somewhat resistant to DSS' involvement in her life. However, Tammy brought Christopher to see Stalling on November 27 as scheduled, and Stalling testified that Christopher had improved, that the healing process was progressing normally, and that Christopher did

not appear to have any new injuries. Merk testified that she visited Tammy again on November 27 and that Tammy was very compliant. Merk said that there were family support workers and a therapist scheduled to be in Tammy's home approximately 20 hours per week to help educate Tammy in parenting skills. Merk stated that followup visits had been scheduled with these providers for November 29 as well as December 1.

On November 28, 1996, Thanksgiving Day, Tammy woke up early to get another of her sons, K.L., from the father's home in Hamburg, Iowa, so that K.L. could accompany Tammy to Tammy's parents' home for Thanksgiving dinner. Tammy testified that she left Christopher at Trotter's apartment for approximately 45 minutes to an hour and that when she returned to Trotter's apartment, Trotter and Christopher were sleeping. When she woke them up, Trotter told her that while she was gone, Christopher came into the living room and had accidentally fallen against the wall heater in the living room and burned his face. In an interview with the police after his arrest on November 29, Trotter maintained that he was alone in the apartment with Christopher when Christopher's face was burned. Trotter also stated that after Christopher burned his face, Trotter put cold water on the burns and put Christopher back to bed.

Tammy, Christopher, and K.L. went to Tammy's parents' house for Thanksgiving dinner at about 10 a.m. on Thanksgiving Day. Tammy's mother testified that after the family gathering, she took Tammy and Christopher to Trotter's apartment at around 4:30 p.m. Trotter told the police that he had run a few errands early in the evening on Thanksgiving Day after Tammy returned and was gone for approximately 30 minutes. Trotter also told the police that at approximately 11 p.m., Christopher woke up and Trotter changed Christopher's diaper. Trotter stated that he did not see Christopher after changing his diaper until the next day at around 1 p.m. when Tammy told Trotter that Christopher was not breathing.

Tammy testified that on Thanksgiving evening, Trotter went to a friend's house for a few minutes and after returning at 9 or 10 p.m., Trotter went in to check on Christopher. Tammy said that Trotter went into Christopher's room with a bowl of water and paper towels. When she asked what he was doing, Trotter

told her that he was changing Christopher's diaper. Tammy also testified that she heard a "thump" sound while Trotter was in the bedroom changing Christopher's diaper but that the sound was nothing to cause alarm. Tammy also said that she heard Trotter say he was sorry shortly after the "thump" sound and that Christopher then calmed down.

Trotter later told the police that sometime between 11 p.m. on November 28 and 8 a.m. on November 29, 1996, he was half asleep and heard Tammy moving around with Christopher in Christopher's room. Trotter said that Christopher was whining and that Trotter could hear a noise that sounded like Tammy throwing the covers over Christopher or something rolling around.

Trotter also told the police that he woke up at approximately 8 a.m. on November 29, 1996, and left Tammy and Christopher alone at the house for about an hour. Tammy testified that Trotter was gone when she woke up on November 29 and that Trotter was in and out all morning but was there by 11:30 a.m. Patrick Wright, a coworker of Trotter's, testified that Trotter had visited him on November 29 at approximately 8:30 or 9:30 a.m. Wright testified that Trotter said Christopher had kept him up all night the previous night and that Trotter was not getting along with Tammy. Wright stated that while working with Trotter sometime during the 2 weeks before Christopher's death, Trotter had told Wright that DSS was trying to help Tammy, that DSS was an obstacle to his relationship with Tammy, and that he was tired of it.

Aldana, a nurse who had helped care for Christopher while Christopher was in the hospital, testified that she saw Tammy at a grocery store in Nebraska City between 12:30 and 12:50 p.m. on November 29, 1996. There was also a cash register receipt and other evidence presented which inferred that Tammy had used food stamps at the store that day at 12:56 p.m.

Trotter told police that he was napping in the early afternoon of November 29, 1996, when Tammy woke him. Tammy told Trotter that Christopher was not breathing. Trotter told police that he put his ear to Christopher's chest and discovered that Christopher was cold and had no heartbeat. Trotter stated that at that point, he knew Christopher was dead. Trotter told police that Tammy wanted to call her mother after Trotter checked on

Christopher. Trotter gave Tammy and Christopher a ride to a pay telephone where Tammy called her mother and asked her to come to Tammy's apartment. Trotter took Tammy to her apartment, and he told police that he left Tammy alone there with Christopher because he had to run some errands. Tammy's mother picked Tammy and Christopher up at Tammy's apartment, and they went to the hospital. Stalling, who was working at the hospital when they arrived, testified that Christopher was cold and that efforts to resuscitate Christopher failed.

Dr. Jerry Jones, a forensic pathologist, performed an autopsy on Christopher. Jones determined that the cause of Christopher's death was a blunt force injury to the head, resulting in an acute subdural hematoma, brain swelling, and a compression of the brain stem. Jones further opined that Christopher's head had been slammed against a hard surface one or more times to produce the fatal injuries. Jones stated that Christopher had suffered the fatal injuries within 24 hours of his death and that shortly after the injuries were sustained, Christopher would have exhibited a progressive decrease in consciousness and activity. Jones observed multiple external injuries to Christopher's head, all the result of the blunt force impact, as well as multiple bruises and abrasions of the cheeks and around the left eye.

Jones testified that he thought Christopher's tooth loss was the result of blunt force to the central part of Christopher's face. Jones testified that there were other injuries to Christopher's teeth and mouth beyond the lost tooth. Jones said that one of Christopher's upper teeth had been dislodged forward and into the gum, causing a laceration of the gum. There was also a tear of the gum tissue over the area where Christopher had lost his tooth, indicating the blunt force trauma. Jones stated that there is no question that the injuries to the teeth and mouth were the result of some blunt force to the area and that he also thought all of those injuries had occurred approximately 2 weeks prior to Christopher's death.

Jones also testified at trial that the burns on Christopher's face, which extended from the midforehead down to the chin, were very significant. Jones stated that the pattern of the burn conformed exactly in size and configuration to the front of the heater grate that was taken from Trotter's living room. There

were also pattern burns present on the outside of Christopher's forearms, which matched the pattern of the heater grate. Jones said that while the burns to Christopher's face and his right forearm extended into a partial thickness of the skin, the burn to his left forearm extended down to the subcutaneous fat.

In Jones' opinion, the burns to Christopher's face were sustained as a result of his face being pushed into and held against the front of the heater grate. The size and pattern of the burns as well as their thickness and deepness, as opposed to thin, burned lines, indicate force was used to force Christopher's face into Trotter's heater grate. Not only were the raised points on Christopher's face burned, but the recessed areas that would normally not have come into contact with the grate—the bridge of the nose, the undersurface of the nose, the undersurface of the lips—were also burned. Jones testified that these areas would have been burned only if Christopher's face had been forced or pushed against the heater grate. Jones testified that the burns on Christopher's forearms indicated that Christopher had used his arms as a defense mechanism to push away from the heater grate in an attempt to prevent himself from being burned. Jones testified that the burns on the forearms lined up exactly with the size and configuration of the heater grate when Christopher's face was positioned in front of the heater grate and Christopher's forearms were positioned in front of him.

Additionally, Dr. John McGreer, a radiologist, testified that upon examination of x rays taken of Christopher's leg after his death, there appeared to be a leg fracture that was approximately 1 month to 6 weeks old.

Trotter was arrested on November 29, 1996, in connection with the death of Christopher. The day of Trotter's arrest, the police searched Trotter's house with Trotter's consent. During the search, Sgt. David Lacy of the Nebraska City Police Department asked how Trotter disposed of his garbage. Trotter showed Lacy two trash cans next to a garage behind Trotter's house and indicated that the empty trash can was his and that the full trash can belonged to his neighbor. Lacy opened the garbage bag in the full trash can and discovered a discarded diaper on top. When Lacy asked Trotter whose diaper it was, Trotter responded that it was his neighbor's and then Trotter walked away from

Lacy toward the house. Upon further investigation of the full garbage bag, Lacy discovered a piece of paper with the name of a coworker of Trotter's written on it. Lacy also discovered paper towels in the garbage bag with what appeared to be bloodstains on them. Lacy took the garbage bag to the hospital and had the hospital run tests to see if the stains were bloodstains.

In an audio recorded interview with the police on November 29, 1996, Trotter admitted that he used both of the trash cans behind his house. When the interviewing officer asked Trotter about some paper towels with bloodstains on them in one of the trash cans, Trotter volunteered that it was probably from wiping Christopher's mouth because Christopher's mouth would bleed now and then. The audio recording of the interview was played for the jury at trial. Additionally, Trotter's neighbor testified that Trotter used the trash can in question.

Trotter was charged with the following: count I, child abuse resulting in death for the events occurring after 1 p.m. on November 28 or on November 29, 1996; count II, manslaughter of Christopher occurring after 1 p.m. on November 28 or on November 29; and count III, child abuse resulting in serious bodily injury for the events occurring between 12 a.m. and 1 p.m. on November 28. The jury found him guilty of all three counts, and he was sentenced to the following on each of the above counts: count I, 25 years' to life imprisonment; count II, 20 years' imprisonment to run concurrently with count I; and count III, 5 to 12 years' imprisonment to run consecutively to the sentences imposed in counts I and II.

Initially, Trotter failed to perfect an appeal due to ineffective assistance of Trotter's trial counsel. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). This court ordered reinstatement of Trotter's direct appeal as a result of Trotter's successful action for postconviction relief. See *id.*

III. ASSIGNMENTS OF ERROR

Trotter assigns, renumbered and restated, that the district court erred in (1) failing to require the State to identify the specific purposes for which other crimes or bad acts evidence was to be offered in this case under the rule of *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); (2) refusing to suppress

before trial, and in admitting into evidence at trial, other crimes or bad acts evidence involving Trotter and his ex-spouses, under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and rule 404 of the Nebraska rules of evidence; (3) refusing to suppress before trial, and admitting at trial, evidence regarding Trotter's hitting and otherwise abusing Christopher prior to November 1996 under rules 403 and 404 of the Nebraska rules of evidence; and (4) admitting over Trotter's foundational objection the expert testimony of a Nebraska State Patrol criminal investigator concerning the spatter pattern of blood alleged to be that of Christopher.

IV. STANDARD OF REVIEW

[1,2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Burdette, supra*.

V. ANALYSIS

1. Prior Bad Acts Involving Trotter and His Ex-Spouses

Trotter assigns that the district court erred in refusing to suppress before trial, and in admitting into evidence at trial, the testimony of his ex-spouses that they had been physically abused by Trotter while married to him.

Before Trotter's trial, the State indicated its intent to offer prior bad acts evidence involving Trotter and his ex-spouses. A hearing was held pursuant to rule 404 (404 hearing) to determine whether the alleged acts had occurred. After the 404 hearing, the district court determined that evidence of Trotter's physical abuse of his two ex-spouses would be admissible at trial. Trotter's ex-wives both testified at the 404 hearing.

At the 404 hearing, Lynette Molczyk testified that she married Trotter in 1981 and that the couple was divorced in 1985. Molczyk testified that Trotter was physically violent with her during their marriage, starting the first month they were married and continuing almost on a monthly basis. In one incident, Trotter hit Molczyk in the face, breaking her glasses. In another, he pushed her down the steps as she was attempting to leave their house, causing scrapes and bruises. Molczyk testified that there were approximately five instances when Trotter grabbed Molczyk by the neck, which caused bruising. Additionally, Molczyk stated that in the summer of 1985, Trotter found Molczyk in a Wal-Mart store and pushed a shopping cart into Molczyk's back. Molczyk also testified that the son she had with Trotter has never complained about Trotter's striking, hitting, or abusing him.

Trotter's second wife, Sharena Gayman, testified at the 404 hearing that she was married to Trotter from December 1987 until December 1993. Gayman stated that in the spring of 1992, she returned home from a work-related trip late one night and that Trotter started to argue with her. Gayman tried to leave the house, but before she could get to her company van, Trotter grabbed her and threw her up against the side of the van, hurting Gayman's shoulder. Gayman also testified that on a couple of other occasions, Trotter shoved her but never hit her. Additionally, Gayman said that she and Trotter were arguing on one occasion and that when she tried to leave, he prevented her from getting in her car and, while in his pickup truck, chased her around their yard and the neighbor's yard for approximately 20 minutes. Gayman also testified that Trotter never, in any way, hit, struck, or threatened her children, who were living with her and Trotter during their marriage.

During the 404 hearing, the prosecutor urged that Trotter's history of domestic violence should be admissible at trial "to show this man's violent tendencies towards the people living in his household." The district court determined that the evidence would be admissible at trial.

In the district court's order on the admissibility of the evidence of other bad acts involving Trotter and his ex-spouses, the court found that the acts described and the injuries sustained by Trotter's ex-wives were sufficiently similar to the acts committed

against Christopher to allow them at trial. The court found that the acts against Trotter's ex-wives would be similar to those committed against Christopher because, in both cases, the acts were against someone living with Trotter, Trotter had superior strength and size, there were injuries to the facial area, parties were grabbed by the neck, and the individuals injured should have been considered loved ones by Trotter. Further, the court noted that Trotter's bad acts against his ex-wives "would appear to be relevant to a jury for consideration of such things as enumerated by §27-404(2), such as motive, opportunity, intent, identity and lack of accident or mistake."

[3] Initially, we address the State's argument that Trotter is precluded from arguing that the admission of such testimony was error. During opening statements at trial, Trotter's attorney mentioned that there would be testimony during trial regarding physical contact by Trotter on his two ex-wives. The State argues that because Trotter mentioned the possible testimony during opening statements, Trotter is precluded from arguing on appeal that it was error for the district court to allow such evidence at trial. While we have not addressed the issue whether opening statements constitute evidence in the criminal context, we have stated, in the civil context, that declarations made in opening statements cannot be used as evidence in deciding a case. *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001).

Other jurisdictions have held that assertions made by the defendant's counsel during opening statements in a criminal action are not evidence. See, *McIntyre v. State*, 717 N.E.2d 114 (Ind. 1999); *State v. Tevay*, 707 A.2d 700 (R.I. 1998); *State v. Donovan*, 698 A.2d 1045 (Me. 1997); *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991); *Cooper v. Com.*, 31 Va. App. 643, 525 S.E.2d 72 (2000); *Bynum v. Com.*, 28 Va. App. 451, 506 S.E.2d 30 (1998). See, also, *State v. McCorkendale*, 267 Kan. 263, 979 P.2d 1239 (1999) (opening statements by prosecutor in criminal prosecution are not evidence). Compare *Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000) (defendant who preemptively introduces evidence of prior conviction on direct examination, after in limine ruling allowing such evidence at trial for impeachment purposes, may not challenge admission of such evidence on appeal).

In *State v. Donovan*, 698 A.2d at 1048, the court held that the defendant's opening statements did not " 'open the door' " for rebuttal by the prosecution to evidence never brought out by the defendant at trial. The court stated that " '[a] distinction exists between assertions made by counsel in an opening statement and the testimony of witnesses during trial. The latter is evidence; the former is not.' " *Id*. In *Bynum v. Com.*, 28 Va. App. at 458-59, 506 S.E.2d at 34, the court stated that "statements made during an opening statement are not evidence; therefore, opening statements may not 'open the door' to otherwise inadmissible evidence." We agree and determine that comments made by counsel during opening statements in a criminal prosecution are not evidence.

Therefore, comments made by Trotter's counsel during opening statements regarding the testimony of Trotter's former spouses were not evidence. As a result, Trotter did not waive his objection to the admission of evidence at trial of other bad acts involving Trotter and his former spouses, nor is Trotter precluded from arguing on appeal that such evidence was improperly admitted at trial.

Next, we address Trotter's first assignment of error on appeal: The district court erred by not informing the jury as to the specific purpose for which the prior bad acts evidence was admitted in this case pursuant to our ruling in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

At trial, after Trotter objected to the introduction of Molczyk's testimony, the district court instructed the jury in the following manner:

> The jury is instructed that the witness will be allowed to testify regarding prior acts allegedly committed by the defendant on the witness. You're instructed that this testimony is not admitted to prove the character of the defendant to show that he acted in conformity therewith, but rather is being admitted for the limited purpose of evidence as to proof of motive, intent, knowledge, identity, or absence of mistake or accident regarding the offenses for which the defendant stands charged in this case.

The court also gave an almost identical instruction to the jury after Trotter objected to the introduction of Gayman's testimony.

[4,5] In *State v. Sanchez, supra*, we held that a trial court is to state the specific purposes for admission of evidence under rule 404(2). The trial court in this case clearly did not state the specific purpose for which the rule 404(2) evidence was being admitted. Indeed, the district court merely cited the list of possible purposes for admitting such testimony as found in rule 404(2). See *State v. Sanchez, supra.* However, Trotter's trial occurred in October 1997 and, as we held in *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999), the rule set forth in *State v. Sanchez, supra*, is to be applied prospectively from the date of our decision in *Sanchez*, which was July 16, 1999. Therefore, the trial court's failure to state the specific purpose for which the prior bad acts evidence was admitted did not constitute reversible error because Trotter's trial occurred prior to our ruling in *Sanchez.*

[6] We next turn to the substantive rule 404 issue presented in the instant appeal. Before the prosecution may offer evidence of other crimes, wrongs, or acts pursuant to rule 404(2), it must first prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act. *State v. Sanchez, supra*. Trotter does not specifically argue on appeal that the State failed to prove by clear and convincing evidence that he physically abused his ex-wives. Therefore, we do not address this issue.

[7] The admissibility of what has been described as "other crimes" or "similar acts" evidence is governed by rule 404(2), which provides:

> 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.

See *State v. Sanchez, supra.*

[8-11] It is axiomatic that only relevant evidence is admissible. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Evidence is relevant when it has 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. *Id.*; *State v. McManus*, 257 Neb. 1, 594 N.W.2d

623 (1999). However, 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. *State v. Sanchez, supra*. 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. 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. *State v. Sanchez, supra*. The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence. *Id*.

[12] An appellate court's analysis under rule 404(2) 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, supra*.

Therefore, we first consider whether the evidence of prior bad acts was relevant for some purpose other than to show Trotter's propensity to commit the crimes charged in the instant case. See *State v. McManus, supra.* The purpose for which the district court allowed evidence of Trotter's acts against his ex-wives is not clear from the record. During the pretrial 404 hearing, the prosecutor argued that Trotter's history of domestic violence is admissible "to show this man's violent tendencies towards the people living in his household." In the district court's pretrial order allowing such evidence to be used at trial, the district court found that the evidence would be admissible to show motive, opportunity, intent, identity, and lack of accident or mistake. Because the district court did not state a specific purpose for which the bad acts evidence was admitted, we will consider only those purposes for the bad acts evidence which are urged in the State's brief. See *State v. Sanchez, supra.* The State's arguments in its brief relate mostly to identity. However, the State also appears to assert that the evidence was properly admitted to show intent, motive, and absence of mistake or accident. Thus,

we will consider intent, motive, identity, and absence of mistake or accident as possible purposes for admitting the evidence.

(a) Intent

In the case at bar, the State's argument relating to intent is that Trotter's prior acts were relevant because his previous acts of willful abuse were similar to those inflicted upon Christopher. The State does not indicate why the similarity between the acts involving his ex-wives and the acts in the instant case demonstrate Trotter's intent, only that Trotter's prior bad acts are similar to the events surrounding Christopher's death. The State suggests that Trotter's intent to harm Christopher in the instant case is shown by Trotter's use of his superior size and strength to physically intimidate and control his ex-spouses.

In *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999), we were faced with a situation in which the defendant, on a prior occasion and in the crime charged, had been drinking at a bar, became intoxicated and angry, and used a gun to intimidate another individual. The State argued that evidence of the prior act was admissible to show his intent because the two occurrences were factually similar. *Id.* We noted that the most obvious reason why the similarities between the two acts showed intent is the inference that the defendant was the type of person who acts with violent intent when he is angry. *Id.* We held that such analysis is classic propensity reasoning and that the evidence must be excluded under rule 404(2). *State v. McManus, supra*.

In the instant case, the State's argument is essentially the same as the State's argument was in *McManus*: The evidence of Trotter's prior violence with respect to his ex-spouses is relevant to show that he is the type to act with violent intent when he wants to control someone smaller and weaker than he is. Because this is classic propensity reasoning, the evidence may not be used to show Trotter's intent in the crime charged. See *id.*

(b) Motive

The State argues that Trotter's motive in this case would be similar to his motive in abusing his ex-wives in that he used his superior size and strength to control the behavior of the other person. In *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992), we addressed a situation in which the defendant was

charged with and convicted of kidnapping a 9-year-old girl who disappeared and was never found. The State introduced evidence of six prior acts of sexual contact by the defendant with young girls. We held that such evidence was admissible to show motive in that case. *Id.* We reasoned: "That the [victim]'s clothing was found at a secluded place suggests a sexual motive for the abduction; thus, the evidence of Phelps' prior acts is clearly relevant as tending to show his motive for kidnapping [the victim], that is, to achieve sexual gratification through assaulting her." *Id.* at 721, 490 N.W.2d at 687.

In the case at bar, however, the State does not indicate why the prior acts relating to Trotter and his ex-wives would show his motive to commit the crimes charged. The State's proffered reason for admitting such testimony, that he was motivated to use his superior size and strength to control the victims, describes what he did, not his motive for doing so. The State improperly attempts to show that because Trotter may have been motivated to control his ex-wives through the use of his superior size and strength, he was likely to use his superior size and strength to control another person. Such focus on Trotter's actions as opposed to the motive is impermissible propensity reasoning under rule 404(2). Essentially, the State reasons that this evidence proves Trotter's character—that Trotter used his superior size and strength in the past—in order to show that he acted in conformity with that character. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Therefore, the evidence is not admissible to show Trotter's motive.

(c) Identity

[13] Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused. *Id.*

In the district court's pretrial order, it stated the following with respect to the similarities between the evidence of Trotter's prior bad acts relating to his ex-wives and the circumstances surrounding Christopher's death:

> The injuries described by the Defendant's two ex-wives had some similarities to the injuries sustained by Christopher, resulting in his death as described by Dr. Jerry Jones. There were injuries to the facial area, including around an eye, and injuries around the throat, where it appeared that Christopher had been grabbed. The acts described by the Defendant's two ex-wives were committed against people who were living with the Defendant. In the instant case, Christopher was, for the most part, living at the same residence as the Defendant. The acts perpetrated by the Defendant on his two ex-wives would have been against individuals smaller and weaker than the Defendant, and ones which the Defendant should have considered to have been loved ones. In the present instance, Christopher was a small child approximately one-and-one-half years of age. The acts employed by the Defendant against his ex-wives would be evidence of a motive, or intent to control, his ex-wives by the use of his superior size and strength. This would be similar to his ability to be able to control, or attempt to control, Christopher by using his superior size and strength to control or correct behavior of Christopher.

In *State v. Burdette, supra*, we determined that it was not error to admit evidence of prior sexual assaults when the crime charged was sexual assault and the similarities between the assault charged in that case and the evidence of prior assaults were quite significant. We found that the fact that the assailant chose victims whose names had been featured in articles identifying them as women who would likely be living alone was unusual and distinctive such that it could be said that the previous sexual assaults and the crimes charged in that case bore the same signature. *Id.*

In *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997), the defendant was charged with eight counts of sexual assault. Evidence was presented at trial regarding another attempted

sexual assault of which the defendant was later convicted. *Id.* The defendant had attacked the victim of the assault at issue as she was attempting to enter her apartment building. The assailant, who was wearing dark clothing, pinned her to the ground and lay on top of her. He displayed a knife and told her that if she did not shut up, he was going to kill her. He told her that she was going to go with him, but he fled after being scared by two witnesses. In all of the eight charged assaults, the defendant in *Freeman* would surprise his victims and attack them while they were alone. The defendant would generally tell his victim to shut up or he would kill her, and the defendant often wielded or displayed a knife. *Id.* We found that the evidence of the defendant's other bad acts tended to show the defendant's identity and method of operation because of the similarities between the crimes charged and the other incident. *Id.* In doing so, we noted that the other attempted sexual assault occurred within 16 days of three of the eight sexual assaults the defendant was charged with in *Freeman*.

We cannot say that the crimes charged and the evidence of Trotter's previous acts in this case are so similar, unusual, and distinctive that the trial judge in this case could reasonably find that they bear the same signature. The evidence of the manner in which Trotter may have abused his ex-spouses is similar to the extent it constituted abuse. While the acts of child abuse and spousal abuse are concededly similar in nature in that they both involve the abuse of a person, the facts described by the district court and the State could be present in most any situation where there is any type of abuse. The similarities the State points to in the case at bar are, in essence, the similarities in the statutory definition of the crimes themselves, not the manner in which Trotter may have carried them out.

In order to be relevant to show intent, the incidents involving the previous act, not the nature of the previous act, must be so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. In this case, the State essentially asks us to adopt a rule in which evidence of prior abuse would always be admissible in a criminal trial where the crime charged is some sort of physical abuse, regardless of the facts surrounding the prior abuse. We decline to adopt such a rule because such evidence, without factual circumstances sufficient to show

that the crimes bear the same signature, would be relevant only to show the defendant's propensity to commit the crime charged.

(d) Absence of Mistake or Accident

In *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991), we addressed a situation where evidence of prior bad acts was admitted to show absence of mistake or accident. In *Stephens*, the defendant's attorney questioned the victim's physician about the possibility that the victim's injury could accidentally have been caused by an inexperienced person, such as the defendant, changing the victim's diaper or cleaning her. We determined that the evidence of the defendant's prior sexual contacts with a 4- or 5-year-old girl in his care was relevant to negate the inferences the defendant sought to raise. We further found that the evidence was relevant to show both the identity of the assailant as being the defendant and the absence of mistake or accident on his part. *Id.*

In the case at bar, Trotter has not asserted that the death of Christopher was the result of an accident or mistake. Thus, the evidence of Trotter's physical abuse of his ex-wives is not admissible to show that Christopher's death was not an accident or mistake because accident or mistake was not at issue. However, on the charge of child abuse resulting in serious bodily injury, Trotter did assert that the burns to Christopher's face were the result of Christopher's accidentally falling against the heater in Trotter's living room. Regardless, the only purpose for admitting the testimony of Trotter's ex-spouses was to show Trotter's propensity for abusing Christopher, not to show that Christopher had not accidentally fallen against the heater. In other words, the evidence was not admitted to show that Trotter had not accidentally caused the injuries to Christopher's face; rather, it was admitted to show that Trotter's character was that of one who abuses people in general. This is improper propensity reasoning, and Trotter's ex-spouses' testimony was not admissible to show lack of accident or mistake.

We determine that the evidence relating to Trotter's physical abuse of his ex-wives was not admitted for a proper purpose under rule 404(2). The incidents involving Trotter's ex-spouses occurred between 1981 and 1985 and in 1992, or between 4 and

15 years prior to Christopher's death in 1996. Indeed, the prosecutor's statement at the 404 hearing was the exact reason the evidence was admitted at trial: that Trotter's history of domestic violence was admissible "to show this man's violent tendencies towards the people living in his household." The evidence was improperly admitted to show Trotter's propensity to commit the crimes charged. Therefore, the district court abused its discretion in admitting such evidence at trial.

2. Harmless Error

[14,15] Having concluded that the district court erred in admitting evidence of the prior bad acts relating to Trotter and his ex-spouses, we must now determine whether the error was harmless beyond a reasonable doubt. See *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). We will focus our analysis on whether admitting such evidence was harmless with respect to Trotter's conviction on each count. Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). 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. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

(a) Count III

We find that the admission of Trotter's ex-spouses' testimony was harmless beyond a reasonable doubt with respect to Trotter's conviction on count III—child abuse resulting in serious bodily injury. Count III related to the morning of November 28, 1996, the time period in which Christopher sustained burns to his face and forearms. Throughout Trotter's taped police interviews, which were played at trial, Trotter maintained that he was alone with Christopher when Christopher sustained the burns to his face and forearms. Tammy also testified that she left Christopher and Trotter alone on the morning of November 28

to get her son K.L. and that when she returned to Trotter's residence, Trotter informed her that Christopher had been burned. Further, Jones opined that the burns to Christopher's face and forearms were too severe to have been accidental. Also, Jones testified that the nature of the burns on Christopher's forearms indicated that Christopher must have tried to push away from the heater with his forearms while someone pushed his face into the heater grate.

It is true that Trotter stated that Christopher accidentally fell against the heater grate; however, given the fact that Trotter maintained that he was alone with Christopher when Christopher was burned and given the nature of Jones' testimony, we determine that the conviction on count III was surely unattributable to any of the testimony of the ex-spouses. Therefore, the erroneous admission of Trotter's ex-spouses' testimony was harmless beyond a reasonable doubt.

(b) Counts I and II

Based upon our review of the entire record in this case, we cannot conclude that the erroneous admission of evidence was harmless beyond a reasonable doubt with respect to counts I and II (child abuse resulting in death and manslaughter, respectively); i.e., that Trotter's guilty verdicts on counts I and II were surely unattributable to the admission of his ex-spouses' testimony. While the evidence properly admitted at trial would be sufficient to sustain a guilty verdict on counts I and II, it is not undisputably so.

In fact, the evidence concerning Christopher's death was in significant dispute. Both Trotter and Tammy stated that they were not in the room when Christopher was fatally injured, and both say that they did not see the other abuse Christopher. In effect, the State's entire case against Trotter was circumstantial in nature since no one testified that they saw Christopher being abused. Whether the jury believed Trotter's statement that he did not commit the crime, as the jury heard in a taped interview with police which was played at trial, or Tammy's testimony at trial that she did not commit the crime was critical to the ultimate verdict. By presenting evidence giving rise to the inference that Trotter was the kind of person who was prone to abuse other people, the State

was able to cast substantial doubt on Trotter's credibility. Faced with such evidence, the jury could have been tempted to infer bad character and action taken in conformity with that character and, thus, could have reached a verdict on an improper basis. See *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

Absent the evidence regarding Trotter's ex-spouses, the jury would have been left with little character evidence other than evidence of Tammy's history with her other children. Evidence was presented at trial tending to show that Tammy had a history of neglecting or mistreating her children. Tammy's mother testified that Tammy voluntarily gave her and her husband guardianship of Tammy's first child, A.C., after A.C. had been removed from Tammy's care when a babysitter noticed marks on A.C. and called the police. Tammy's mother testified that Tammy's second child, K.L., had been living with Tammy and three other people in Otoe, Nebraska, when Tammy left the house one day, thinking there was a babysitter for K.L. The others in the house decided they no longer wanted K.L. with them, and so they called K.L.'s paternal grandparents to come for him. Tammy had a third child before Christopher was born, but gave the child up for adoption at the hospital shortly after giving birth.

In late 1994, Tammy lived with Delmar Robbs and his 3-year-old son, M.R., for a few months in a basement apartment of a house in Omaha, Nebraska. During this time, Robbs was working the night shift at a trucking company installing tires. Robbs testified that he had Tammy watch M.R. while Robbs was at work. While at work one evening, Robbs got a call from the upstairs neighbor, and when Robbs arrived, M.R. had bruises and scratches all over his body. The neighbor testified that she had heard screaming and shouting from the downstairs apartment that evening for approximately 30 minutes. The neighbor banged on the door to the basement apartment, and Tammy eventually came to the door. The neighbor stated that she entered the apartment and discovered Tammy sweating, red faced, and tense and heard Tammy threaten M.R. The neighbor also testified that she did not see M.R.'s injuries the day before when M.R. had come upstairs to visit her. The day after the incident, Robbs had the neighbor babysit M.R. The neighbor then took M.R. to the hospital where photographs were taken of his injuries.

Virginia Childers, Tammy's cousin and the stepdaughter of Tammy's friend, testified that Tammy was at Childers' father's home on a particular occasion and that Childers saw Tammy slap Childers' young stepbrother.

The above evidence, in and of itself, is not sufficient for a jury to conclude that Tammy was responsible for Christopher's death. This type of evidence, however, which was admitted without a rule 404 objection, is sufficient to potentially cast a reasonable doubt whether Trotter was responsible for Christopher's death. On this record, we cannot conclude beyond a reasonable doubt that the improperly admitted evidence did not materially influence the jury in reaching its verdicts on counts I and II. In other words, we cannot conclude with any confidence that the actual guilty verdicts rendered on counts I and II were surely unattributable to the improperly admitted testimony of Trotter's ex-spouses. Therefore, we must reverse the judgment of the district court and the convictions of Trotter on the charges of manslaughter and child abuse resulting in death.

Further, because the State has not raised the issue either at trial or on appeal, we do not comment on whether the evidence of Tammy's past conduct was consistent with rule 404.

3. Prior Bad Acts Involving Trotter and Christopher

[16,17] Having concluded that Trotter is entitled to a new trial with respect to counts I and II, we need not consider the remaining errors assigned by Trotter with the exception of one error relating to count III. Trotter argues that the district court erred in refusing to suppress before trial, and admitting at trial, evidence regarding Trotter's hitting and otherwise abusing Christopher prior to November 1996 under rules 403 and 404 of the Nebraska rules of evidence. At trial, Trotter neither objected to Tammy's testimony that Trotter hit Christopher in the face at 3 o'clock in the morning on one occasion nor objected to her testimony regarding the events surrounding Trotter's discovery of Christopher's tooth. In fact, on direct examination, Trotter's attorney questioned Tammy at length regarding her recollection of the events surrounding Christopher's tooth loss. The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party

will not be heard to complain of the alleged error on appeal. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997). One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). Therefore, Trotter's assignment of error regarding the admission of evidence concerning Trotter's prior abuse of Christopher is without merit.

VI. CONCLUSION

For the foregoing reasons, we conclude that the district court erred in admitting the evidence of prior bad acts relating to Trotter and his ex-spouses. However, the erroneous admission of this evidence was harmless beyond a reasonable doubt with respect to Trotter's conviction on count III—child abuse resulting in serious bodily injury. Therefore, Trotter's conviction on count III and his sentence on count III of 5 to 12 years' imprisonment is affirmed. Because we conclude that the admission of Trotter's ex-spouses' testimony is not harmless beyond a reasonable doubt with respect to counts I and II, we reverse the judgment of the district court and the convictions of Trotter on the charges of manslaughter and child abuse resulting in death and remand the cause for a new trial on counts I and II.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

JEFF FOOTE, APPELLANT, V. O'NEILL PACKING ET AL., APPELLEES.

632 N.W. 2d 313

Filed August 17, 2001. No. S-00-492.

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. **Statutes.** Interpretation of a statute presents a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.

4. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
5. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.
6. **Workers' Compensation: Supreme Court.** The Nebraska Supreme Court has consistently given the Nebraska Workers' Compensation Act a liberal construction to carry out justly the spirit of the act.
7. **Workers' Compensation.** The Nebraska Workers' Compensation Act is designed to compensate an injured worker for two distinct losses resulting from a work-related injury or occupational disease: the loss of earning capacity based on the concept of disability and medical and other costs associated with the injury or disease.
8. ____. The Nebraska Workers' Compensation Act should be broadly construed to accomplish the beneficent purpose of the act.
9. **Workers' Compensation: Legislature: Intent.** The history of Neb. Rev. Stat. § 48-120 (Reissue 1998), from its original enactment in 1913 to the present version, manifests a legislative intent to make medical benefits available to a disabled worker without regard to any time limitation measured from the last date of payment (when an award is entered), as long as further medical treatment is reasonably necessary to relieve the worker from the effects of the work-related injury or occupational disease.
10. **Workers' Compensation: Stipulations.** Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.
11. **Workers' Compensation.** The Nebraska Workers' Compensation Court has the statutory authority to order payment of future medical expenses incurred more than 2 years after the date of the last compensation payment.
12. **Workers' Compensation: Final Orders.** Once a party has filed a petition and an award of compensation has been entered, that award is final and not subject to readjustment, unless there is an increase or decrease in incapacity or the condition of a dependant has changed.
13. **Workers' Compensation: Liability.** A stipulated award may provide that the employer has liability for future medical treatment.
14. **Stipulations.** The construction of a stipulation is a question of law.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

James J. Regan for appellant.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 1994, Jeff Foote, the appellant, suffered an injury in the course of employment that resulted in permanent partial impairments of 4 percent to his right hand, 10 percent to his left upper extremity, and 5 percent to his right upper extremity. In 1995, Foote filed a petition against O'Neill Packing and Aetna Insurance in the Workers' Compensation Court. The court entered an award, pursuant to a stipulation of the parties, on May 21, 1996, ordering payments for temporary disability and permanent loss of use of the right hand and both arms. The stipulation also provided, and the court ordered, that "the Defendants shall still be liable to pay to or on behalf of the Plaintiff all reasonable and necessary medical expenses resulting from said injuries."

The last workers' compensation payment was made on June 19, 1996. On January 19, 1999, Foote sought medical care from Dr. David Clough, who opined that Foote's bilateral carpal and cubital tunnel syndromes were continuations of the 1994 compensable injuries and that his continuing employment had not substantially changed the course in progression. Foote filed a petition in the compensation court against O'Neill Packing, Aetna Insurance, and The Travelers (appellees) seeking payment of the $123 medical bill from Clough. The appellees' answer alleged that the claim was barred by the statute of limitations. The parties stipulated that there was no evidence of an increase in disability or impairment from the injury since the time of the initial award.

The workers' compensation trial court dismissed Foote's petition, based on the determination that Foote's claim was barred by the 2-year statute of limitations set forth in Neb. Rev. Stat. § 48-137 (Reissue 1998). The review panel of the compensation court affirmed the dismissal. The Nebraska Court of Appeals

affirmed the decision of the compensation court without opinion, citing *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997). See *Foote v. O'Neill Packing*, case No. A-00-492 (Neb. App. Oct. 6, 2000) (disposed of without opinion). Foote petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

Foote assigns, consolidated and restated, that the Court of Appeals erred in relying upon *Snipes v. Sperry Vickers, supra*, in determining that his claim for payment of medical benefits was barred.

STANDARD OF REVIEW

[1] 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. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001).

[2,3] Interpretation of a statute presents a question of law. *Fontenelle Equip. v. Pattlen Enters., ante* p. 129, 629 N.W.2d 534 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001).

ANALYSIS

In *Snipes v. Sperry Vickers, supra*, we interpreted § 48-137, which provides in relevant part:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition [under the act]. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

We held that claims for medical expenses filed more than 2 years after the last payment of compensation were barred by § 48-137 in the absence of evidence of a material increase in the claimant's disability which would permit the claimant to seek an increase in benefits pursuant to Neb. Rev. Stat. § 48-141(2) (Reissue 1998). See *Snipes v. Sperry Vickers, supra.*

Foote argues that the instant case is distinguishable from *Snipes v. Sperry Vickers, supra*, in that the claimant in that case did not initially file a claim for compensation, but was voluntarily compensated by his employer. In the case at bar, Foote filed a petition after the initial injury and obtained an order directing the appellees to pay for medical expenses resulting from the injury. Foote argues, in essence, that he did file his claim within the 2-year limitation and that the award he obtained includes the medical expenses for which he now seeks compensation.

The trial court rejected this argument on the theory that § 48-137 applies "in any case," regardless of whether the last payment of compensation was made voluntarily or pursuant to a prior award. In response to Foote's argument that the disputed medical treatment was encompassed in the language of the 1996 award, the review panel, relying on *Snipes v. Sperry Vickers, supra*, stated that

> while a trial judge may write in an award that future medical expenses are to be paid, the trial judge has no authority to order payment of future medical expenses incurred more than two years after the date of the last payment unless there is a change in condition of the employee sufficient to satisfy the requirements of Section 48-141, R.R.S. 1998.

The two questions this court must resolve are (1) whether the review panel correctly determined that a workers' compensation trial court has no authority to order payment of future medical expenses incurred more than 2 years after the date of last payment unless there is a change in condition of the employee sufficient to satisfy the requirements of § 48-141 and (2) whether § 48-137 bars a claim made more than 2 years after the accident or last payment of compensation in a situation where compensation was paid pursuant to an award from the compensation court. Resolution of these questions requires an analysis of those provisions of the Nebraska Workers' Compensation Act

which specifically relate to payment of medical benefits and the statute of limitations.

[4] The interpretation of a statute 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. *Fontenelle Equip. v. Pattlen Enters., ante* p. 129, 629 N.W.2d 534 (2001). Further, when considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Id.*

Authority to Order Future Medical Payments

The statutory provisions in effect at the time of Foote's accident and subsequent award in the compensation court are found at Neb. Rev. Stat. § 48-120(1) and (6) (Reissue 1993) and state, in pertinent part:

> (1) The employer shall be liable for all reasonable medical, surgical, and hospital services . . . and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . subject to the approval of and regulation by the Nebraska Workers' Compensation Court, not to exceed the regular charge made for such service in similar cases.
>
> . . . .
>
> (6) The Nebraska Workers' Compensation Court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of physician, hospital, rehabilitation facility, or other medical services when it deems such change is desirable or necessary. Any dispute regarding medical, surgical, or hospital services furnished or to be furnished under this section may be submitted by the parties, the supplier of such service, or the compensation court on its own motion for informal dispute resolution by a staff member of the compensation court or an outside mediator pursuant to section 48-168. . . . The compensation court may adopt and promulgate rules

and regulations regarding informal dispute resolution or the submission of disputes to an independent medical examiner that are considered necessary to effectuate the purposes of this section.

We first consider whether the review panel is correct in determining that the workers' compensation trial court lacked the authority to order, as part of a final award, payment of future medical expenses incurred more than 2 years after the date of the last payment, even if the medical expenses are reasonable and necessary and a result of the disabling injury. The operative language of § 48-120(1) pertinent to this issue states that "[t]he employer shall be liable for all reasonable medical . . . services . . . and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ." Foote argues that in light of the fact that the disabling effects of a permanent disability may continue after an award of permanent partial disability has been entered, the obvious purpose of the statutory scheme is to authorize the Workers' Compensation Court to order, as part of a final award, an employer to pay the costs of the medicines and medical treatment reasonably necessary to relieve the worker from the effects of the injury even though such medical treatment may not be rendered for more than 2 years after the entry of the award. We agree with Foote's argument.

[5,6] The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. See, generally, *Union Packing Co. v. Klauschie*, 210 Neb. 331, 314 N.W.2d 25 (1982); *Moise v. Fruit Dispatch Co.*, 135 Neb. 684, 283 N.W. 495 (1939); *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938). It is in light of this beneficent purpose that we have consistently given the act a liberal construction to " 'carry out justly the spirit of the Nebraska Workers' Compensation Act.' " *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 595, 558 N.W.2d 799, 806 (1997). Accord *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977). See, also, *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000); *Union Packing Co. v. Klauschie, supra*.

[7] The act is designed to compensate an injured worker for two distinct losses resulting from a work-related injury or occupational disease: the loss of earning capacity based on the concept of disability and medical and other costs associated with the injury or disease. See 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02 (2001). Consistent with this statutory design, the act authorizes an award of permanent disability, either partial or total, as a means of compensating the injured worker for the loss of earning capacity. See, *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991); *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989). The act also, pursuant to § 48-120, authorizes an award of medical benefits reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.

While both an award of permanent disability and an award of medical benefits are intended to offset the adverse economic consequences sustained by an injured worker, the need for medical treatment does not necessarily cease upon the entry of an award of permanent disability. *Grover v. Industrial Com'n of Colorado*, 759 P.2d 705 (Colo. 1988). Once a worker has reached maximum medical improvement from a disabling injury and the worker's permanent disability and concomitant decreased earning capacity have been determined, an award of permanent disability is appropriate. It is an obvious fact of industrial life, however, that an injured worker can reach maximum medical improvement from an injury and yet require periodic medical care to prevent further deterioration in his or her physical condition. *Id.* See, also, *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986).

[8] Because the statutes should be broadly construed to accomplish the beneficent purpose of the act, *Miller v. E.M.C. Ins. Cos., supra*, it is inappropriate to graft onto the statutory scheme a substantial limitation on medical benefits when no such limitation is set forth in the act itself. The only limitation on medical benefits set forth in § 48-120 is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished. It would be inconsistent with our principles of

statutory interpretation set forth above to read another limitation into the statute.

In addition to being in accord with the intended purposes of the act, our construction of § 48-120 is consistent with the legislative intent underlying the medical benefits provision, as evidenced by an examination of various amendments adopted by the Legislature over the years following the original enactment of the provision in 1913. As originally enacted in 1913, the statute limited medical benefits to medical and hospital services during the first 21 days after the disability began, with the employer's liability not to exceed $200. See 1913 Neb. Laws, ch. 198, § 20, pp. 585-86. Subsequent amendments, however, have greatly expanded the availability of medical benefits: 1917 Neb. Laws, ch. 85, § 6, p. 202 (providing compensation for major medical expenses, not to exceed $200, beyond 21-day period); 1919 Neb. Laws, ch. 91, § 1, p. 228 (eliminating 21-day limit altogether); 1921 Neb. Laws, ch. 122, § 1, p. 520 (eliminating $200 limit); 1965 Neb. Laws, ch. 278, § 1, p. 799 (providing compensation for "first prosthetic devices"); 1975 Neb. Laws, L.B. 127 (providing compensation for all prosthetic devices, as well as all supplies and treatment required to "relieve pain or promote and hasten the employee's restoration to health and employment"); and 1978 Neb. Laws, L.B. 529 (providing compensation for plastic or reconstructive surgery).

[9] We conclude that the history of the medical benefits provision, from its original enactment in 1913 to the present version applicable here, clearly manifests a legislative intent in § 48-120 to make medical benefits available to a disabled worker without regard to any time limitation measured from the last date of payment (when an award is entered), as long as further medical treatment is reasonably necessary to relieve the worker from the effects of the work-related injury or occupational disease. It is particularly significant to note that the statute, as originally enacted, contained a limitation on the time period during which medical expenses were compensable and that the Legislature later specifically removed that limitation from the statute. Furthermore, the construction we herein adopt accords with the interpretation which other courts have placed on statutory enactments similar to the medical benefits provision of § 48-120. See,

e.g., *Barnes v. W.C.A.B.*, 23 Cal. 4th 679, 2 P.3d 1180, 97 Cal. Rptr. 2d 638 (2000); *Lisney v. LIRC*, 171 Wis. 2d 499, 493 N.W.2d 14 (1992); *Grover v. Industrial Com'n of Colorado*, 759 P.2d 705 (Colo. 1988); *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986); *Depue v. Barsh Truck Lines*, 493 P.2d 80 (Okla. 1972); *Eide v. Whirlpool Seeger Corp.*, 260 Minn. 98, 109 N.W.2d 47 (1961); *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill. App. 3d 705, 691 N.E.2d 13, 229 Ill. Dec. 77 (1997).

[10,11] In so construing § 48-120, however, we hasten to emphasize that before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease. The employer, of course, may contest any future claims for medical treatment on the basis that such treatment is unrelated to the original work-related injury or occupational disease, or that the treatment is unnecessary or inapplicable. See § 48-120(6). Where the record has established, however, that future medical treatment will be reasonably necessary, the compensation court is authorized to enter an award of future medical benefits subject to the provisions of § 48-120(6).

§ 48-137 Analysis

Having determined that the Workers' Compensation Court has the statutory authority to order payment of future medical expenses incurred more than 2 years after the date of the last compensation payment, we now consider whether § 48-137 bars a claim made more than 2 years after the accident or last payment of compensation in a situation where compensation was paid pursuant to an award from the compensation court. In the instant case, the compensation court determined that § 48-137 operated to bar Foote's claim. That section provides, in relevant part:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the

> accident, one of the parties shall have filed a petition as provided in section 48-173. In case of death, all claims for compensation shall be forever barred unless, within two years after the death, the parties shall have agreed upon the compensation under the Nebraska Workers' Compensation Act, or unless, within two years after the death, one of the parties shall have filed a petition as provided in section 48-173. When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

Foote argues that his present claim is not barred by § 48-137 because he complied with § 48-137 by filing a petition in 1995. In reaching a contrary conclusion, the compensation court determined that the language "in any case" extends the 2-year limitation from the time of the last payment to cases in which a petition has been filed.

This conclusion is inconsistent, however, with the language of § 48-137, quoted above, indicating that a claim is forever barred *unless* a petition is filed. To state that a limitation will not take effect until the expiration of 2 years from the last payment presupposes that such a limitation is applicable in the first place, and the statute clearly provides that the 2-year limitation is contingent upon the failure of one of the parties to file a petition. See § 48-137. The language "in any case," upon which the compensation court relied, makes clear that when a petition has not been filed, the 2-year limitation from the making of the last payment runs in cases both of personal injury and of death. See *id.* It does not provide that the limitation period shall be applied where a party has timely filed a petition. See *id.*

[12] Instead, once a party has filed a petition and an award of compensation has been entered, that award is final and not subject to readjustment, unless there is an increase or decrease in incapacity or the condition of a dependant has changed. See Neb. Rev. Stat. §§ 48-140 and 48-141 (Reissue 1998). In other words, when a petition has been filed and an award made by the compensation court, there is no 2-year limitation on claims relating to the same accident because such claims are absolutely barred unless the requirements of § 48-141 are met.

The appellees rely on *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997), for the proposition that § 48-120 is not an exception to § 48-137. In that case, however, the claimant did not comply with § 48-137 by filing a timely petition, and we have concluded that § 48-137 does not apply to circumstances in which the claimant has timely filed a petition and obtained a final award of compensation. The appellees also rely on the case *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981), to argue that § 48-137 applies regardless of whether payments have been made pursuant to a prior award. That case, however, is distinguishable from the instant case. In *O'Connor*, the claimant was awarded permanent disability by the compensation court. The claimant sought additional compensation more than 6 years after the making of the last payment, claiming an increase in incapacity. This court noted that the claimant had obtained medical treatment for his condition throughout the time period between the last payment and the claim of increased incapacity, but determined that the claim was not barred by § 48-137 because the claimant's increase in incapacity was the result of a latent condition that several physicians were unable to diagnose. *O'Connor v. Anderson Bros. Plumbing & Heating, supra*.

In *O'Connor v. Anderson Bros. Plumbing & Heating, supra*, the question was whether the claim of increased incapacity was barred by § 48-137. Had the claimant in that case not made a claim of increased incapacity under § 48-141, his claim would have been barred regardless of when it was brought because it would have been an unauthorized attempt to readjust a final award of compensation. See § 48-140. In this case, there is no claim for which § 48-141 applies. In short, while § 48-137 may bar a claim brought under § 48-141, § 48-137 does not otherwise apply where a petition has been timely filed and an award obtained.

Foote's claim in the instant case is admittedly based on the same accident that was the subject of the 1996 award, and the parties agree that the requirements of § 48-141 have not been satisfied. Consequently, the compensation court erred in applying the 2-year limitation of § 48-137 in the instant case because absent satisfaction of § 48-141, a claim for additional benefits relating to the same accident is barred regardless of whether or

not it is brought within 2 years of the making of the last compensation payment. We must analyze, therefore, whether Foote's claim in the instant case is a claim for additional benefits relating to the same accident or whether Foote's claim is covered by the 1996 award.

Terms of 1996 Award

Having determined that the compensation court was authorized to award payment of future medical expenses based upon a stipulation or appropriate evidence, we must finally determine whether that authority was exercised by the compensation court in this case when it entered the 1996 award. If it was not, then Foote's claim would be barred as an attempt to readjust a final award of compensation. See § 48-140. As stated above, the 1996 award was entered pursuant to stipulation, and both the stipulation and the award stated that "the Defendants shall still be liable to pay to or on behalf of the Plaintiff all reasonable and necessary medical expenses resulting from said injuries."

The trial court in this case determined that the award was not an award of future medical benefits, stating that

> the intent of the parties in agreeing to such provision in a stipulated award was not to waive any future benefit that the particular party may be entitled to, but only to [e]nsure payment of medical expenses due and owing on the date of the award or in the future subject to any legal right a party may possess now or in the future. If the Court were to accept the plaintiff's argument that . . . the award of May 21, 1996 tolls the statute of limitations, then there would be no period of time in which the statute of limitations could run. The Court finds that was not the parties' agreement or intent.

The trial court's concern about the statute of limitations is misplaced, however, as § 48-137 does not operate to bar the enforcement of a validly entered final award of compensation. Moreover, the language of the stipulation does not support the construction placed upon it by the trial court.

[13,14] The parties stipulated that the appellees would be liable for *all* reasonable and necessary medical expenses resulting from said injuries. Neither the stipulation nor the order places any temporal limitation on when such medical expenses were to

be incurred. A stipulated award may provide that the employer has liability for future medical treatment. *Price v. W.C.A.B.*, 10 Cal. App. 4th 959, 12 Cal. Rptr. 2d 831 (1992). The construction of a stipulation is a question of law, and we conclude that the stipulation at issue in this case subjected the appellees to liability for all reasonable and necessary medical expenses resulting from Foote's injuries, whether they were due and owing at the time of the award or whether they are incurred in the future.

Accordingly, we conclude that Foote's claim in the instant case is not barred because he is simply asking the compensation court to exercise its continuing jurisdiction over medical benefits to enforce the terms of its 1996 award. See § 48-120(1) (stating that liability for medical expenses is "subject to the approval of and regulation by the Nebraska Workers' Compensation Court"). See, also, *Barnes v. W.C.A.B.*, 23 Cal. 4th 679, 2 P.3d 1180, 97 Cal. Rptr. 2d 638 (2000) (noting distinction between rescinding and enforcing award and holding that workers' compensation board retained jurisdiction over award of future medical benefits); *St. Clair v. County of Grant*, 110 N.M. 543, 797 P.2d 993 (N.M. App. 1990) (holding that court had continuing jurisdiction to enforce judgment requiring payment of future medical expenses).

CONCLUSION

We determine that Foote's claim for payment of medical expenses is not barred by § 48-137 and that the 1996 compensation court award authorized the payment of reasonable and necessary medical expenses resulting from said injuries, even where those expenses were incurred after the award was entered and more than 2 years from the time of the making of the last payment. Consequently, we conclude that the Court of Appeals erred in affirming the compensation court's order of dismissal.

We note that the 1996 award requires that for medical expenses to be compensable, they must be reasonable and necessary and result from the injuries that were the subject of the award. Because the compensation court determined that Foote's claim was barred by the statute of limitations, it did not reach those questions. Furthermore, should Foote ultimately prevail, he may be entitled to attorney fees. See, Neb. Rev. Stat. § 48-125(1) (Cum. Supp. 2000); *Harmon v. Irby Constr. Co.*, 258 Neb. 420,

604 N.W.2d 813 (1999). Therefore, this cause must be remanded to the compensation court for those determinations.

We reverse the judgment of the Court of Appeals and remand the cause to the Court of Appeals, with directions to reverse the judgment of the compensation court and remand the cause to the compensation court for further proceedings that are consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TEDD C. HUSTON, RESPONDENT.

631 N.W. 2d 913

Filed August 31, 2001. No. S-01-087.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. The following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
5. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
6. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
7. ____. The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors.
8. ____. In proceedings to discipline an attorney, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.

9. ____. The propriety of a sanction in attorney discipline proceedings must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior cases presenting similar circumstances.
10. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
11. **Disciplinary Proceedings: Presumptions.** Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On January 18, 2001, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Tedd C. Huston, respondent. A referee was appointed and heard evidence. Our opinion discusses only those charges the referee found were established by clear and convincing evidence.

The formal charges alleged, inter alia, that Huston violated the following provisions of the Code of Professional Responsibility, Canons 1, 2, and 9:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> . . . .
>
> DR 2-106 Fees for Legal Services.
>
> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

. . . .

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay account charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The formal charges also alleged Huston violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

On January 19, 2001, Huston filed an answer to the formal charges, admitting certain of the allegations, but denying that he had violated either the disciplinary rules or his oath as an attorney.

On January 24, this court appointed a referee to hear evidence and make a recommendation as to the appropriate sanction to be imposed. A referee hearing was held on March 28, at which hearing evidence was adduced and argument was made. On May 22, the referee filed his report. On May 23, Huston sent a letter to the referee, stating that he did not intend to file any exceptions to the report, but noting two factual matters in the report he believed needed correction. On June 1, the referee filed Huston's letter as a correction to the original report.

Relator has filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001), which provides that when no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. Thus, because no exceptions were filed, we consider the referee's findings to be final and conclusive.

The relator's burden of proof in disciplinary proceedings is to establish the allegations set forth in the formal charges against the attorney by clear and convincing evidence. See, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000); *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000). Based on the final and conclusive findings in the referee's report, we conclude that the formal charges are supported by the evidence and grant relator's motion under rule 10(L). Huston is suspended from the practice of law in the State of Nebraska for 6 months, as set forth below.

FACTS

The substance of the referee's findings may be summarized as follows: Huston was admitted to practice law in the State of Nebraska on June 21, 1952. He has been engaged in the private practice of law in Broken Bow, Custer County, Nebraska, since that date and at all times relevant to these disciplinary proceedings. In November 1997, Huston became semiretired and moved to Mesa, Arizona. He maintained his office in Broken Bow, however, splitting his time between his home in Arizona and his office in Broken Bow. Huston has employed the same office secretary for 38 years, and she works in the Broken Bow office 2 days per week when Huston is not in town. Huston and his secretary communicate by either telephone or fax once or twice a week when Huston is in Arizona.

Huston began representing Henrietta Johnson McCallister in 1956 or 1957. During the course of his representation of McCallister, Huston prepared her last will and testament, together with two codicils to the will, and also prepared her annual tax returns. McCallister died on November 22, 1997. At the time of her death, her estate totaled $344,974.81 in liquid funds held in four financial institutions in and around Broken Bow, and some securities. Of this amount, $137,892.53 was property subject to probate and $207,084.28 was jointly held nonprobate property. McCallister owned no real estate at the time of her death.

Huston was in Arizona at the time of McCallister's death. Upon learning of her death, however, he directed his secretary to begin preparing the opening documents for the estate. He then drove to Broken Bow to commence the probate of the estate. On December 2, 1997, Huston appeared in Custer County Court, and McCallister's will and the two codicils were admitted into informal probate. Richard S. Stone and William A. Johnson were appointed copersonal representatives of the estate.

Following the court's hearing, Huston, Stone, and Johnson met, and after visiting certain of the financial institutions where McCallister had maintained funds and reviewing her tax returns, they determined that the estate had assets of approximately $350,000 to $400,000 and that there were 26 heirs and beneficiaries. The value of the estate included nonprobate property passing by right of survivorship.

During this meeting, Huston discussed fee arrangements with the copersonal representatives. The referee acknowledged that there was a dispute in the evidence concerning the fee arrangement. Huston's customary practice was to compute an attorney fee at the rate of 2.5 percent of the probate property and 1 percent of the nonprobate property. Based upon the evidence, the referee concluded that Huston agreed to represent the copersonal representatives on an hourly basis of $125 or 2.5 percent of the value of the estate, whichever amount was less.

During the December 2, 1997, meeting, Johnson and Stone signed a $5,000 voucher and delivered it to Huston as the initial payment of his attorney fee. Huston deposited this fee directly into his office operating account and not into his trust account.

Huston worked on the McCallister estate from December 1997 to December 1998. Some of the work he performed in closing the estate included the following: On February 11, 1998, Huston completed the estate inventory, which was filed with the Custer County Court and county assessor on February 18. On May 26, Huston began preparing the final accounting. On June 1, Huston reviewed the final accounting. On July 23 and 24, Huston worked on and consulted with Stone regarding the final accounting for the estate. On August 28 and September 1, Johnson signed closing documents. On November 30, the final accounting, signed by both Johnson and Stone and showing receipts and disbursements, was filed with the county court. Although signed and dated April 10, 1998, the "Informal Closing of Estate by Verified Statement" was not filed with the county court until November 30.

The list of disbursements in the final accounting showed that Huston took a partial attorney fee of $5,000 on December 2, 1997, a check for $2,067.52 (including reimbursement for expenses of $67.52) on February 9, 1998, a legal fee of $2,000 on April 8, and $500 as the balance of the attorney fee on May 26, for a total attorney fee of $9,500. None of these payments were deposited into a trust account. Furthermore, Huston did not keep contemporary records of the time he expended working on the estate, and he did not present itemized billing statements to the copersonal representatives before requesting payment from the estate.

On December 1, 1998, Amy Seever Mooney, one of the heirs, filed an objection to the final accounting based upon Huston's attorney fees. Other heirs wrote letters joining in the objection. Huston filed a motion to dismiss the objection, attaching to the motion a statement of his time and charges. The county court held a hearing on the objection on April 7, 1999. No testimony was taken, but the court heard oral arguments from Huston and Jeff Seever, another heir, both of whom appeared pro se.

The county court determined that Huston's attorney fees were excessive. The court found that the estate consisted of liquid assets which should have taken very little time to assemble and distribute. The court further found that after reviewing the statement of charges attached to Huston's motion to dismiss, there

was "considerable duplication of effort" in handling estate matters between Huston and his secretary. The court determined that much of the time Huston indicated that he had spent on estate activities was overstated. Finally, the court found that the charges for work Huston's secretary had performed as a legal assistant were excessive, given that much of the itemized work was more secretarial in nature. Accordingly, the court reduced Huston's attorney fees from $9,500 to $4,000.

Without advising Johnson or gaining his consent, Huston immediately filed an appeal from the county court's order. The district court dismissed Huston's appeal for lack of jurisdiction. Huston then appealed the district court's decision to the Nebraska Court of Appeals. The referee's report states that the appeal was "still pending" as of the date of the report.

On June 1, 1999, the Counsel for Discipline's office received a letter from Seever complaining about the amount and the early withdrawal of Huston's attorney fees, as well as his appeal of the county court's order. The Counsel for Discipline forwarded Seever's complaint to Huston and asked for Huston to reply, as well as to provide the Counsel for Discipline with a copy of his office file in the McCallister estate.

After receiving the notice from the Counsel for Discipline's office, on June 28, 1999, Huston wrote Johnson and sent him an affidavit for his signature regarding the attorney fee agreement. The affidavit Huston prepared stated that Huston had told the copersonal representatives that the attorney fee would amount to approximately $10,000 plus expenses. On July 6, Johnson replied to Huston's letter, indicating a different recollection concerning the attorney fee agreement. In his letter, Johnson stated that there was no mention of $10,000, but, rather, the agreed-upon fee was $125 per hour or 2.5 percent of the estate, whichever amount was less.

On October 18, 1999, the Counsel for Discipline's office submitted written questions to Huston, which questions addressed, inter alia, Huston's fee agreement with the copersonal representatives. In his reply to the Counsel for Discipline's inquiry, Huston stated that Johnson did not remember the fee arrangement and had declined to sign an affidavit. Furthermore, when Huston provided the Counsel for Discipline's office with a copy

of his file on the McCallister estate, he failed to include a copy of Johnson's July 6 letter. Huston later claimed that he did not forward the letter with the file because the letter was in Arizona. Huston's secretary testified, however, that the last time she had seen the letter, it was in the office file in Broken Bow.

With regard to the formal charges, the referee determined that Huston's handling of the estate took longer than it should have. The referee found that the delay was not due to the complexity of the estate. He found there were no unusual legal issues involving the probate of the will or the administration of the estate, nor any unusual estate or inheritance tax issues. The estate was liquid, did not include any real estate, and, except for 100 shares of stock, was held in financial institutions. The assets were easily inventoried and collected. Because there were adequate estate assets to pay inheritance taxes due from the joint tenancy beneficiaries, there was no need to require contribution. The heirs and beneficiaries were easily located, yet they experienced substantial delay in receiving their distributions. In summary, the referee found there was no satisfactory explanation for the length of time it took to close the estate.

The referee attributed the delay in closing the estate to Huston's practicing law in Nebraska while in the process of retiring to live in Mesa, Arizona. The referee found Huston's attempt to continue to practice while entering retirement led to difficulty in counseling clients, supervising an office, remaining current on legal developments, and maintaining focus on professional responsibilities.

The referee also found that Huston received advances on his attorney fee which he failed to deposit in his trust account, but, rather, deposited in his office operating account. The payments Huston received always exceeded the amount of time he had devoted to the case. He received $5,000 in December 1997 when he had performed very little work on the estate. He received an additional $2,000 in February 1998, yet if he were paid based upon the rate of $125 per hour, he had devoted only $2,625 worth of time on the case. In April, Huston received an additional $2,000 as an attorney fee, when he had spent a total of $5,310 worth of time on the case. When Huston received his final payment of $500 in May 1998, he had devoted a total of

$6,562.50 worth of time on the case. When the estate was concluded in December 1998, Huston had been paid a total of $9,500, yet if his services had been billed out at the hourly rate of $125, he had spent only $8,750 worth of time on the case.

Huston claimed that the initial payment of $5,000 was an "engagement retainer," which he stated was earned when received, a practice he had used regularly with clients. The referee found, however, that under the fee agreement, which provided for an attorney fee based upon the lesser of the hourly or percentage fee, the fee could only be "earned" when Huston had performed the work.

The referee determined that Huston had charged an excessive fee for his representation of the copersonal representatives. Under the fee agreement, the referee found that Huston was entitled to the lesser of 2.5 percent of the probate assets plus 1 percent of the nonprobate assets, a total of $5,518.17, or $125 per hour, a total of $8,750. Thus, Huston's fee for the McCallister estate should have been the lesser amount of $5,518.17, rather than the $9,500 he received from the estate. The referee noted that the county judge, who relied upon his experience in probate matters, reduced Huston's fee to $4,000 and that Huston admitted the attorney fee he had been paid was excessive.

With regard to Huston's conduct during the Counsel for Discipline's investigation of Seever's complaint, although the referee found that Huston had cooperated fully during the investigation, the referee concluded that Huston's representation to the Counsel for Discipline's office regarding Johnson's inability to recall the fee agreement was untrue, concluding that Johnson clearly recalled the fee agreement and that his recollection was at odds with the affidavit prepared by Huston. The referee also determined that there was no satisfactory explanation for the omission of Johnson's July 6, 1999, letter from the office file when that file was forwarded to the Counsel for Discipline's office.

In addition to the facts recited above, the referee stated in his report that Huston had been an attorney in the Broken Bow area for 49 years. He had four children, three of whom were lawyers and one who was the executive director of a national organization headquartered in Washington, D.C. Huston had been a

community leader, serving as a member of the Broken Bow School Board, vice president of the Nebraska Junior Chamber of Commerce, president of the Broken Bow Chamber of Commerce, and a founding director of the Custer County Foundation. He has been an active supporter of the University of Nebraska, a member of the President's Advisory Council, and a supporter of the Nebraska Humanities Council.

Huston had served as president of the Custer County Bar Association and as host for several regional bar meetings. He provided pro bono legal services to many community organizations, including the Custer County Association for Retarded Children. The referee also received many letters in support of Huston.

The referee concluded that Huston admitted his misconduct and acknowledged responsibility for his actions. He cooperated fully with the disciplinary proceedings. His failure to deposit client funds into a trust account before performing the work proceeded from a good faith belief that such a practice was permissible as an engagement retainer. He was remorseful for his transgressions. The referee did not note whether Huston had had any prior disciplinary proceedings.

In his report, the referee specifically found by clear and convincing evidence that Huston had violated DR 1-102(A)(1), (4), and (5); DR 2-106; DR 9-102(A); and his oath of office as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations and considering the mitigating factors the referee found present in the case, the referee recommended that Huston be suspended from the practice of law for 6 months.

ANALYSIS

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-recited facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that Huston engaged in conduct which was prejudicial to the administration of justice, in violation of DR 1-102(A)(5), by unnecessarily delaying payments to beneficiaries of the McCallister estate. We conclude that the $9,500 fee Huston collected for his work on the McCallister estate was excessive, in violation of DR 2-106. We conclude that Huston violated DR 9-102(A) by depositing unearned attorney fees he received into his personal account instead of his trust account. We conclude that by virtue of Huston's untrue statement concerning Johnson's recollection of the attorney fee agreement and failure to deliver the entirety of his office file on the McCallister estate to the Counsel for Discipline, he has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of DR 1-102(A)(4). We further conclude that Huston has violated DR 1-102(A)(1) and the attorney's oath of office, see § 7-104.

[3,4] We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. NSBA v. Brown*, 251 Neb. 815, 821, 560 N.W.2d 123, 128 (1997). Accord *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

[5,6] With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). We

have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

> To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

State ex rel. NSBA v. Rothery, 260 Neb. at 766, 619 N.W.2d at 593. Accord, *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

[7-9] We have noted that "[t]he determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors." *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 631, 599 N.W.2d 592, 601 (1999). An isolated incident not representing a pattern of conduct is considered as a factor in mitigation. *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996). Finally, the propriety of a sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances. *State ex rel. NSBA v. Rothery, supra*; *State ex rel. NSBA v. Howze, supra*.

[10,11] As we have stated, Huston's conduct violated numerous provisions of the Code of Professional Responsibility and violated his oath of office as an attorney, and we do not condone it. In particular, we note that this case presents the misappropriation or commingling of client funds. We have previously stated that absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. *State ex rel. NSBA v. Howze, supra*. Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary. *Id*. A review of the facts in this case persuades us that the presumption of disbarment has been overcome.

Huston's violation of his oath of office as an attorney and his violation of the ethical standards governing the conduct of attorneys are serious matters. Although the misconduct charged was

an isolated incident, we must impose a disciplinary sanction to deter others from misconduct similar to Huston's in order to protect the public and to maintain the reputation of the bar as a whole. This court has found suspension to be the proper punishment in situations where the violation was grievous, but the totality of the circumstances warranted some leniency. See, *State ex rel. NSBA v. Bruckner, supra*; *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995).

Upon due consideration and after a de novo review of the record and a balancing of Huston's offenses with all mitigating factors, the court agrees with the referee's recommendation and concludes that Huston should be suspended from the practice of law in the State of Nebraska for 6 months.

CONCLUSION

When we balance the need to protect the public, the nature of Huston's offense, the need for deterring others, and the reputation of the bar as a whole against Huston's interest in preserving his privilege to practice law and all mitigating circumstances, we conclude that the appropriate discipline is to suspend Huston from the practice of law in the State of Nebraska for 6 months, effective immediately. Pursuant to Neb. Ct. R. of Discipline 23(B) (rev. 2001), the costs of these proceedings are assessed against Huston.

JUDGMENT OF SUSPENSION.

IN RE ESTATE OF HELEN R. MECELLO, ALSO KNOWN AS HELEN R. GERINGER, DECEASED.
JOSEPH R. KITTA, APPELLEE AND CROSS-APPELLANT, V. GEORGE R. GERINGER, APPELLANT AND CROSS-APPELLEE.

633 N.W. 2d 892

Filed September 7, 2001. No. S-00-141.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Decedents' Estates: Appeal and Error.** An appellate court, in reviewing a probate court judgment for errors appearing on the record, will not substitute its factual findings for those of the probate court where competent evidence supports those findings.
4. **Statutes: Wills.** Statutory provisions regarding the manner in which wills must be executed are mandatory and subject to strict construction.
5. **Wills: Witnesses.** The attestation required of witnesses to a will consists of their seeing that those things exist and are done which the law requires to exist or to be done in order to make the instrument, in law, the will of the testator.
6. **Wills: Proof.** In contested cases, the proponents of a will have the burden of establishing prima facie proof of due execution, death, testamentary capacity, and venue.
7. ____: ____. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.
8. **Evidence: Words and Phrases.** Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
9. **Wills.** Whether a trial court should have applied the doctrine of animo revocandi is a question of law.
10. **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.
11. **Wills: Presumptions.** Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his or her death, the presumption is that the testator destroyed it animo revocandi.

Appeal from the County Court for Douglas County: JOHN E. HUBER, Judge. Reversed and remanded with directions.

Francis R. Pane and, on brief, Lisa M. Meyer, of Gaines, Pansing & Hogan, for appellant.

William Stillmock for appellee.

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

WRIGHT, J.

NATURE OF CASE

This is an appeal from the Douglas County Court, which denied the admission to probate of two wills allegedly executed by Helen R. Mecello (Mecello). The proponent of the 1996 will, Joseph R. Kitta (Kitta), offered an initialed copy of the will because the original could not be found. The proponent of the 1991 will, George R. Geringer (Geringer), offered a signed original.

The trial court found that both wills were duly executed and that the 1996 will revoked the 1991 will. However, the trial court

also found that because the original 1996 will could not be located, it was presumed that Mecello had destroyed the instrument animo revocandi. Geringer has appealed, and Kitta has cross-appealed. We moved this matter to our docket pursuant to our statutory authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

SCOPE OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

Mecello died on January 5, 1999. Geringer, Mecello's stepson, filed an "Application for Appointment of Special Administrator in Informal Proceedings" on January 6. On January 8, an "Amended Appointment of Special Administrator" was entered by the trial court, indicating that appointment was necessary to, inter alia, obtain access to Mecello's safe-deposit box. On February 4, Geringer filed an "Application for Informal Adjudication of Intestacy . . . and Appointment of Personal Representative."

On February 19, 1999, attorney David Kolenda filed an affidavit with the trial court stating that he had prepared a will for Mecello and that she had executed said will on June 18, 1996 (the 1996 will). Attached to the affidavit was a copy of the 1996 will, which copy Mecello had allegedly initialed rather than signed.

On April 2, 1999, Kitta filed a petition for formal probate of the 1996 will and appointment of a personal representative. On April 5, 1999, Geringer petitioned for formal probate of a will dated June 25, 1991 (the 1991 will), and appointment of a personal representative. The actions were consolidated on the motion of the parties.

At trial, Geringer and his wife, Patricia Geringer, testified that sometime in late February or early March 1999, they and their daughter went through Mecello's house and discovered a

safe. Inside the safe, they discovered the 1991 will with a note allegedly stapled to it, which note Geringer tore off. The note read: "Ron[,] This is my will (dated June 25, 1991). All others are Revoked! [signed] Helen R Mecello May 9 1998 Mom."

In summary, the 1991 will devised $10,000 each to Geringer, Kerri Sibert, Scott Geringer, and Christopher Geringer; $5,000 to Brandon Sibert; $1,000 to St. Gerald's Catholic Church; and the remainder to Samuel Mecello, Mecello's husband, if living, otherwise to the cash devisees in proportion to their cash devises. The 1991 will revoked all previous wills and codicils.

The 1996 will devised $25,000 to Kathryn Kitta; $20,000 to Louis Mecello; $15,000 to the American Red Cross; $10,000 each to Kitta, Edward Kitta, Catholic Relief Services, the Salvation Army, and the Child Saving Institute; $5,000 each to Mary Kitta Scheebuger, Rick Sibert, Mary Kitta, Food for the Poor, Inc., the Visiting Nurse Association of Omaha, Nebraska, and the Salesian Society of St. John Bosco; $3,000 each to Richard Kitta, Thomas Kitta, Michael Kitta, Albert Kitta, Carol Kitta Gray, Debbie Kitta Wieczorak, Lori Kitta Long, Nicholas Sibert, and Brandon Sibert; $2,500 each to Emily Ryan and Mary Ridge; $2,000 to Marinell Garnatz; a certificate of deposit to St. Gerald's Catholic Church; and a certificate of deposit to Trinity Broadcasting Network. The will directed the personal representative to sell Mecello's house and give $10,000 to Christopher Geringer, with the remaining proceeds to go to Geringer. The will bequeathed Mecello's automobile to Daryl Greger. The residue of Mecello's estate was to go to St. John's Cemetery. The will revoked all previous wills and codicils.

At trial, Kolenda testified that he met with Mecello at his office on June 18, 1996. After they discussed and reviewed the will and determined that it met with Mecello's approval, Kolenda arranged for another witness to be present for the signing. He testified that Mecello signed the will in the presence of himself, the other witness, and his secretary, who would have notarized their signatures. Although Kolenda did not recall the name of the second witness, he stated that there were definitely two witnesses and that his secretary notarized their signatures. A copy of the will that was executed on that date was initialed by Mecello. This copy, marked as exhibit 7, was eventually sent to

the First National Bank of Omaha (First National Bank). Kolenda stated that he would have asked Mecello whether this was her last will and testament and would have also asked her whether she was executing this will as a free and voluntary act for the purposes expressed therein.

Kolenda stated that it was his opinion that Mecello was of sound mind and that she knew the extent "of her family and her relatives and the natural objects of her bounty." As a subscribing witness, he watched Mecello sign the document and execute it as her last will and testament in the presence of the other witness. In addition, Kolenda testified that a self-proving affidavit was also executed by himself, Mecello, and the other witness in the presence of his secretary, who then notarized the self-proving affidavit along with the will.

The affidavit provided:

> 1. That the Testatrix declared, published and signed such instrument as her Will in the presence of each of [the witnesses] and that [the Testatrix] declared, published, and signed each instrument willingly, or directed another to sign for her, and that the Testatrix executed such instrument as her free and voluntary act for the purposes therein expressed.
>
> 2. That each of us, witnesses, signed the Will as a witness in the presence and hearing of the Testatrix and at her request.
>
> 3. That each of us, witnesses, signed the Will as a witness in the presence of each other.
>
> 4. That to the best knowledge of each of us, at all times during the activities stated above:
>
> (a) The Testatrix was 18 years old or more, or was not a minor;
>
> (b) The Testatrix was of sound mind; and
>
> (c) The Testatrix was under no constraint or undue influence.

After the will and self-proving affidavit were executed, Kolenda called Thomas Gaughen, a trust officer at First National Bank, and told him that a copy of the will would be sent to him because the bank was named as personal representative. Gaughen told Kolenda that a copy of the will initialed by

Mecello would suffice. Kolenda stated that this was the reason that Mecello's initials were on the copy of the will that was sent to First National Bank.

Gaughen testified that he received "an unexecuted copy" of the 1996 will. Several other witnesses testified to conversations they had had with Mecello regarding this will and her intentions concerning the disposition of her property. A more detailed discussion of these facts will be set forth in the analysis section of this opinion.

Janet L. Huff, a safe-deposit clerk at the Norwest Bank in Ralston, testified that Mecello maintained a safe-deposit box there. Geringer contacted Huff prior to January 8, 1999, with regard to accessing the box. Since Mecello was the only signator for the box, Huff told Geringer that she would need a "court paper" granting him access. When Huff refused to let Geringer enter the box, Geringer replied that he was Mecello's son. Huff still refused to allow Geringer into the box because his name was not on the "access card."

On January 8, 1999, Geringer and his wife returned to the Norwest Bank with a "Letter of Special Administrator" allowing him access to the safe-deposit box. Huff testified that the Geringers were alone when they opened and examined the box in a privacy room. When the Geringers returned the box to Huff, it was empty. Geringer then surrendered the key and signed a contract closing the box.

Geringer testified that following Mecello's death, as special administrator of her estate, he entered her home and found the 1991 will and the attached handwritten note described above. Patricia Geringer testified that she also found a 1985 will in a stack of papers next to a shredder on Mecello's desk. On the front page of the will, a handwritten note across the text of the will states: "This Will is Void[.] [T]here is a New one Made[.] Febr 14—1998 [signed] Helen R Geringer Mecello." Patricia Geringer testified that the 1985 will, marked as exhibit 15, was in the same condition as when she found it. Geringer offered exhibit 15 into evidence. Kitta's objection on the basis of insufficient foundation was sustained.

The trial court found that Mecello executed a will on June 25, 1991; that Geringer, the proponent of the 1991 will, had met the

burden of establishing testamentary capacity and venue; and that the 1991 will was duly executed. The trial court also found that Mecello executed a will on June 18, 1996, in the law offices of Kolenda; that the execution of the 1996 will was attested to by Kolenda and another witness who could not be identified; and that the will was notarized by the secretary in Kolenda's office. The trial court concluded that on June 18, 1996, Mecello was of sound mind and voluntarily executed the original and an initialed copy of the 1996 will. The trial court found that upon execution of the 1996 will, the original was left in the possession of Mecello and a copy bearing her initials was sent to First National Bank. The original of the 1996 will could not be found.

The trial court concluded that Kitta, the proponent of the 1996 will, had not met his burden to provide sufficient evidence to overcome the presumption that the lost will was destroyed by Mecello animo revocandi. Therefore, the trial court denied probate of the 1996 will. However, the trial court received the 1996 will as evidence that the 1991 will was revoked by Mecello and concluded that there was not sufficient evidence to establish Mecello's intent to revive the 1991 will.

For these reasons, the trial court denied probate of both the 1991 will and the 1996 will. Geringer, the proponent of the 1991 will, appealed, and Kitta, the proponent of the 1996 will, cross-appealed.

ASSIGNMENTS OF ERROR

Geringer assigns as error the trial court's findings that the 1996 will was duly executed, that the 1996 will revoked the 1991 will, and that a note allegedly attached to the 1991 will did not revive the 1991 will. The trial court also allegedly erred by failing to admit the voided 1985 will into evidence.

Kitta's cross-appeal assigns as error the trial court's finding that the 1996 will was destroyed animo revocandi.

ANALYSIS

[3] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001). 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*. An appellate court, in reviewing a probate court judgment for errors appearing on the record, will not substitute its factual findings for those of the probate court where competent evidence supports those findings. See *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000).

[4] Geringer argues that the trial court erred in finding that the 1996 will was duly executed. The statutory requirements for execution of a will are set forth in Neb. Rev. Stat. § 30-2327 (Reissue 1995):

> Except as [otherwise] provided . . . every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

Statutory provisions regarding the manner in which wills must be executed are mandatory and subject to strict construction. See *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948).

[5] We first consider whether the trial court's finding that the 1996 will was duly executed is supported by competent evidence. The attestation required of witnesses to a will consists of their seeing that those things exist and are done which the law requires to exist or to be done in order to make the instrument, in law, the will of the testator. *Id*. "Due execution means compliance with the formalities required by the statute in order to make the instrument the will of the testatrix." *In re Estate of Flider*, 213 Neb. 153, 155, 328 N.W.2d 197, 199 (1982).

Neb. Rev. Stat. § 30-2430 (Reissue 1995) provides:

> (a) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the state competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.
>
> (b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing

the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

[6,7] In contested cases, the proponents of a will have the burden of establishing prima facie proof of due execution, death, testamentary capacity, and venue. See Neb. Rev. Stat. § 30-2431 (Reissue 1995). We point out that in the case at bar, death and venue are not contested nor at issue. "Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." *Id*. In this case, the original of the 1996 will cannot be found.

[8] Geringer claims that Kitta, the proponent of the 1996 will, did not produce sufficient evidence to meet the standard that the will constituted a valid testamentary document. In discussing the requirements of proving a lost will, we noted in *Williams v. Miles*, 68 Neb. 463, 478, 94 N.W. 705, 711 (1903) (quoting *Clark v. Turner*, 50 Neb. 290, 69 N.W. 843 (1897)), that " 'while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear and convincing. . . .' " Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994). Proof by clear and convincing evidence is still the requirement. See *In re Estate of Thompson*, 214 Neb. 899, 336 N.W.2d 590 (1983) (reaffirming requirement that proof of lost will be by clear and convincing evidence).

First, it is incumbent upon the proponent of a lost will to explain why the original will is not being offered for probate. See, *Hober v. McArdle*, 173 Neb. 510, 113 N.W.2d 625 (1962); *In re Estate of Francis*, 94 Neb. 742, 144 N.W. 789 (1913). Here, Kolenda, Mecello's attorney, testified to the circumstances surrounding the preparation and execution of the 1996 will and that an initialed copy was sent to the First National Bank, which was the personal representative named in the will. There was evidence that the 1996 will was placed in Mecello's safe-deposit box at the Norwest Bank and that 5 days before her death,

Mecello told a friend that her will was in the box at the bank. The trial court found that upon execution of the 1996 will, the original was left in the possession of Mecello but that the original could not be found. We conclude that the proponent of the 1996 will has satisfactorily explained why a copy of the 1996 will was offered for probate.

Geringer suggests that because the statutorily mandated requirements for due execution are missing from the copy of the 1996 will, its proponent should have been required to introduce more substantiating evidence. We disagree. A lost will may be proved by secondary evidence which is clear and convincing. In *Williams*, we expressly recognized that secondary evidence may be used to prove due execution of a will lost during the lifetime of the testator. The requirement is that such evidence be direct, clear, and convincing. "Due execution of an attested or unattested will may be proved by other evidence." § 30-2430(a).

Kolenda testified that after he discussed the will with Mecello and it met with her approval, he arranged for another witness to be present for the signing. Mecello then signed the will in the presence of Kolenda, the other witness, and Kolenda's secretary, who notarized their signatures. Kolenda asked Mecello whether this was her last will and testament and whether she was executing this will as a free and voluntary act for the purposes expressed therein.

Geringer claims that because attorney Kolenda could not recall the name of the second witness, the evidence was insufficient to support the trial court's finding that the will had been fully executed. Geringer's reliance upon *In re Estate of Thompson* is misplaced. There, we cited *Matter of Estate of Weidner*, 192 Mont. 421, 628 P.2d 285 (1981), stating:

> [W]here it could not be established that there was a second individual who had witnessed either the signing [of the document] or the testator's acknowledgment of her signature, there was insufficient evidence to support a finding that the will was fully executed and thus it could not revoke a prior will.

In re Estate of Thompson, 214 Neb. at 903, 336 N.W.2d at 592-93. In that case, due execution of the will could not be established because it was not proved that there was in fact a second

individual who had witnessed either the signing or the testator's acknowledgment of her signature.

Here, it was the identity of the second witness that could not be established, not whether there was in fact a second witness to the will. The evidence clearly and convincingly established that the will was executed by Mecello in a manner consistent with Neb. Rev. Stat. § 30-2329 (Reissue 1995). We conclude that the signature requirements have been proved by clear and convincing evidence.

The proponent of the 1996 will also has the burden of establishing prima facie proof of testamentary capacity. See, § 30-2431; *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982). As noted in *In re Estate of Camin*, § 30-2431 does not describe the manner by which such prima facie proof must be presented. Prior to the adoption of 1974 Neb. Laws, L.B. 354, this court stated in *In re Estate of Coons*, 154 Neb. 690, 48 N.W.2d 778 (1951), that all available witnesses must testify in a contested case. Otherwise, a prima facie case is not made. With the passage of L.B. 354, the only statutory requirement for the testimony of an attesting witness is found in § 30-2430(a), which requires "the testimony of at least one of the attesting witnesses."

The proponent of the 1996 will successfully established prima facie proof of Mecello's testamentary capacity with the testimony of Kolenda, an attesting witness and the attorney who prepared the will. Kolenda testified that Mecello was of sound mind, that she knew the extent of her family and relatives and the natural objects of her bounty, and that she executed the will as a free and voluntary act for the purposes expressed in the will. There was no evidence offered to rebut the proof of Mecello's testamentary capacity.

We conclude that the trial court's findings that the 1996 will was duly executed and that Mecello had the requisite testamentary capacity were supported by clear, convincing, and competent evidence and are neither arbitrary, capricious, nor unreasonable. Therefore, Geringer's assignment of error is without merit.

We next address Kitta's cross-appeal that the trial court erred in concluding that Mecello had destroyed the 1996 will animo revocandi. The trial court found that upon execution of the 1996 will, the original of the will was left in her possession. Relying

upon our decision in *Muse v. Stewart*, 173 Neb. 520, 113 N.W.2d 644 (1962), the trial court concluded that because the 1996 will could not be found, it was presumed that Mecello had destroyed the 1996 will animo revocandi. The trial court found that Kitta, the proponent of the 1996 will, had not met his burden of providing sufficient evidence to overcome this presumption. Kitta argues that the presumption of revocation was overcome by evidence of sufficient quality.

[9,10] Whether the trial court should have applied the doctrine of animo revocandi is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

[11] In *Muse*, we discussed the doctrine of animo revocandi. We stated that the law of Nebraska is well settled that where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his or her death, the presumption is that the testator destroyed it animo revocandi, citing *Williams v. Miles*, 68 Neb. 463, 94 N.W. 705 (1903). "The very fact that the will cannot be found is regarded as tending to show that the testator destroyed it animo revocandi." *Muse*, 173 Neb. at 525, 113 N.W.2d at 647. The presumption of revocation is not conclusive, but may be overcome by proof that is clear, unequivocal, and convincing that the testator did not revoke the will. See *id*.

In *Williams*, we stated that

> [t]he presumption of destruction *animo revocandi* is one of fact only. It governs in the absence of circumstances tending to a different conclusion, but may be overcome by circumstantial or other evidence to the contrary. . . . And declarations of the testator subsequent to the execution of the will, are admissible for this purpose.

(Citations omitted.) 68 Neb. at 468, 94 N.W. at 707.

> If the will is traced out of the testator's custody . . . the burden is on him who asserts a revocation to show that it came once more under the testator's control, or was destroyed by his direction. . . . In such cases if the person into whose hands the will is traced had an interest in procuring its destruction, some courts have suggested that they would

> go very far in presumptions as to the contents of the lost will and the mode of its disappearance.

Id. at 467, 94 N.W. at 707.

The doctrine of animo revocandi is applied when a will is last known to be in the custody of the testator and cannot be found after the testator's death. The logic is that since the testator was the last person to have custody of the will and it cannot be found, it is presumed that the testator destroyed the will. After the death of the testator, if custody of the will is shown to be in the possession of another, the doctrine of animo revocandi does not apply.

Here, the question is whether the proponent of the 1991 will is entitled to the presumption that the 1996 will was revoked. The declarations of Mecello after the execution of the 1996 will were admissible to show that she did not revoke it. See *id*. Five days before her death, Mecello told Mary Kitta that her will was in her safe-deposit box at the bank. After Mecello's death, Geringer entered the box and emptied its contents. Thus, the facts show that a person other than Mecello who would benefit from the revocation of the 1996 will had access to the box which Mecello had stated contained her will. Therefore, under the facts of this case, Geringer is not entitled to the presumption that Mecello revoked the will, and we decline to apply the doctrine of animo revocandi.

Geringer failed to show that Mecello entered her safe-deposit box after her conversation with Mary Kitta or that anyone else had access to the box before Geringer took possession of its contents. The access card at the bank would have shown the date if Mecello had entered the box or if any other person had accessed it. The safe-deposit clerk testified that records were kept concerning Mecello's entry into the box, as well as anyone else's access to it. The access card was not offered in evidence.

Thus, Geringer, the proponent of the 1991 will, failed to establish by any evidence that the 1996 will was last in the possession of Mecello or was revoked by her direction. Geringer was not entitled to the presumption of revocation. The doctrine of animo revocandi should not have been applied in this case, and the trial court erred in applying the doctrine.

Muse v. Stewart, 173 Neb. 520, 113 N.W.2d 644 (1962), the case relied upon by the trial court, is readily distinguishable on

the facts. There, we applied the doctrine of animo revocandi because there was no evidence that the lost will had been in the possession of anyone other than the testatrix. The testatrix stated that she was going to place the will and a postnuptial agreement in her safe-deposit box. The original will was never seen after it was placed in the box, and the evidence was undisputed that the will was deposited in a box to which the testatrix alone had access. After her death, several persons went to the bank and examined the box. They found the postnuptial agreement but did not find the will. Although there was an inference that one of the persons who would benefit if the will was revoked might have utilized an opportunity to destroy it, there was no evidence that this had occurred. We stated that there was not a scintilla of evidence to infer a motive for removing the will from the box unless it would have been to change or revoke it.

In contrast, the evidence clearly and convincingly established that Mecello did not revoke her will and that her will was in the safe-deposit box 5 days before her death. When Geringer first attempted to gain access to the box, he was refused entry because Mecello was the only signator for the box. Thereafter, Geringer returned with letters of administration and he was allowed access to the box. Geringer then removed everything from the box, returned an empty box to the bank, surrendered the key, and signed a contract closing the box. No inventory was made of the contents, and no disinterested witness testified as to the contents of the box.

Daryl Greger, a neighbor and friend, testified that he had had several discussions with Mecello about the disposition of her estate and matters relating to her will. Mecello told Greger that she kept her will in a safe-deposit box.

Mary Kitta, a very close friend of Mecello's and a former sister-in-law, testified that about 5 days before her death, Mecello called and was upset because Mecello's brother was ill and not expected to live and she did not want to be "the last one." Mecello said that her brother was all she really had and that " 'Ronny don't ever call. He don't come around.' " Mecello told Mary Kitta that Geringer would be "a very surprised young man because her Will all signed is in the safe deposit box, and the bank is going to handle it."

Mary Ridge, Mecello's neighbor, testified that in October or November 1998, Mecello told her that Geringer would be very surprised that he was going to get the house but that he and his wife could not live in it. They would have to sell it. Mecello told Ridge that she did not register her will at the courthouse because she was afraid Patricia Geringer would get in and read it at the courthouse. Mecello said that she kept her will in a safe-deposit box at the Norwest Bank.

Beverly Callahan, a friend of Mecello's, testified that after Samuel Mecello died, Mecello stated: " 'I suppose the kid will get everything now.' " Callahan responded: " 'What do you mean?' . . . 'He don't get it unless you say so, but you have to get a good lawyer and specify everything and make sure it was signed and put it in a safe place.' " According to Callahan, Mecello then stated: " 'Safe place, I got. I got a safe deposit box.' " Later, Mecello told Callahan she was glad they had had that discussion because she thought everything automatically went to her stepson. Callahan responded: " 'No, you can give it to whoever you want—charities, or whatever. You—as long as you leave him something.' . . . 'You got to leave him something.' " Mecello thanked Callahan for telling her this and said that she had put her will in her safe-deposit box.

All reasonable inferences clearly establish that the 1996 will was not last in the possession of Mecello. If a will is traced out of the testator's custody, the burden is on him who asserts a revocation to show that it came once more under the testator's control or was destroyed by his or her direction. *Williams v. Miles*, 68 Neb. 463, 94 N.W. 705 (1903). There was no evidence that Mecello had entered the safe-deposit box after her conversation with Mary Kitta just 5 days before her death. The evidence was undisputed that Geringer, the proponent of the 1991 will, entered the box after Mecello's death. The burden was on Geringer to show the 1996 will was revoked by Mecello.

CONCLUSION

The contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, or revocation. See § 30-2431. The proponent of the 1991 will, Geringer, has not established revocation of the 1996 will. Thus, we conclude that the trial court

erred in failing to admit the 1996 will, which was duly executed, to probate. Having so concluded, it is unnecessary for us to address Geringer's other assignments of error.

For the reasons set forth herein, we reverse the judgment of the trial court and remand the cause with directions to admit the 1996 will to probate.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., concurring.

I disagree with the majority's determination that the presumption that Mecello destroyed the 1996 will with the intention to revoke it (animo revocandi) does not apply. The majority concludes that because Geringer gained access to the safe-deposit box after Mecello's death, the 1996 will had been traced out of Mecello's custody, making the presumption of revocation inapplicable.

The 1996 will was in Mecello's possession and control until her death. Before her death, the will was last seen in her possession, and at no point during her lifetime was the will traced out of her possession and control. After Mecello's death, the will could not be found. The presumption is Mecello destroyed the will with the intent to revoke it, but I believe the presumption of revocation was rebutted.

When a will is shown to have been made and left in the custody of the testator, if it cannot be found after his or her death, the presumption is that the testator destroyed it animo revocandi. *Muse v. Stewart*, 173 Neb. 520, 113 N.W.2d 644 (1962). The fact that the will cannot be found is regarded as tending to show that the testator destroyed it animo revocandi. *Id*. Thus, the doctrine applies where a will was last seen in, or traced to, the decedent's possession, but cannot be found after his or her death. See, *id.*; *In re Estate of Drake*, 150 Neb. 568, 35 N.W.2d 417 (1948). See, e.g., *In re Estate of Morgan*, 389 Ill. 484, 59 N.E.2d 800 (1945); *Stiles v. Brown*, 380 So. 2d 792 (Ala. 1980); 79 Am. Jur. 2d *Wills* § 606 (1975 & Cum. Supp. 2001). See, generally, *Williams v. Miles*, 68 Neb. 463, 94 N.W. 705 (1903).

But the majority states that the presumption does not apply because the 1996 will was traced out of Mecello's control *after* her death. The majority notes that we have stated that if the will is traced out of the testator's custody, the burden is on the party

who asserts a revocation to show that it came once more under the testator's control, or was destroyed by his or her direction. *Williams v. Miles, supra*. The majority then concludes that because Geringer gained access to Mecello's safe-deposit box after her death, the presumption of revocation does not apply because the will was traced out of Mecello's possession and the burden was on Geringer to prove that the will was revoked by Mecello. I find such a conclusion illogical.

When a will is traced out of the possession of the decedent *during his or her lifetime* and cannot be found after his or her death, it is logical that the presumption of revocation either would not apply or would apply with less force because it is the decedent's access to the will during his or her lifetime that provides the reason for the presumption to apply. If a testator had no access to the will, he or she would have been unable to destroy it with the intent to revoke it. See *Hober v. McArdle*, 173 Neb. 510, 113 N.W.2d 625 (1962).

But the majority's holding that the presumption does not apply when the will is traced out of the decedent's control *after* his or her death obliterates the doctrine of animo revocandi. When a person dies, he or she no longer has control over his or her property. Usually, someone is going to gain access to the property. In every case, a will can be traced out of the decedent's custody after death. Thus, the holding of the majority leaves no situation under which the presumption can ever apply.

In cases in which a party had access to a will after the testator's death, the issue is whether the presumption has been rebutted, and not whether it applies. See, e.g., *Stiles v. Brown, supra*. See, generally, 79 Am. Jur. 2d, *supra*. Further, courts have analyzed this issue in terms of whether the presumption was rebutted even when an interested person had access to the will before the testator's death. See, e.g., *Moore et al. v. Williams et al.*, 30 Tenn. App. 479, 207 S.W.2d 590 (1947); *McClellan v. Owens*, 335 Mo. 884, 74 S.W.2d 570 (1934). Indeed, in *Muse v. Stewart, supra*, we analyzed the issue in terms of whether the presumption had been rebutted when the proponents of a will contended that someone other than the decedent had access to and destroyed the will either before or after the decedent's death.

Applying the above principles of law, I believe the presumption of revocation applies. Although Mecello is presumed to have destroyed the 1996 will with the intent to revoke it, this presumption is not conclusive and may be overcome by proper and sufficient proof that the testator did not revoke the will. *Muse v. Stewart*, 173 Neb. 520, 113 N.W.2d 644 (1962).

The evidence to overcome the presumption of revocation of a lost will must be clear, unequivocal, and convincing. *Id.* The burden is on the proponents, and the determination of the sufficiency of the evidence to overcome the presumption is for the court in the first instance. *Id.* But such a rule does not require evidence amounting to positive certainty, but only such as reasonably produces a moral conviction. *In re Estate of Morgan*, 389 Ill. 484, 59 N.E.2d 800 (1945). "[W]here the testimony all shows an attitude of mind and statements of the testator not only inconsistent with [a] revocation but contrary to it, courts are justified in concluding that the presumption has been rebutted." *Id.* at 489, 59 N.E.2d at 802. Thus, we have explained that the "presumption of destruction *animo revocandi* is one of fact only. It governs in the absence of circumstances tending to a different conclusion, but may be overcome by circumstantial or other evidence to the contrary." *Williams v. Miles*, 68 Neb. 463, 468, 94 N.W. 705, 707 (1903).

After the execution of the will, declarations of the testator are admissible for the purpose of proving that the testator did not destroy the will with the intention to revoke it. *Id.* See, also, *Muse v. Stewart, supra*. Also, the nature of the testator's relationship with beneficiaries of the will and with those challenging the will are admissible. See *In re Estate of Morgan, supra*. Proof that the testator felt kindly or loving toward the beneficiaries under the will carries weight and tends toward the conclusion of nonrevocation of the will by the testator. 79 Am. Jur. 2d *Wills* § 628 (1975 & Cum. Supp. 2001). See, generally, *In re Estate of Morgan, supra*. Although the mere fact that a will contestant had access to the will after the testator's death is not enough by itself to overcome the presumption, when such evidence is combined with other evidence that the testator did not destroy the will with the intent to revoke, the presumption can be overcome. See, *Stiles v. Brown*, 380 So. 2d 792 (Ala. 1980);

McClellan v. Owens, supra. See, generally, *In re Estate of Brown*, No. 01A01-9809-PB-00471, 1999 WL 802718 (Tenn. App. Oct. 7, 1999) (reversing trial court's finding that presumption had not been overcome). Likewise, standing alone, evidence that a duplicate will was retained in the custody of another person generally cannot act to rebut the presumption of revocation but may be combined with other evidence to rebut the presumption. See, generally, *Stiles v. Brown, supra*. Finally, it is not incumbent on the proponents to show the exact manner in which, or the particular person by whom, the will was destroyed. *McClellan v. Owens, supra*. Rather, it simply must be shown under the evidence as a whole that the will was not destroyed by the testator with the intent to revoke it. *Id.* See, also, *In re Estate of Morgan*, 389 Ill. at 487, 59 N.E.2d at 801 ("it is not necessary that the court be able to determine what happened to a will if there is evidence that indicates it was not revoked or cancelled by the testator").

The Illinois Supreme Court found the presumption to be rebutted when a testator, shortly before death, made references to his will which indicated an unchanged attitude regarding the disposition of his property and when no evidence was provided to show why the testator would want to revoke his will. *In re Estate of Morgan, supra*. The presumption has also been overcome when it was shown that others had access to the will, the testator had close relationships to the beneficiaries of the will, and other items where the will was kept had turned up missing. *Moore et al. v. Williams et al.*, 30 Tenn. App. 479, 207 S.W.2d 590 (1947). Further, the presumption has been overcome when a contestant to the will had access to it, the testator's attorney kept a duplicate of the will, and the attorney told the testator that the duplicate must be destroyed if the testator ever desired to revoke the will. *Stiles v. Brown, supra*.

I believe that the evidence shows that Mecello did not destroy the 1996 will with the intent to revoke it and that the trial court was clearly wrong in determining that the presumption had not been rebutted. The record is replete with statements by Mecello that her will was in her safe-deposit box and that she desired Geringer to receive very little of her property. As the majority noted, 5 days before her death, Mecello told Mary Kitta that

Geringer did not call or visit her. Mecello then stated to Mary Kitta that Geringer would be "a very surprised young man" because the will was signed, it was in the safe-deposit box, and the bank was going to handle it. Kitta testified that Mecello indicated to him that Geringer would get her house and nothing else.

Daryl Greger, a friend and neighbor of Mecello, testified that Mecello told him that she kept her will in her safe-deposit box. Greger also testified that Mecello was not very fond of Geringer and was reluctant to leave anything to him, but had mentioned that she would probably leave him the house and its contents. Shortly before her death, Mecello told Greger that she was leaving him her car. These statements are consistent with the terms of the 1996 will. Greger further testified that Mecello had once lost her keys to her safe-deposit box, had searched everywhere for them, and was extremely upset about the loss. The record reflects that on October 16, 1997, Mecello had the box redrilled and received new keys. Mecello told Greger that after she had the box redrilled, Geringer and his wife, Patricia Geringer, came to visit. Mecello told Greger that Patricia Geringer left the room for a period of time and that later that night, Mecello found the old safe-deposit box keys in plain sight inside a drawer.

Mary Ridge, Mecello's neighbor, testified that Mecello kept her will in her safe-deposit box. Ridge testified that in October or November 1998, Mecello told her that Geringer would be surprised that he was going to get the house but that it would have to be sold. Mecello told Ridge that she was also leaving money to different charities. These statements are also consistent with the terms of the 1996 will. Ridge urged Mecello to register her will at the courthouse, but Mecello said she was afraid that Patricia Geringer, who is an attorney, would find a way to read the will at the courthouse.

Beverly Callahan, another friend, testified that when Samuel Mecello died, Mecello stated that she assumed Geringer would " 'get everything now.' " Callahan told Mecello that " '[h]e don't get it unless you say so, but you have to get a good lawyer and specify everything and make sure it was signed and put it in a safe place.' " Mecello responded to this by saying " 'Safe place, I got. I got a safe deposit box.' " Mecello later told Callahan that she had made a will and had placed it in her safe-deposit box.

Yvonne Hager, a neighbor, testified that in October 1998, Mecello gave her some paintings of plates Mecello had painted and stated that Geringer and Patricia Geringer would probably come and take everything in the house when she died. Mecello indicated to Hager that she did not want the Geringers to get everything. Mecello had spoken about her will to Hager in the past, but had not told Hager where it was. Hager was aware that Mecello had a safe-deposit box and stated how upset Mecello was when she lost the keys to the box.

After Mecello's death, Geringer gained access to the safe-deposit box after arranging to be appointed special administrator. In his application for appointment of special administrator, prepared by Patricia Geringer, Geringer represented to the county court that he was an interested person as defined by Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2000). Geringer then represented that he was named personal representative in the will or was otherwise a proper person to be appointed. But, at the time Geringer made these representations, he had not found a will. Further, Geringer's testimony shows that Mecello never told Geringer that he would be appointed personal representative under a will and never told him that she had a will. I note that under Neb. Rev. Stat. § 30-2457 (Reissue 1995), a special administrator may be appointed on the application of any interested person. Under the definitions in § 30-2209, a stepson is not an interested person. An heir can be an interested person, but Geringer does not qualify as an heir. In order to meet the requirements to be appointed special administrator, Geringer would be required to be a devisee under a will or a person with priority to be appointed personal representative. See § 30-2209(3), (18), and (21). At the time Geringer made the application for appointment of special administrator, he had no knowledge that he met either of those requirements, yet he nonetheless represented to the county court that he did. The appointment was informal, and no notice was given to interested persons. The record reflects that members of the Kitta family lived in the area and would have been interested persons under § 30-2209(21). These were the proper parties to apply for appointment as special administrator.

Geringer and Patricia Geringer were the only people present when the safe-deposit box was emptied. Geringer later failed to

timely file an inventory of the contents of the safe-deposit box with the county court. On March 8, 1999, a motion for inventory was filed. The court filed an order for inventory and report of special administrator on June 1. On June 30, the court entered an order to show cause which ordered Geringer to file appropriate documents or be removed as special administrator. Geringer finally filed an inventory on July 15. Geringer did not list the 1991 will in the inventory. Geringer filed an amended inventory on August 24, which listed the 1991 will, but did not include the note Geringer alleges was attached to the will. The county court made a factual finding that the signature on the note did not resemble Mecello's signature on another document.

These facts rebut the presumption that Mecello destroyed the 1996 will with the intention to revoke it. The evidence clearly and convincingly supports the conclusion that 5 days before her death, Mecello still had a will in her safe-deposit box that she intended to have remain in effect. The record shows that Mecello was fond of certain beneficiaries under the will and continued to be close to those beneficiaries at the time of her death. Numerous witnesses testified regarding Mecello's desire to limit the property that was left to Geringer. No evidence has been provided to show that Mecello changed her mind in this regard. I further note that Mecello did not contact either attorney Kolenda or the named personal representative First National Bank and ask that copies of the 1996 will be destroyed.

The record does not support the conclusion that within the 5 days before her death, Mecello changed her mind about her will, retrieved it from her safe-deposit box, and destroyed it. Rather, the record shows overwhelming support for the conclusion that Mecello had the 1996 will in her safe-deposit box and intended that it be in effect at the time of her death.

I believe Kitta has shown by clear and convincing evidence that Mecello did not destroy her will with the intent to revoke it and that the county court was clearly wrong when it determined otherwise. I would find that the presumption of revocation had been rebutted. After the presumption was rebutted, Geringer failed to sustain his position by a preponderance of the evidence. I would hold that the 1996 will could be admitted to probate if it was not revoked by a later instrument.

The majority did not address the effect of the note allegedly attached to the 1991 will which was dated May 9, 1998, and which stated, "This is my will . . . . All others are Revoked!" Neb. Rev. Stat. § 30-2332(1) (Reissue 1995) provides that a will is revoked "by a subsequent will which, as is evident either from its terms or from competent evidence of its terms, revokes the prior will or part expressly or by inconsistency." The county court found that the note was not listed on either of the inventories filed by Geringer and made a factual finding that the signature on the note did not resemble Mecello's signature on another document. The note attached to the 1991 will is not sufficient to revoke the 1996 will. I would reverse, and remand with directions to admit the 1996 will to probate. Accordingly, I concur.

HENDRY, C.J., and STEPHAN, J., join in this concurrence.

JEFFREY LAKE DEVELOPMENT, INC., A NEBRASKA NONPROFIT CORPORATION, AND MIDWAY WILDLIFE AND RECREATION CLUB, A NEBRASKA NONPROFIT CORPORATION, APPELLEES, V. THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

633 N.W.2d 102

Filed September 7, 2001. No. S-00-376.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995) 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. **Contracts: Actions.** A suit on a contract is an action at law.
4. **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, 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.
5. **Judgments: Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.

6. **Judgments: Statutes: Appeal and Error.** In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
7. **Public Utilities: Corporations: Real Estate.** Pursuant to Neb. Rev. Stat. § 70-625 (Reissue 1986), subject to the limitations in the petition for its creation and all amendments thereto, a public power district shall have all the usual powers of a corporation for public purposes and may purchase, hold, sell, and lease personal property and real estate reasonably necessary for the conduct of its business.
8. **Public Utilities.** Pursuant to Neb. Rev. Stat. § 70-655 (Reissue 1976), the board of directors of any public power district shall have the power and be required to fix, establish, and collect adequate rates, tolls, rents, and other charges for electrical energy, water service, water storage, and for any and all other commodities, services, or facilities sold, furnished, or supplied by the district, which rates, tolls, rents, and charges shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation and conduct of the business of the district.
9. **Courts: Contracts: Public Policy.** It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.
10. ____: ____: ____. The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and should be exercised only in cases free from doubt.
11. **Public Utilities: Corporations: Contracts.** Pursuant to Neb. Rev. Stat. § 70-642.02 (Reissue 1996), no member of a board of directors shall be interested, directly or indirectly, in any contract to which the district, or any one for its benefit, is a party, and any such director who shall have such an interest shall be subject to removal from office therefor by the remaining members of the board. Such interest in any contract by a director shall void the obligation thereof on the part of the power district. Ownership of less than 1 percent of the outstanding stock of any one class of any corporation shall not constitute an interest, direct or indirect, within the meaning of § 70-642.02.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

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

Steve Windrum for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Central Nebraska Public Power and Irrigation District (Central) entered into two leases which are the subject of this

case: one with Jeffrey Lake Development, Inc. (JLDI), dated May 1, 1980, and another similar lease with Midway Wildlife and Recreation Club (MWRC) dated May 1, 1981. These leases respectively concerned portions of the lakefront property surrounding Jeffrey and Central Midway Lakes and contemplated the further sublease by JLDI and MWRC of portions of the leased property for construction of cabin residences and for recreational use. In 1994, Central sought to unilaterally change the terms of the leases in order to begin charging rent. JLDI and MWRC brought an action against Central seeking a declaratory judgment and an injunction to prevent Central from changing the lease. The trial court granted summary judgment in favor of JLDI and MWRC. The Nebraska Court of Appeals reversed, and remanded for a trial. *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 974, 568 N.W.2d 585 (1997). Neither party sought further review of this decision. The trial court then heard the case on the merits and found for JLDI and MWRC after a bench trial. Central appeals the trial court's decision, and we moved the case to our docket pursuant to our power to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

In 1980, Central entered into a lease with JLDI concerning portions of the lakefront property surrounding Jeffrey Lake. In 1981, Central entered into a substantially similar lease with MWRC concerning property surrounding Central Midway Lake, along with several other lakes. JLDI and MWRC are nonprofit associations that were formed for the purpose of managing the properties they lease from Central. JLDI and MWRC had originally entered into leases with Central concerning these properties in 1944 and 1945, respectively. Over the years, the parties executed several subsequent leases, none of which provided for the payment of cash rent to Central, but all of which contained terms JLDI and MWRC were required to meet in order to continue the lease.

The 1980 lease with JLDI defines the primary term to be 31 years but provides for an automatic annual 1-year extension, unless JLDI breaches the lease or the parties agree to modify it. The 1981 lease with MWRC provides for the same term. Neither lease provides for the payment of cash rent.

In 1994, Central's board of directors passed "Resolution 94-2" which authorized Central to offer a modification to the leases in order to provide, among other things, for rent to be paid by the sublessees to Central. The resolution also authorized Central to begin terminating the leases if the parties were unable to reach an agreement to modify the leases. JLDI subsequently filed this action, which MWRC later joined, seeking a declaratory judgment regarding the rights of the parties and an injunction to prevent Central from unilaterally modifying the leases. Central filed a cross-petition asserting that the lease to JLDI is invalid because of a conflict of interest on the part of one of its directors. Both parties filed motions for summary judgment, and the trial court granted JLDI and MWRC's motion. The Court of Appeals reversed. After trial on the merits, the trial court found for JLDI and MWRC. From this decision, Central appeals.

ASSIGNMENTS OF ERROR

Central assigns, revised and restated, the following errors:

(1) The trial court erred in entering a declaratory judgment for JLDI and MWRC and in finding that the leases were not illegal, ultra vires, or void.

(2) The trial court erred in finding that the leases are not in violation of public policy and hence illegal and void.

(3) The trial court erred in finding that the Jeffrey Lake lease is not void and unenforceable under Neb. Rev. Stat. § 70-642.02 (Reissue 1996) due to a conflict of interest on the part of C.J. Hargleroad, a director of Central.

(4) The trial court erred in overruling Central's motion for new trial.

(5) The trial court erred in construing the terms of the leases.

STANDARD OF REVIEW

[1-3] An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995) 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. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994). JLDI and MWRC's petition in this case seeks an injunction, whereas Central's cross-petition seeks a declaration that the leases are void. An action for injunction sounds in equity. *Omega Chem.*

Co. v. United Seeds, 252 Neb. 137, 560 N.W.2d 820 (1997). A suit on a contract is an action at law. *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). Thus, while JLDI and MWRC's petition is an action in equity, Central's cross-petition is an action at law.

[4] 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, 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. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[5] In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

[6] In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001); *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000).

ANALYSIS

Ultra Vires

Central first argues that the two leases constitute gifts of public property. Central is essentially arguing that the leasehold interests it gave to JLDI and MWRC, respectively, have value and that Central received no consideration or inadequate consideration in return for the leasehold interests. Central points to the fact that the leases do not provide for any rent to be paid to Central and that they are of indefinite duration. Central asserts that the trial court was clearly wrong in finding that noncash consideration existed. Central's conclusion is that if the leases actually constitute gifts of public property, then the leases are ultra vires, because Central is not authorized to make such gifts.

JLDI and MWRC, on the other hand, argue that in fact they did give consideration, pointing to numerous duties imposed

upon them under the 1980 and 1981 leases which were not imposed upon them under previous leases. Under the 1980 and 1981 leases, JLDI and MWRC were obligated to require their sublessees to build cabins on their subleased lots, and these cabins were required to be constructed upon a concrete slab. There are 128 subleases on Jeffrey Lake and 49 on Central Midway Lake. Values of the improvements range up to $75,000 apiece. The leases also imposed "general recreational responsibility" on JLDI and MWRC and required them to cooperate with the Nebraska Game and Parks Commission for the control and regulation of boating, swimming, and other uses of said property, "all for the best and safest uses of the facilities by the public." The leases obligate JLDI and MWRC to keep all respective leased premises, including those areas which are not subleased, free of refuse and in a "good, husband-like condition." Also under the leases, JLDI and MWRC are required to maintain and operate public wells and are required to protect Central's interest from adverse possession. JLDI and MWRC had none of these obligations under previous leases.

In addition to the above terms, JLDI and MWRC also agreed to the following conditions in the 1980 and 1981 leases: JLDI and MWRC respectively must destroy weeds from the entire leased area, including those areas not subleased. The leases prohibit using the leased land for commercial or business purposes. Moreover, under these leases, a sublessee may not sublease more than one of Central's lots. Under the terms of the leases, Central may vary the water level in the reservoirs at its discretion, and it may terminate the leases without recourse and destroy any improvements made if it has a need to enhance its electrical generating or irrigation facilities. JLDI and MWRC argue that the above requirements provided in the lease constitute legal detriments to JLDI and MWRC and are adequate consideration for the leasehold interest.

[7,8] Under Neb. Rev. Stat. § 70-625 (Reissue 1986), Central has, subject to the limitations in the petition for its creation, "all the usual powers of a corporation for public purposes and may purchase, hold, sell, and lease personal property and real estate reasonably necessary for the conduct of its business." It is undisputed that the real estate in question was reasonably necessary

for the conduct of Central's business. Central argues, however, that it is required under Neb. Rev. Stat. § 70-655 (Reissue 1976) to charge rent on such real estate. Section 70-655 provides:

> The board of directors of any district . . . shall have the power and be required to fix, establish and collect adequate rates, tolls, rents, and other charges, for electrical energy, water service, water storage, and for any and all other commodities, services or facilities sold, furnished or supplied by the district, which rates, tolls, rents and charges shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the benefits of a successful and profitable operation and conduct of the business of the district.

Even if this section requires rent to be collected on these properties, such rent would not necessarily have to be cash rent, but would only have to be reasonable consideration. *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 974, 568 N.W.2d 585 (1997). This section would merely require consideration. Thus, the question is whether the consideration that passed from JLDI and MWRC, respectively, to Central under the leases constituted reasonable consideration.

As noted above, the leases in question here require of JLDI and MWRC numerous performances and forbearances. In our de novo review, we conclude that JLDI and MWRC incurred legal detriment and that Central obtained benefit by entering into the respective leases. Because consideration was given in exchange for the leasehold interests, we find that the leases are not gifts and, as such, are not ultra vires.

Public Policy

Central next argues that the leases are against public policy. The trial court in regard to the public policy issue stated:

> The Court has no difficulty in recognizing that the lots at Jeffrey Lake and Midway have substantial value, which value has increased over the years. That, however, does not lead to the conclusion that [Central] is giving away its property in violation of public policy. . . .

> [JLDI and MWRC] also rightly point out that additional obligations were entered into by it when the last agreement was negotiated in 1980, including the maintaining of a cooperative relationship between the Game & Parks Commission for the recreational use of the lake and various requirements in regard to the cabins located upon the lake.
>
> The Court certainly accepts the testimony by [Central] that Jeffrey Lake is simply a pass-through for the irrigation system developed by [Central]. While that may be the case, over the life of the agreement of the parties which had been in existence for close to 60 years, [Central] has never maintained Jeffrey Lake as merely a pass-through, but has recognized its recreational value through its agreement with [JLDI and MWRC] as well as the Game & Parks Commission. Also, it seems anomalous for [Central], at this late date, to claim that it has been violating the public policy of this State by giving away the property of a political subdivision, while continually participating in the maintenance and enhancement of the facilities at Jeffrey Lake. Given the circumstances of the lease arrangements, the obligations placed upon [JLDI and MWRC] under the lease agreement, the benefit to [Central] in regard to the FERC Licensing and goodwill received by the maintenance of the recreational facility, it seems clear that [Central] is not giving anything away, but is receiving a benefit for which it contracted and which it is obligated to comply with.

On appeal, Central argues that public policy imposes upon Central a duty to serve the public in Central's service area by furnishing electrical energy and water service at the lowest cost consistent with sound business judgment. Central maintains that because the leases in this case do not require cash rent and continue for an indefinite term, they impair Central's ability to discharge its duty to the public. As a result, Central concludes, the leases are against public policy and are thus illegal.

[9,10] In *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996), the claim was made by several rural electric utilities against the Nebraska Electric Generation and Transmission Cooperative, Inc., that the contracts with

the cooperative were void as against public policy. We held the contracts were valid, stating:

> " ' "It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. * * * 'the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and . . . should be exercised only in cases free from doubt.' . . ." ' "

Id. at 918, 546 N.W.2d at 319, quoting *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985), and *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954). Under our de novo review, we cannot say that in this case, the issue is free from doubt.

The fallacy of Central's argument is that it assumes that the provision of hydroelectric power and irrigation is the only public interest involved in this case. Certainly, the provision of power and irrigation under this statutory scheme is a public purpose, but so is the recreational use of these lakes. It would not be appropriate for this court to decide whether one public purpose should be given precedence over another. To hold these leases void as against public policy would be to declare the public interest in power and irrigation under these statutes to be superior to the public interest in the recreational use of these lakes. We are ill-equipped to make such a decision, and we conclude, as did the Court of Appeals, that "it is far better to allow the contract negotiated and drawn between Central, representing the electric power provider and irrigator on one side, and [JLDI and MWRC], representing those interested in recreation on the other, to stand rather than make a judicial determination that one public interest supplants another." See *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 974, 988, 568 N.W.2d 585, 594 (1997). The respective parties to a contract bear risks that the conditions under which the contract was entered will change and become less favorable to them over the course of the contract's term. Here, the parties have bargained for the terms of the leases and have assumed risks that the conditions may change during the course of the lease. If we were to accept Central's argument,

then Central could terminate any of its contracts whenever conditions changed unfavorably for Central. In other words, anytime one of Central's contracts became a greater burden to Central than it would bear if it were free from the obligations of the contract, Central could terminate the contract on the ground that it is against public policy. Such a situation may benefit Central initially because it could relieve Central of any obligation to perform its existing contracts. However, parties contemplating entering contracts with Central would be deterred from doing so because they could not be assured of Central's performance. This would certainly impair Central's ability to perform its duty to the public. We decline to so "emasculate" the liberty of contract by setting aside the contracts on the ground of public policy. We therefore affirm the finding of the trial court in this regard.

Conflict of Interest

[11] Central asserted in its cross-petition and now contends on appeal that under the provisions of § 70-642.02, the Jeffrey Lake lease is void. As proof of its claim, Central offered evidence to show that at the time Central's lease with JLDI was executed, Hargleroad was serving on Central's board of directors and was subleasing a lot from JLDI on Jeffrey Lake. Central contends that this evidence proves that Hargleroad held an interest prohibited by § 70-642.02, which states as follows:

> No member of the board of directors shall be interested, directly or indirectly, in any contract to which the district, or any one for its benefit, is a party, and any such director who shall have such an interest shall be subject to removal from office therefor by the remaining members of the board . . . . Such interest in any contract by a director shall void the obligation thereof on the part of the power district. Ownership of less than one percent of the outstanding stock of any one class of any corporation shall not constitute an interest, direct or indirect, within the meaning of this section.

Central concludes that because Hargleroad held such an interest in the sublease from JLDI, the lease is void under the terms of the statute.

There is no question that Hargleroad was not directly interested in the 1980 lease. The question presented is whether

Hargleroad's sublease from JLDI is an indirect interest under the terms of the statute. Central's argument on this issue assumes that a sublease of Central's land by one of Central's directors is, as a matter of law, an indirect interest that is prohibited by the statute. We have never so held under this or any other similar statutory prohibition of interested transactions, and we decline to make such an assumption now. The question of whether an interest exists under the statute is therefore a question of fact. See *Copple v. City of Lincoln*, 202 Neb. 152, 274 N.W.2d 520 (1979) (decision whether particular interest of public official is sufficient to disqualify him from going on or participating in actions taken by public body is factual one and depends on circumstances of particular case). As such, we review the trial court's determination on the issue for clear error. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). The question then is whether the trial court committed clear error in finding that Hargleroad's interest is not an indirect interest under § 70-642.02.

An analysis of whether a director's interest is an indirect interest contemplated by the statutory prohibition depends on a showing that the potential for a conflict of interest exists. See, *Wyzykowski v. Rizas*, 132 N.J. 509, 524, 626 A.2d 406, 413 (1993) ("[a]n actual conflict of interest is not the decisive factor, nor is 'whether the public servant succumbs to the temptation,' but rather whether there is a potential for conflict"); *Griggs v. Princeton Borough*, 33 N.J. 207, 219, 162 A.2d 862, 869 (1960) ("it is the existence of such interests which is decisive, not whether they were actually influential"); *Delta Electric Const. Co. v. City of San Antonio*, 437 S.W.2d 602 (Tex. Civ. App. 1969). Because Central raised this issue in its cross-petition, it bore the burden to show that a potential conflict of interest exists on the part of Hargleroad.

The evidence Central presented on the issue shows only that Hargleroad was simultaneously a member of Central's board of directors and a sublessee of JLDI's. Central has not shown what powers Hargleroad had as a director that would give him the ability to influence the terms of a sublease between JLDI and a sublessee. Nor has Central shown the rights and duties of the parties to Hargleroad's sublease. Indeed, Central did not even

introduce Hargleroad's sublease into evidence, despite being requested to do so by the Court of Appeals in its opinion at the summary judgment stage of this case. Instead, Central merely introduced a blank sublease which may or may not have been similar to the one executed by JLDI and Hargleroad. Because Central bears the burden of proof on this issue, it must introduce evidence to show by a preponderance that a prohibited interest existed at the time the lease was executed. The trial court concluded that Central did not meet its burden, and we cannot say that this conclusion is clearly wrong.

CONCLUSION

Based on our de novo review, giving weight to the fact that the trial judge heard and observed the witnesses in arriving at its conclusion, we find that the trial court did not err in finding that the leases from Central to JLDI and MWRC are not ultra vires, are not void as against public policy, and are not in violation of § 70-625. Furthermore, based on our review of the trial court's decision on Central's cross-petition, we conclude that the trial court was not clearly wrong in finding that Central had not met its burden of showing that Hargleroad's sublease was among those interests prohibited by § 70-642.02. Given our disposition of these issues, we need not address JLDI and MWRC's arguments that Central is barred by the doctrines of equitable estoppel and laches from asserting the invalidity of the leases. We also find Central's remaining assignments of error to be without merit.

We, therefore, affirm the trial court's order filed March 15, 2000, in all respects.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TIMOTHY E. SOPINSKI, RESPONDENT.

633 N.W. 2d 111

Filed September 7, 2001. No. S-01-265.

Original action. Judgment of suspension.

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

PER CURIAM.

On March 5, 2001, the Counsel for Discipline charged respondent, Timothy E. Sopinski, with three counts of violating his oath of office as an attorney and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1), (5), and (6), and Canon 6, DR 6-101(A)(3). DR 1-102(A)(1), (5), and (6) provide as follows: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law." DR 6-101(A)(3) provides: "DR 6-101 Failing to Act Competently. (A) A lawyer shall not: . . . (3) Neglect a legal matter entrusted to him or her."

On July 24, 2001, respondent filed with this court a conditional admission of guilt as to the allegations contained in the formal charges. On August 2, the parties filed a stipulation of counsel requesting that a suspension, if any, take effect no earlier than 10 days nor longer than 30 days after entry of an order of suspension.

The formal charges state as follows: Respondent was duly admitted to the practice of law in the State of Nebraska on September 23, 1997, has engaged in the practice of law in Lancaster County, and at all times relevant to this matter, was a deputy public defender in Lancaster County.

Respondent represented Gregory C. Thompson in regard to criminal charges filed in the district court for Lancaster County. On April 17, 2000, respondent filed a notice of appeal with the Nebraska Court of Appeals in *State v. Thompson*, A-00-427. Thompson's brief was due in the Court of Appeals on July 6. On July 11, the Clerk of the Nebraska Supreme Court and Court of Appeals sent respondent a letter by certified, U.S. mail, return receipt requested, advising respondent that Thompson's brief had not been filed by the July 6 deadline. Respondent received the letter on July 13. The letter further advised respondent that the appeal would be dismissed for failure to prosecute if the brief was not filed within 10 days from respondent's receipt of

the letter. Respondent failed to file a brief in the Court of Appeals, and Thompson's appeal was dismissed on July 31.

Thompson had no contact with respondent after his appeal was perfected to the Court of Appeals. Thompson did not consent to the dismissal of his appeal. Thompson did not have prior knowledge that respondent would not file a brief on his behalf and was not notified by respondent that the appeal had been dismissed.

On April 19, 2000, a letter of complaint written by Thompson against respondent was received by the office of the Counsel for Discipline. On the same date, the office of the Counsel for Discipline forwarded a copy of Thompson's letter to respondent and asked respondent to file a written response with the office of the Counsel for Discipline. In a letter dated May 18, the office of the Counsel for Discipline advised respondent that his response to the Thompson letter had not been received, and respondent was again requested to submit a written response to the office of the Counsel for Discipline.

On June 6, 2000, the office of the Counsel for Discipline logged Thompson's letter as a grievance against respondent pursuant to Neb. Ct. R. of Discipline 9(D) (rev. 2001). A copy of the grievance was mailed to respondent by certified, U.S. mail, return receipt requested, and was received by respondent's office on June 7. An accompanying cover letter advised respondent that pursuant to rule 9(E), respondent was required to file an appropriate response to the grievance with the office of the Counsel for Discipline within 15 working days. By letter dated July 5, 2000, the office of the Counsel for Discipline advised respondent that his response to the Thompson grievance had not been received. On August 1, respondent submitted a written response to the Thompson grievance.

On September 14, 2000, the office of the Counsel for Discipline sent a disciplinary grievance to respondent by certified, U.S. mail, return receipt requested, which was received by respondent's office on September 15. An accompanying cover letter advised respondent that pursuant to rule 9(E), respondent was required to file an appropriate response to the grievance with the office of the Counsel for Discipline within 15 working days. By letter dated October 12, 2000, the office of the Counsel for Discipline advised respondent that his response to the

September 14 grievance had not been received. As of the filing of the formal charges on March 5, 2001, respondent had not submitted a written response to the September 14, 2000, grievance.

In the conditional admission, respondent admits the facts as outlined in the formal charges and admits that he violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3). Respondent also admits that he violated his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

After the charges were filed in this action, respondent enrolled in and completed an inpatient alcohol treatment program provided by Valley Hope. Respondent has abstained from the use of alcohol, which he admits was an apparent contributing factor to the errors and omissions which gave rise to the filing of the formal charges.

The conditional admission includes a stipulation between respondent and the Counsel for Discipline regarding the proper discipline to be imposed in this case. Respondent and the Counsel for Discipline agreed in the stipulation that respondent should be suspended from the practice of law in the State of Nebraska for 60 days, comply with the provisions of a monitoring contract respondent entered into with the Nebraska Lawyers Assistance Program (NLAP) dated July 6, 2001, and accept a term of probation of at least 1 year from the date of the NLAP contract.

Based on the conditional admission of respondent and the recommendation of the Counsel for Discipline, this court finds by clear and convincing evidence that respondent has violated DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); and his oath of office as an attorney. Accordingly, we suspend respondent from the practice of law in the State of Nebraska for a period of 60 days, effective 20 days after the filing of this opinion. Upon his application for reinstatement, respondent shall have the burden of proving that he has not practiced law during the period of suspension, that he has met the requirements of Neb. Ct. R. of Discipline 16 (rev. 2001), and that he is fit to practice law. In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to respondent; (2) respondent's compliance with the terms of his contract with the NLAP monitoring program; (3) a showing by independent, third-party proof that respondent has continued

active participation in an alcohol recovery program and has maintained abstinence from the use of alcohol during the period of suspension; and (4) the submission by respondent and approval by this court of a probation plan, to be in effect for a period of 1 year following reinstatement, whereby respondent's recovery program and his compliance with the Code of Professional Responsibility will be monitored by the NLAP and the Counsel for Discipline. Failure to comply with the terms of the probation plan would constitute grounds for further disciplinary action. Respondent is directed to comply with rule 16. Costs and expenses are taxed to respondent. See Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF SUSPENSION.

FOLGERS ARCHITECTS LIMITED, ASSIGNEE OF FOLGERS ARCHITECTS & FACILITY DESIGN, INC., A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT, V. RICHARD A. KERNS ET AL., APPELLANTS AND CROSS-APPELLEES.

633 N.W. 2d 114

Filed September 14, 2001. Nos. S-98-1326, S-98-1327, S-98-1328.

1. **Judgments: Appeal and Error.** 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.
2. **Contracts: Damages: Estoppel.** When an unambiguous contract exists that covers the issue for which damages are sought, promissory estoppel is not a viable theory of recovery.
3. **Appeal and Error.** An appellate court may, at its option, notice plain error.
4. **Prejudgment Interest.** Neb. Rev. Stat. § 45-103.02 (Reissue 1998) prescribes the conditions for allowance of prejudgment interest on all causes of action accruing on or after January 1, 1987.
5. **Supreme Court: Courts: Appeal and Error.** Upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petitions for further review from the Nebraska Court of Appeals, SIEVERS and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Douglas County, GERALD E. MORAN, Judge. Judgment of Court of Appeals affirmed in part, reversed in part and modified in part, and cause remanded with directions.

P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellants.

Gregory C. Scaglione, of Koley, Jessen, Daubman, & Rupiper, P.C., L.L.O., for appellee.

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

STEPHAN, J.

In these consolidated actions, Folgers Architects Limited (FAL), as the assignee of Folgers Architects & Facility Design, Inc. (FAFD), seeks to recover professional fees relating to several apartment construction projects. Claims were asserted against Richard A. Kerns, as well as various corporations and limited partnerships. Following a bench trial, the district court for Douglas County entered judgment in favor of FAL on all but one of the projects. The defendants below appealed, and FAL cross-appealed. The Nebraska Court of Appeals affirmed in part, affirmed in part as modified, reversed and dismissed in part, and in part vacated and set aside the judgment of the district court. *Folgers Architects v. Kerns*, 9 Neb. App. 406, 612 N.W.2d 539 (2000). FAL filed a petition for further review. A second petition for further review was filed jointly on behalf of Kerns; Burwick Apartments, Ltd.; Thornberry Apartments, Inc.; Sussex Place Apartments, Inc.; Ashberry Apartments, Inc.; and Walton Heath Apartments, Inc. We granted both petitions for further review.

I. BACKGROUND

1. FACTS

The facts relevant to the issues on appeal are set forth in detail in the opinion of the Court of Appeals and briefly summarized here. In late 1992 or early 1993, Jeffrey Anderzhon, an architect associated with Anderzhon Architects, Inc. (AAI), met with

Kerns to discuss the possibility of AAI's providing architectural services for the development of several apartment complexes. Several breakfast meetings were subsequently held to discuss the development of the apartment complexes, which were to include projects known as Thornberry, Burwick, Walton Heath, Ashberry, Sussex Place, Greely, Wingpoint, Devonshire, and Kennamare. It was agreed that the design of the projects would be based on two other apartment complexes designed by Anderzhon and that fees would be paid on a per unit basis. Anderzhon was to be paid a $5,000 initial retainer fee for each project and would issue invoices for his services as work progressed. It was further agreed that as each apartment project progressed, ownership entities would be formed and a written standard form contract prepared by the American Institute of Architects (AIA), known in the industry as a B181 contract, would be executed by the ownership entities and the architect. The written contracts were to comply with the requirements of Housing and Urban Development.

In April 1993, Anderzhon began providing architectural services for the projects. In July 1994, AAI merged its operation with FAFD, although Anderzhon retained the accounts receivable for the work already performed by AAI. All services provided by Anderzhon and FAFD after July 1994 were billed by FAFD.

On the Burwick and Walton Heath projects, ownership entities were formed and B181 contracts were executed. On the Thornberry, Ashberry, and Sussex Place projects, ownership entities were formed but no written contracts were executed. On the Greely, Wingpoint, Kennamare, and Devonshire projects, no entities were formed and no written contracts were executed. Anderzhon and FAFD provided services for all projects. Due to a lack of funding, none of the projects were completed, and in May 1995, Anderzhon sent Kerns a letter of termination.

In 1995, 1996, and 1997, FAFD filed separate lawsuits which were subsequently consolidated against Kerns; Burwick Apartments, Ltd.; Thornberry Apartments, Inc.; Sussex Place Apartments, Inc.; Ashberry Apartments, Inc.; and Walton Heath Apartments, Inc. On or about May 1, 1997, Anderzhon resigned his position with FAFD. At that time, Anderzhon assigned to FAFD the accounts receivable of AAI for architectural services

provided on the projects prior to July 1994. In 1997, FAFD discontinued its operations and assigned its accounts receivable to JLK Enterprises, which Anderzhon referred to as an "assignment entity." Subsequently, FAL purchased the accounts receivable of JLK Enterprises, which included the accounts at issue in these actions.

At the close of trial, FAL sought and received leave to file a consolidated petition to conform the pleadings with the evidence presented. On August 27, 1998, FAL filed a consolidated petition naming as additional defendants Burwick Apartments, Inc.; Thornberry Apartments, Ltd.; Sussex Place Apartments, Ltd.; Ashberry Apartments, Ltd.; and Walton Heath Apartments, Ltd. On September 8, these newly added defendants filed a special appearance, objecting to the jurisdiction of the court for the reason that no sufficient and proper service of summons had been served upon them. The district court overruled the special appearance.

2. Judgment of District Court

(a) Burwick and Walton Heath Projects

On November 12, 1998, the district court entered an order of judgment. As to the Burwick and Walton Heath projects, the district court found a breach of enforceable written and oral contracts between Anderzhon (the architect) and Kerns; Burwick Apartments, Inc.; and Burwick Apartments, Ltd. The court also found a breach of enforceable written and oral contracts between the architect and Kerns; Walton Heath Apartments, Inc.; and Walton Heath Apartments, Ltd. Furthermore, the district court found that Kerns and the above entities were liable to FAL, as assignee, on the theories of promissory estoppel and quantum meruit. Judgment was therefore entered against Kerns; Burwick Apartments, Inc.; and Burwick Apartments, Ltd., in the principal amount of $98,433.46, plus prejudgment interest of $62,097.78 and postjudgment interest at 18 percent per annum. Judgment was entered against Kerns; Walton Heath Apartments, Inc.; and Walton Heath Apartments, Ltd., in the principal amount of $200,238.24, plus prejudgment interest of $126,323.10 and postjudgment interest at 18 percent per annum.

(b) Thornberry, Ashberry, and Sussex Place Projects

With respect to the Thornberry, Ashberry, and Sussex Place projects, the district court found a breach of enforceable oral contracts between the architect and Thornberry Apartments, Inc.; Thornberry Apartments, Ltd.; Ashberry Apartments, Inc.; Ashberry Apartments, Ltd.; Sussex Place Apartments, Inc.; and Sussex Place Apartments, Ltd. The court also found all of the above ownership entities liable to FAL on the theories of promissory estoppel and quantum meruit. Judgment was entered against Thornberry Apartments, Inc., and Thornberry Apartments, Ltd., in the principal amount of $116,668.48, plus prejudgment interest of $49,068.15. Judgment was entered against Sussex Place Apartments, Inc., and Sussex Place Apartments, Ltd., in the principal amount of $72,470.36, plus prejudgment interest of $30,479.61. Judgment was entered against Ashberry Apartments, Inc., and Ashberry Apartments, Ltd., in the principal amount of $37,218.32, plus prejudgment interest of $15,653.46.

(c) Greely, Wingpoint, and Kennamare Projects

With respect to the Greely, Wingpoint, and Kennamare projects, the district court found a breach of an enforceable oral contract for Kerns to pay the architect $5,000 per project as an initial fee or retainer. The court also determined that there was sufficient evidence to find Kerns liable to FAL on these projects on the theories of promissory estoppel and quantum meruit. Judgment was entered against Kerns in the principal amount of $15,000, plus prejudgment interest of $6,308.71.

(d) Devonshire Project

With respect to the Devonshire project, the district court found that FAL failed to satisfy its burden of proof on any cause of action.

3. Judgment of Court of Appeals

Kerns and the various corporations and partnerships found liable by the district court appealed to the Court of Appeals, and FAL cross-appealed. We separately address each assignment of error considered by the Court of Appeals and its disposition by that court.

(a) Issues Raised by Kerns et al.

In their initial assignments of error, Kerns and the ownership entities contended that the district court erred in overruling the special appearances of the defendants named for the first time in the consolidated petition. The Court of Appeals found that no service was obtained on these parties and therefore held that the district court erred in overruling the special appearances of Burwick Apartments, Inc.; Thornberry Apartments, Ltd.; Sussex Place Apartments, Ltd.; Ashberry Apartments, Ltd; and Walton Heath Apartments, Ltd. The judgments against these parties were vacated.

Next, Kerns and the ownership entities assigned that FAL's claims based upon breach of written contracts on the Burwick and Walton Heath projects were barred by an anti-assignment provision in those contracts. After reviewing case law from other jurisdictions, the Court of Appeals held, as a matter of first impression in Nebraska, that a contractual provision prohibiting an assignment of rights under a contract, unless a different intention is manifested, does not forbid the assignment of a right to collect money damages for breach of the contract. Finding that the general rule applied to the facts of this case, the Court of Appeals held that the assignment to FAL was not prohibited by the terms of the written contracts.

Kerns and the ownership entities next assigned that the district court erred in permitting recovery on the written contracts for the Burwick and Walton Heath projects because neither project had obtained final approval from Housing and Urban Development. The Court of Appeals, relying on a contractual termination provision in the written contracts, held that the district court did not err in permitting recovery of the fees due on these projects.

Kerns also assigned that the district court erred in finding him personally liable on the written contracts for the Burwick and Walton Heath projects. The Court of Appeals held that Kerns signed the written contracts in his official capacity only and did not bind himself personally when doing so. The Court of Appeals thus reversed the finding that Kerns was personally liable on the written contracts.

Kerns and the ownership entities assigned that the trial court erred in finding that there were oral contracts for the Thornberry, Ashberry, Sussex Place, Kennamare, Devonshire, Wingpoint, and Greely projects. The Court of Appeals held that the district court was not clearly wrong in finding that the parties had entered into oral contracts for the payment of architectural services but that no payment had been made under those contracts and thus affirmed the judgment of the district court.

Kerns and the ownership entities also assigned that the district court erred in finding that FAL was entitled to recover on the basis of promissory estoppel. The Court of Appeals held there was no error in finding that FAL was entitled to recover on the basis of promissory estoppel on all projects.

Kerns and the ownership entities assigned that the district court erred in allowing FAL to recover on the theory of quantum meruit. The Court of Appeals held that because express written and/or oral agreements existed, recovery on the basis of quantum meruit was not permissible.

Finally, Kerns and the ownership entities assigned that the district court erred in awarding prejudgment interest. The Court of Appeals held that the district court's award of prejudgment interest was improper because FAL failed to comply with the statutory requirements of Neb. Rev. Stat. § 45-103 (Reissue 1998).

(b) Issues Raised by FAL's Cross-Appeal

FAL raised three issues on cross-appeal to the Court of Appeals. First, FAL asserted that the district court erred in failing to find Kerns personally liable on the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects. The Court of Appeals found that the district court did in fact find Kerns personally liable on these projects and affirmed such finding.

Second, FAL assigned that the district court erred in not awarding prejudgment interest at the rate of 18 percent on the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects, when it did so on the judgments relating to the written contracts for Burwick and Walton Heath. The Court of Appeals held that FAL was not entitled to prejudgment interest on any project because FAL failed to comply with the statutory requirements of Neb. Rev. Stat. § 45-103.02 (Reissue 1998).

Third, FAL assigned that the district court erred in failing to award postjudgment interest at the contract rate of 18 percent on projects other than Burwick and Walton Heath. The Court of Appeals found no agreement to pay a rate of interest other than that specified in § 45-103 and awarded by the district court and thus affirmed the judgment of the district court.

II. ASSIGNMENTS OF ERROR

In their petition for further review, Kerns and the ownership entities allege that the Court of Appeals erred in (1) finding that the trial court did find Kerns individually liable for the judgments awarded on the Thornberry, Ashberry, and Sussex Place projects; (2) affirming the judgments on the promissory estoppel theory; (3) affirming the judgment as to Walton Heath Apartments, Inc.; (4) failing to enforce the anti-assignment clause in the written contracts; (5) applying an incorrect standard of review to the quantum meruit and promissory estoppel causes of action; and (6) improperly summarizing the trial testimony of Anderzhon.

In its petition for further review, FAL asserts that the Court of Appeals erred in (1) applying an incorrect standard of review in evaluating the trial court's award of prejudgment interest; (2) overruling the award of contractual prejudgment interest on the Burwick and Walton Heath projects; and (3) reversing the award of statutory prejudgment interest on the Thornberry, Ashberry, Sussex Place, Greely, Wingpoint, and Kennamare projects.

III. STANDARD OF REVIEW

[1] 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. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000).

IV. ANALYSIS

In its order of judgment, the district court referred to the various apartment projects in related groups and made findings with

respect to each group. We utilize this same format in analyzing the issues which have been presented to us for further review.

1. Burwick and Walton Heath Projects

With respect to the Burwick and Walton Heath projects, ownership entities were formed and B181 contracts were executed. In its petition for further review, FAL did not contest the Court of Appeals' determination that Kerns was not personally liable on the written contracts or under a quantum meruit theory of recovery. The issues related to these projects are therefore limited to whether the Court of Appeals erred in (1) finding Kerns personally liable for all of the fees incurred on a promissory estoppel theory; (2) affirming the judgment against Walton Heath Apartments, Inc.; (3) reversing the award of prejudgment interest; and (4) failing to find that the anti-assignment provision in the written contracts barred the assignment from FAFD to FAL.

(a) Promissory Estoppel

[2] Kerns argues that the Court of Appeals erred in affirming the judgment of the district court holding him liable on the theory of promissory estoppel. The Court of Appeals found that Kerns did not bind himself personally on the contracts when he signed in his official capacity. Anderzhon testified that Kerns did not sign any guarantee to bind himself personally and that Kerns never said he would be personally responsible for the corporations' obligations. Moreover, the written contracts entered into between the architect; Burwick Apartments, Inc.; and Burwick Apartments, Ltd., and between the architect and Walton Heath, Ltd., provide FAL a remedy for the damages it suffered and thus there is no unjust enrichment. When an unambiguous contract exists that covers the issue for which damages are sought, promissory estoppel is not a viable theory of recovery. See, *Ruiz v. A.B. Chance Co.*, 234 F.3d 654 (Fed. Cir. 2000); *Borowski v. State Chemical Mfg. Co.*, 97 Ohio App. 3d 635, 647 N.E.2d 230 (1994); 28 Am. Jur. 2d *Estoppel and Waiver* § 57 (2000). Recovery on a theory of promissory estoppel is based upon the principle that injustice can be avoided only by enforcement of a promise. See, *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Hawkins Constr. Co. v. Reiman Corp.*, 245

Neb. 131, 511 N.W.2d 113 (1994). Where, as here, a contract is formed subsequent to the promise upon which estoppel is asserted, there is no injustice in requiring the parties to abide by their contract. We hold that the Court of Appeals erred in determining that Kerns was individually liable on the theory of promissory estoppel.

(b) Walton Heath Apartments, Inc.

Walton Heath Apartments, Inc., argues that the Court of Appeals erred in affirming the district court's finding that it was liable on the written contract. Walton Heath Apartments, Inc., argues that the written contract was entered into by the architect and Walton Heath, Ltd., and thus it is not liable on the contract.

[3] We note that this assignment of error was not raised before the Court of Appeals. However, an appellate court may, at its option, notice plain error. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000). The record clearly reveals that it was the limited partnership Walton Heath Apartments, Ltd., and not the corporate entity Walton Heath Apartments, Inc., that executed the written contract. Accordingly, the judgment against Walton Heath Apartments, Inc., is vacated. Moreover, because there is no evidence of a promise between Walton Heath Apartments, Inc., and the architect that could support a finding on the basis of promissory estoppel, the judgment against Walton Heath Apartments, Inc., on that basis is also vacated. As a result of our opinion, FAL has no judgment against Walton Heath Apartments, Inc.

(c) Prejudgment Interest

FAL argues that the Court of Appeals erred in reversing the district court's award of prejudgment interest on the Burwick and Walton Heath projects. The Court of Appeals held that the amounts due were unliquidated and that FAL failed to comply with the statutory requirements of § 45-103.02. On petition for further review, FAL contends that the statutory requirements do not apply when a contract between the parties addresses prejudgment interest.

Article 9.4 of the written contracts relating to the Burwick and Walton Heath projects provides: "Payments due the

Architect and unpaid under this Agreement shall bear interest from the date payment is due at the rate entered below, or in the absence thereof, at the legal rate prevailing at the principal place of business of the Architect." Although no interest rate was stated in the contract, the testimony of Anderzhon established that the prevailing rate was 18 percent per annum. FAL argues that because the parties' contract established a rate of interest and did not require that the claim be liquidated as a condition for recovery of prejudgment interest, the Court of Appeals erred in analyzing the claim under § 45-103.02. In essence, FAL contends that the parties may contract out of § 45-103.02.

Section 45-103.02 provides in relevant part: "(1) . . . interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement" if certain conditions (a) through (d) are met. It also provides: "(2) . . . interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the rendition of judgment." Therefore, the plain language of § 45-103.02 encompasses unliquidated claims under subsection (1) and liquidated claims under subsection (2).

The Court of Appeals determined that the claim was unliquidated and that the statutory conditions of subsection (1) were not met. The court therefore reversed the award of prejudgment interest. With respect to these two projects, FAL does not dispute the finding that the claims were unliquidated, but, rather, contends that such a finding is irrelevant because "[w]hen the parties have agreed to a contract rate, the contract governs when, how and at what rate the interest will accrue, not NEB. REV. STAT. § 45-103.02." Memorandum brief for appellee in support of petition for further review at 4. Stated more simply, FAL argues "[o]nly if there is no contract interest provision would the issue of prejudgment interest be analyzed under NEB. REV. STAT. § 45-103.02." Memorandum brief for appellee in support of petition for further review at 4.

Thus, FAL contends that § 45-103.02 does not apply where the parties agree, by their contract, to a prejudgment interest rate and to the circumstances in which prejudgment interest may be recovered. The first part of this contention is correct. Specifically, the

parties' ability to contract regarding the rate of interest is expressly addressed in the statutory language. Section 45-103, which is referenced in § 45-103.02(1) with respect to unliquidated claims, specifies the general rate of interest on decrees and judgments for the payment of money. Section 45-103(2) expressly provides that the general statutory rate does not apply to a "written contract in which the parties have agreed to a rate of interest other than that specified in this section." Therefore, the statutory language allows the parties to contract for the rate of interest that will be applied to an unliquidated claim. Similarly, Neb. Rev. Stat. § 45-104 (Reissue 1998), expressly referenced in § 45-103.02(2) with respect to liquidated claims, provides that "[u]nless otherwise agreed," interest shall be allowed at 12 percent per annum. Thus, the statutory language also allows the parties to contract as to the rate of interest on a liquidated claim. FAL's contention that the Court of Appeals' interpretation effectively prevents a litigant from recovering prejudgment interest at a rate agreed to in the contract is thus without merit.

FAL cites two prior Nebraska cases in support of its assertion that a contractual provision authorizing the payment of prejudgment interest trumps § 45-103.02(1). The first, *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989), involved a 1985 contract dispute over an AIA standard form contract similar if not identical to the contract at issue in the instant case. Paragraph 9.4 of the contract provided, as does the contract in the instant case, that " 'Payments due the Architect and unpaid under this Agreement shall bear interest from the date payment is due at the rate entered below, or in the absence thereof, at the legal rate prevailing at the principal place of business of the Architect.' " *Id.* at 907, 443 N.W.2d at 274. The contract then provided that the legal rate of interest in the State of Nebraska was to be applied. *Id.* Holding that the trial court's award of interest was correct, we reasoned that "[u]nder the contract, interest on the amount due the architect is an explicit item of recovery for the architect." *Id.*

Relying on *Getzschman*, FAL argues that we have addressed the issue presented in the instant case and held that if the parties contract for prejudgment interest, § 45-103.02(1) does not apply. The cause of action in *Getzschman* arose, however, in 1985, prior

to the 1986 enactment of § 45-103.02. At the time that *Getzschman* was decided, there was no statute governing unliquidated prejudgment interest claims. Rather, the law at the time authorized prejudgment interest on certain liquidated claims unless otherwise agreed. See, § 45-104; *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985); *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976). Thus *Getzschman* recognized merely that the parties had otherwise agreed to allow prejudgment interest to accrue on the unliquidated claim.

[4] Since *Getzschman* was decided and § 45-103.02 was enacted, we have repeatedly held that § 45-103.02 prescribes the conditions for allowance of prejudgment interest on all causes of action accruing on or after January 1, 1987. See, *Blue Valley Co-op. v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999); *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998); *Daubman v. CBS Real Estate Co.*, 254 Neb. 904, 580 N.W.2d 552 (1998); *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994); *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993); *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). To the extent that FAL argues that the contract between the parties is an agreement allowing prejudgment interest under the "[u]nless otherwise agreed" language in § 45-104, we have also rejected that argument. See *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

FAL also cites this court to *Mandolfo v. Chudy*, 5 Neb. App. 792, 564 N.W.2d 266 (1997), *affirmed* 253 Neb. 927, 573 N.W.2d 135 (1998). In *Mandolfo*, the Court of Appeals addressed whether coguarantors of a promissory note could recover the entire principal sum and interest from another coguarantor, or merely a pro rata share. After allowing recovery of the entire principal balance, the district court also awarded interest calculated at 11 percent as shown on the face of the note. In *Mandolfo*, the Court of Appeals addressed the award of prejudgment interest as follows:

> The [plaintiffs] seek to recover "repayment of interest in accordance with the specific terms and conditions of the

> Note." . . . They argue that because the parties contracted for payment of interest, the contract controls, and that the agreed upon interest rate should be enforced. . . . Both parties argue that the other is not entitled to interest under the prejudgment interest statute, Neb. Rev. Stat. § 45-103.02 (Reissue 1993), because of failure to comply with the statute. We affirm the district court's decision to calculate interest on the terms of each promissory note rather than under the prejudgment statute, § 45-103.02. In *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993), the Supreme Court held that in order to receive prejudgment interest, a litigant must strictly comply with § 45-103.02, which allows prejudgment interest to accrue from the date of the plaintiff's first offer of settlement which is exceeded by the judgment when all express statutory conditions for such offer are met. Here, interest is properly calculated on the basis of the terms of the promissory note.

5 Neb. App. at 801-02, 564 N.W.2d at 273.

Contrary to FAL's assertions, however, *Mandolfo* does not hold that if the parties contract for the payment of interest, then the contract, and not § 45-103.02, governs the award of prejudgment interest. Unlike the present case, *Mandolfo* involved a suit on an interest-bearing instrument. In such a suit, the plaintiff is merely seeking damages for breach of contract, and one of the elements of such damages is the amount of interest the plaintiff would have obtained had the breach not occurred. See *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). Such interest is not "prejudgment" interest subject to the statutory requirements of § 45-103.02. See *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985). FAL's contention that the Court of Appeals erred in disregarding the contractual prejudgment interest provision is without merit.

FAL also argues that the Court of Appeals allowed postjudgment interest at the contract rates and asserts that such an allowance is "wholly inconsistent" with its refusal to allow prejudgment interest at the contract rates. Memorandum brief for appellee in support of petition for further review at 6. Postjudgment interest is awarded pursuant to Neb. Rev. Stat. § 45-103.01 (Reissue 1998), which simply provides: "Interest as

provided in section 45-103 shall accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of judgment." The reference in this statute to § 45-103 allows the provision in the written contract as to rate of interest to apply, just as in § 45-103.02. The difference, however, is that § 45-103.01 contains no further conditions on the award of postjudgment interest, in contrast to § 45-103.02 regarding prejudgment interest. Consequently, there is no inconsistency in the application of the contract rate for postjudgment interest. The Court of Appeals did not err either in refusing to apply article 9.4 of the B181 contracts or in reversing the award of prejudgment interest because there was no showing of compliance with the conditions set forth in § 45-103.02(1).

(d) Anti-Assignment Provision

The B181 contracts entered into on the Burwick and Walton Heath projects provide in part in article 8.3: "Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other." It is undisputed that there was no written consent given prior to the assignment to FAL. Kerns and the ownership entities argue that the contractual prohibition against an assignment of "any interest" without prior written consent bars FAL, as an assignee, from recovering damages for any breach of the contracts.

The parties have not cited a Nebraska case addressing this issue, and our independent research has revealed no such case. As noted by the Court of Appeals, however, there are cases from other jurisdictions which specifically address the issue presented.

The Washington Supreme Court addressed whether the identical language present in the instant case barred an assignment for breach of contract damages in *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wash. 2d 816, 881 P.2d 986 (1994). In that case, a school district (District) contracted with an architect to design a new elementary school. The contract between the District and the architect provided: " 'Neither the Owner [District] nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.' " *Berschauer/Phillips*, 124 Wash. 2d at 829, 881 P.2d at 993-94. A construction company, relying upon the plans created by the

architect, subsequently submitted a bid to construct the new school and was awarded the project by the District. When construction costs exceeded estimates by approximately $3.8 million, the construction company sued the District for breach of contract, alleging its loss was in part caused by the defective plans. The District settled with the construction company, and in doing so, the District assigned " 'any and all such claims relating to this project' " that it had against the architect to the construction company. *Id.* at 820, 881 P.2d at 989. When the construction company sought recovery from the architect based upon this assignment, the architect claimed the anti-assignment provision in its contract with the District prohibited the District from assigning its claim to the construction company.

On appeal, the construction company argued the language at issue was merely a general anti-assignment clause and thus did not prohibit the assignment of a breach of contract action. The architect, in contrast, argued that the contract prohibited the assignment of "*any interest*," which necessarily included a cause of action for breach of contract. *Id.* at 829, 881 P.2d at 994. Reasoning that the contractual language at issue was "a boilerplate provision intended to prohibit the exchange of contractual performances" and that the architect had completed the terms of the contract prior to the assignment, the court held that the clause did not prohibit the assignment of a cause of action for breach of contract. *Id.* at 830, 881 P.2d at 994.

The contractual language at issue in this case was also reviewed in *Ford v. Robertson*, 739 S.W.2d 3 (Tenn. App. 1987), a case relied upon by the Court of Appeals. In *Ford*, an owner and an architectural firm entered into an AIA standard form contract containing the following provision: " 'Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.' " *Id.* at 4. After completing design services on numerous apartment complexes and executing a certificate of substantial completion, the architects were paid in full. Thereafter, the owner sold the apartments to the plaintiffs in an instrument also assigning " 'Grantor's right, title and interest in and to all leases and other contracts (including, without limitation, all warranties, guaranties and bonds,) affecting the property . . . .' " *Id.* at 4.

Plaintiffs thereafter attempted to sue the architects for breach of contract. Interpreting the owner's assignment as a conveyance of every interest he had in the property, the Tennessee Court of Appeals held that the owner could assign his right to recover damages from the architects for breach of contract. The court reasoned:

> The law draws a distinction between the right to assign performance under a contract and the right to receive damages for its breach. The nonassignability clause prohibits the assignment or transfer of any "interest in this agreement." This "any interest" language must be construed to mean any interest in the performance of the *executory* contract.
>
> Plaintiffs contend, and we agree, that this is a suit for damages for breach of a fully *executed* contract and is not a suit for performance by the Architects of an executory contract. What the plaintiffs acquired by the assignment was any claim that [the owner] had against the Architects for money damages for nonperformance and such a claim is not within the scope of the clause prohibiting assignment of "any interest in this agreement."

(Emphasis in original.) *Id.* at 5. See, also, *Cordis Corp. v. Sonics Intern., Inc.*, 427 So. 2d 782 (Fla. App. 1983) (holding provision forbidding assignment of rights under contract does not preclude assignment of accrued claims for damages arising from breach of contract); *Fuller v. Favorite Theaters Co. of Salt Lake*, 119 Utah 570, 230 P.2d 335 (1951) (holding provision prohibiting assignment of contract does not affect assignability of cause of action for breach of contract). We find the reasoning of these cases to be persuasive.

Kerns' argument to the contrary is premised upon *American Community Stores Corp. v. Newman*, 232 Neb. 434, 441 N.W.2d 154 (1989). In that case, we held that in Nebraska, an assignment by a lessee of an interest in a lease which prohibits such assignment without the lessor's consent generally is ineffective without such consent. *American Community Stores Corp.* is distinguishable from the instant case. Assigning an interest in a lease directly affects the parties' actual performance of the contract, whereas the assignment of a right to collect damages for a breach of contract, as in the instant case, does not. Therefore,

the intent of the provision against assignment of rights under a contract, which generally is to allow the parties to choose with whom they contract, is not affected by allowing an assignment of a right to collect damages for breach of contract. 6 Am. Jur. 2d *Assignments* § 33 (1999). See, also, *Panwitz v. Miller Farm-Home Oil Service*, 228 Neb. 220, 224, 422 N.W.2d 63, 66 (1988) (holding contractual provision prohibiting assignment without vendor's consent "does not preclude such assignment or sale if the contract has been fully performed or if assignee offers and is able to complete performance" (emphasis omitted)). It is undisputed that the assignment at issue occurred after the contracts were breached. The anti-assignment clause therefore did not bar the assignment of the claims at issue.

2. Thornberry, Ashberry, and Sussex Place Projects

On the Thornberry, Ashberry, and Sussex Place projects, ownership entities were formed but no written contracts were executed. With respect to these projects, the issues presented to us for further review are whether the Court of Appeals erred in (1) determining that the district court found Kerns personally liable under a theory of breach of oral contract and (2) reversing the award of statutory prejudgment interest. Because of our disposition of these assignments of error, it is also necessary for us to address whether the Court of Appeals erred in failing to find Kerns liable on the theories of promissory estoppel or quantum meruit.

(a) Individual Liability of Kerns and Promissory Estoppel

With respect to these three projects, the applicable portion of the district court's order provides:

> As for the Thornberry, Ashberry and Sussex projects, [FAL] satisfied its burden of proving (1) enforceable verbal contracts between the architect and Thornberry Apartments, Inc. and Thornberry Apartments, Ltd; Ashberry Apartments, Inc. and Ashberry Place Apartments, Ltd; and Sussex Place Apartments, Inc. and Sussex Place Apartments, Ltd., (b) the architect render[ed] services as called for in said contracts (c) and which were terminated through no fault of the architect but through fault of said Defendants, and (d) said Defendants owe

> [FAL] for professional fees, reimbursable expenses and termination expenses. Notwithstanding, the evidence is also more than sufficient to satisfy [FAL]'s burden on its promissory estoppel and quantum meruit causes of action against said Defendants.

The district court thereafter entered judgment on these projects against the above entities. As noted above, the Court of Appeals vacated the judgment against Thornberry Apartments, Ltd.; Ashberry Apartments, Ltd.; and Sussex Place Apartments, Ltd., based upon its finding that their special appearance should have been sustained.

The Court of Appeals interpreted the order as finding Kerns personally liable on these projects. The order, however, makes no mention of Kerns individually, and judgment was entered solely against the ownership entities. We therefore construe the holding of the district court as finding that Kerns was not personally liable on these projects.

[5] In its cross-appeal to the Court of Appeals, FAL argued that the district court erred in not finding Kerns personally liable on these projects on the theories of oral contract, promissory estoppel, or quantum meruit. Because of its erroneous interpretation of the district court's order, the Court of Appeals did not reach this assignment. Upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998). We now address the merits of the assignment.

The district court found that Kerns was liable on the theory of oral contract to pay a $5,000 retainer on the Greely, Wingpoint, and Kennamare projects. The finding that the evidence establishes an oral contract is supported by the record. Kerns does not take issue with the existence of this contractual liability, and FAL does not contest its scope on further review. The record reflects that during their breakfast meetings, Anderzhon and Kerns discussed all of the projects, including the Greely, Wingpoint, and Kennamare projects, as well as the Thornberry, Ashberry, and Sussex Place projects, as a single undertaking. The record thus establishes that Kerns entered into an oral contract to pay the first

$5,000 in fees on each project, payable before any ownership entities were formed or written contracts were signed, but that the parties agreed that other fees would be the responsibility of the ownership entities only. Because the evidence reveals that Kerns promised to pay the initial $5,000 on all of the projects, it was clearly erroneous for the district court not to find Kerns obligated by oral contract for the $5,000 initial payment on the Thornberry, Ashberry, and Sussex Place projects, just as the court found him liable for that amount on the Greely, Wingpoint, and Kennamare projects.

We note, however, that the record reflects that $11,600 was paid on the Thornberry project, an amount in excess of Kerns' $5,000 contractual liability. We therefore hold that the district court clearly erred in not finding Kerns to be personally liable for breach of oral contract for the $5,000 initial retainer on the Ashberry and Sussex Place projects.

To the extent that FAL argues that Kerns is liable for all of the damages on the Thornberry, Ashberry, and Sussex Place projects on the theory of promissory estoppel or quantum meruit, such argument is without merit. Neither promissory estoppel nor quantum meruit is a viable theory when an enforceable contract exists between the parties and the contract governs the damages at issue. See *Ruiz v. A.B. Chance Co.*, 234 F.3d 654 (Fed. Cir. 2000). Moreover, because the architect and Kerns agreed that Kerns' liability was to be $5,000 on each project, there is no evidence to support any reasonable reliance on the part of the architect which would support recovery in excess of that amount. Kerns' individual liability to FAL on these projects was limited to the $5,000 initial retainer.

(b) Prejudgment Interest

FAL argues that the Court of Appeals erred in reversing the district court's award of prejudgment interest. Initially, FAL contends that the Court of Appeals applied the wrong standard of review in that it failed to apply a clearly erroneous standard of review. We stated in *Blue Valley Co-op. v. National Farmers Org.*, 257 Neb. 751, 757, 600 N.W.2d 786, 792 (1999), "[r]egarding the prejudgment interest awarded . . . and whether . . . damages were liquidated, our scope of review is de novo." The Court of Appeals therefore did not err in examining the record de novo.

Based upon our de novo review of the record, we agree with the Court of Appeals that there was a reasonable controversy as to the amounts due, and therefore the claims were unliquidated. Because FAL failed to comply with the statutory requirements of § 45-103.02(1), the Court of Appeals correctly reversed the award of prejudgment interest.

3. Pending Motions Filed During Appeal

During the pendency of this appeal, both parties filed motions relating to the supersedeas deposits made by Kerns. The total of the supersedeas deposits as it currently exists is sufficient to satisfy the judgment as modified by the Court of Appeals and as further modified by this court, and all pending motions are therefore denied as moot.

V. CONCLUSION

As a result of our opinion, FAL has a judgment on the Burwick project against Burwick Apartments, Ltd., in the principal amount of $98,433.46 plus costs. No prejudgment interest applies to this amount. FAL has no judgment against Burwick Apartments, Inc.

FAL has no judgment with respect to the Walton Heath project. The judgment against Walton Heath Apartments, Ltd., was correctly vacated by the Court of Appeals, and we hold that Walton Heath Apartments, Inc., cannot be liable because it was not a party to the written contract and there is no evidence of a promise made by Walton Heath Apartments, Inc. Moreover, Kerns is not personally liable on this project.

FAL has a judgment in the principal amount of $116,668.48 against Thornberry Apartments, Inc.; a judgment in the principal amount of $72,470.36 against Sussex Place Apartments, Inc.; and a judgment in the principal amount of $37,218.32 against Ashberry Apartments, Inc. No prejudgment interest is awarded on these amounts.

FAL has a judgment against Kerns individually in the amount of $15,000 on the Greely, Wingpoint, and Kennamare projects, collectively. No prejudgment interest is awarded on this amount.

FAL has a judgment against Kerns individually in the amount of $10,000 on the Ashberry and Sussex Place projects, collectively. No prejudgment interest is awarded on this amount.

The judgment of the Court of Appeals is affirmed in part, reversed in part, and modified in part. The Court of Appeals is directed to remand the cause to the district court with directions to enter judgment in accordance with this opinion.

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

KENNETH VONDERSCHMIDT, APPELLEE AND CROSS-APPELLANT, V. SUR-GRO AND TRI-STATE INSURANCE CO. OF MINNESOTA, APPELLANTS AND CROSS-APPELLEES.

635 N.W. 2d 405

Filed September 21, 2001. No. S-00-095.

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 do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of a Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. **Workers' Compensation: Words and Phrases.** An "accident," as defined by the Nebraska Workers' Compensation Act, is an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
4. ____: ____. "Discontinuation of employment" by an employee must be such that the employee can indicate an identifiable point in time where he or she had to stop work and seek medical treatment.
5. **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.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation

Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Sur-Gro and its workers' compensation insurer, Tri-State Insurance Co. of Minnesota (Tri-State), appealed from an order awarding Kenneth Vonderschmidt permanent partial disability benefits and vocational rehabilitation services. The Nebraska Court of Appeals reversed the judgment of the Workers' Compensation Court review panel and remanded the cause with directions to dismiss. See *Vonderschmidt v. Sur-Gro*, No. A-00-095, 2000 WL 33121860 (Neb. App. Dec. 19, 2000) (not designated for permanent publication). Vonderschmidt filed a petition for further review, which this court granted.

SCOPE OF REVIEW

[1] 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. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001).

FACTS

Vonderschmidt was employed as a chemical applicator for Sur-Gro from 1990 until he was discharged on July 31, 1997. In November 1996, while operating a dry spreader to apply fertilizer to various fields, Vonderschmidt experienced difficulty operating the spreader's clutch. Vonderschmidt stated that he nearly

had to stand on the clutch pedal to release the clutch. A mechanic eventually checked the clutch and found that it was broken.

During the time that Vonderschmidt operated the defective clutch, 8 to 10 hours per day for 2 to 3 weeks, he experienced pain and swelling in the knee of his left leg, which he used to operate the clutch. His stepdaughter, who is a nurse, advised him to see his doctor.

On November 29, 1996, Vonderschmidt saw his family physician, Dr. Allan Tramp, who determined that Vonderschmidt's knee pain was related to his use of the defective clutch. Dr. Tramp diagnosed Vonderschmidt as suffering from "[o]veruse syndrome with secondary effusion and tendonitis in knee." Dr. Tramp recommended that Vonderschmidt use an anti-inflammatory medication for pain and ice to reduce the swelling. Dr. Tramp did not restrict Vonderschmidt's work activities, and he returned to work. Since Sur-Gro's fall spraying season had ended, Vonderschmidt was not immediately required to use the spreader with the defective clutch.

Between December 1996 and April 1997, Vonderschmidt performed maintenance tasks, repaired equipment, and unloaded fertilizer supplies for the next season. During this time, he experienced pain in his knee if he twisted or bent it more than usual or if he worked on his small farming operation. When the spraying season commenced in April 1997, Vonderschmidt again began operating a spreader with a heavy clutch. The pain in his knee returned and, in fact, worsened.

On June 24, 1997, Vonderschmidt returned to see Dr. Tramp, who noted that the recurring pain in Vonderschmidt's knee was related to renewed operation of a spreader with a clutch. Dr. Tramp diagnosed Vonderschmidt as suffering from "[left] knee acute arthralgia and tendonitis secondary to overuse," and he noted that Vonderschmidt might require an orthopedic referral.

Vonderschmidt was examined by Dr. David Heiser, an orthopedist, on June 30, 1997. Dr. Heiser reviewed x rays and found that Vonderschmidt suffered from "[l]eft knee strain very likely related to overuse." After the first visit, Dr. Heiser directed Vonderschmidt to refrain from operating a vehicle with a heavy clutch. Dr. Heiser also recommended that Vonderschmidt restrict his kneeling, squatting, and climbing. Vonderschmidt

provided Sur-Gro with notice of his work restrictions and was subsequently fired on July 31.

Vonderschmidt returned to Dr. Tramp on August 1, 1997, and was referred to another orthopedist, Dr. Ian Crabb, for a second opinion. Upon examination, Dr. Crabb found mild tenderness in the anterior of Vonderschmidt's left knee with some mild crepitus, but no joint line tenderness. Dr. Crabb stated that the condition should resolve over time. Vonderschmidt testified that Dr. Crabb told him to refrain from driving a vehicle with a heavy clutch.

On January 9, 1998, Vonderschmidt was reexamined by Dr. Tramp. Although Vonderschmidt's knee condition had improved because of decreased physical activity, he continued to experience periodic swelling, aching, discomfort, and stiffness. Dr. Tramp noted that Vonderschmidt would continue to have mild chronic difficulties with his knee and might be restricted as to the type and amount of work he could complete consistently. Dr. Tramp noted that if difficulties continued, he would recommend a followup with an orthopedist.

Vonderschmidt began working as a security guard for a casino in Kansas on February 20, 1998. On May 16, he returned to Dr. Tramp, who found that Vonderschmidt was limited in the type of employment that he could participate in because of increased knee pain upon bending, twisting, or squatting. Repetitive use of a clutch on a truck, tractor, or other equipment would be inappropriate, Dr. Tramp stated.

Dr. Tramp wrote to Vonderschmidt's attorney on July 22, 1998, and stated that Vonderschmidt's condition was stable and permanent and that no major changes were anticipated. Dr. Tramp restricted the types of employment in which Vonderschmidt could engage to those that do not involve repetitive bending, squatting, or extensive walking. Dr. Tramp recommended that Vonderschmidt avoid any repetitive twisting motion or repetitive bending or pressure on the knee because that could cause increased pain, swelling, and dysfunction. Although Dr. Tramp stated that Vonderschmidt had sustained a permanent injury with persistent pain and limitations in his daily activities, Dr. Tramp was unable to report an exact percentage of disability based on weakness or decreased range of motion.

Vonderschmidt was then referred to a third orthopedist, Dr. Richard Brennan, who found that Vonderschmidt had significant impairment of his knee and a 25-percent permanent partial impairment of the left knee. Upon the request of Sur-Gro and Tri-State, Vonderschmidt returned to Dr. Crabb for reevaluation on December 28, 1998. Dr. Crabb found that Vonderschmidt continued to have a problem with his knee which had been contributed to significantly by the use of the defective clutch. As of January 12, 1999, Dr. Crabb noted that Vonderschmidt's knee problem was not likely to improve significantly, and Dr. Crabb gave Vonderschmidt an impairment rating of 10 percent in the left lower extremity.

Vonderschmidt filed his petition with the Workers' Compensation Court on July 17, 1998. He alleged that he had sustained an injury to his left knee on or about November 29, 1996, while employed by Sur-Gro as a chemical applicator. He alleged the injury was caused by repeated trauma to his left knee that resulted from the use of a clutch on equipment owned by Sur-Gro. He claimed that he aggravated the injury on or about June 24, 1997. Sur-Gro and Tri-State denied that the injury arose out of and in the course of Vonderschmidt's employment.

A trial judge of the Workers' Compensation Court found that Vonderschmidt injured his left knee on or about November 29, 1996, while operating a spreader for Sur-Gro. The trial judge found that the injury did not result in any temporary impairment until after the injury recurred on June 24, 1997. As a result of the injury and the recurrence, Vonderschmidt suffered a 25-percent impairment to his left lower extremity, as established by Dr. Brennan.

The trial judge found that Vonderschmidt was not entitled to temporary indemnity benefits, but that he was entitled to payment of $310.67 per week for 53.75 weeks of permanent partial disability. The trial judge also ordered Sur-Gro and Tri-State to pay certain medical bills and mileage incurred for travel to and from medical appointments. Sur-Gro and Tri-State were required to pay future medical expenses reasonably necessary as a result of the accident and injury. The trial judge also found that Vonderschmidt was entitled to vocational rehabilitation services. The trial judge's order did not address attorney fees or

waiting-time penalties as requested in Vonderschmidt's petition. Vonderschmidt sought review by a three-judge panel of the Workers' Compensation Court.

The review panel affirmed the trial judge's order and concluded that waiting-time penalties, costs, and attorney fees should not be awarded in the trial court. Because Sur-Gro and Tri-State had cross-appealed and had failed to obtain a reduction in the amount of the award, the review panel ordered them to pay $500 in attorney fees to Vonderschmidt.

Sur-Gro and Tri-State appealed to the Court of Appeals, and Vonderschmidt cross-appealed. The Court of Appeals held that Vonderschmidt had not suffered a compensable injury as the result of an accident, reversed the Workers' Compensation Court review panel's affirmance of the trial judge's award of benefits, and remanded the cause with directions to dismiss. See *Vonderschmidt v. Sur-Gro*, No. A-00-095, 2000 WL 33121860 (Neb. App. Dec. 19, 2000) (not designated for permanent publication). We granted Vonderschmidt's petition for further review.

ASSIGNMENTS OF ERROR

In his petition for further review, Vonderschmidt makes the following assignments of error: The Court of Appeals erred (1) in concluding that he did not suffer an accident within the meaning of the Nebraska Workers' Compensation Act; (2) in concluding that reversal was mandated by *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999); and (3) in failing to conclude that no reasonable controversy existed.

ANALYSIS

The trial judge found that Vonderschmidt had injured his left knee on or about November 29, 1996, while operating a spreader for Sur-Gro but that the injury did not result in any temporary impairment until after the injury recurred on June 24, 1997. The trial judge found that as a result of the injury and the recurrence, Vonderschmidt suffered a 25-percent impairment to his left lower extremity, as established by the medical evidence.

The Court of Appeals concluded that Vonderschmidt did not sustain his burden of proof that he suffered an accident within the meaning of Neb. Rev. Stat. § 48-151(2) (Reissue 1998),

reversed the Workers' Compensation Court review panel's affirmance of the trial judge's award of benefits, and remanded the cause with directions to dismiss. The Court of Appeals opined that Vonderschmidt never discontinued his employment, as required in *Jordan*.

[2] 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. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001). In determining whether to affirm, modify, reverse, or set aside a judgment of a Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Jordan v. Morrill County, supra*.

[3] An "accident," as defined by the Nebraska Workers' Compensation Act, is "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151(2). The parties do not dispute whether the injury was "unexpected or unforeseen" or whether Vonderschmidt demonstrated "objective symptoms." The disagreement centers on whether the injury occurred "suddenly and violently."

We have long held that the term "suddenly and violently" does not require that an accident occurred "instantaneously and with force." Rather, the element is satisfied if (1) the employee has sustained an injury at an identifiable point in time arising out of and in the course of his or her employment, (2) the employee discontinues employment because of the injury, and (3) the employee seeks medical treatment because of the injury. See *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). The Court of Appeals reversed the award of benefits because Vonderschmidt did not completely discontinue his employment. The Court of Appeals stated that Vonderschmidt had not proved an accident as defined by § 48-151(2). It opined that *Jordan* required " 'discontinuation of employment' " that was

more than simply the few hours that Vonderschmidt needed for his medical appointments. *Vonderschmidt v. Sur-Gro*, A-00-095, 2000 WL 33121860 at *5 (Neb. App. Dec. 19, 2000) (not designated for permanent publication).

In *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), we stated that cessation of employment is a requirement regardless of whether the injury arises from an accident or an occupational disease. In either event, the injury must be such that the employee discontinues employment and seeks medical treatment. "[T]he injury must culminate at a point when the employee can no longer perform the required work." *Id*. at 389, 603 N.W.2d at 418.

It appears that there is some confusion with regard to the phrase "discontinuation of employment." In *Jordan*, we stated that "interruption of employment" meant nothing other than "discontinuation of employment." We did not define how long a "discontinuation of employment" must last for an injured employee to receive benefits. The Court of Appeals' determination that "discontinuation of employment" means something more than a few hours needed for medical appointments creates a harsh result that was not intended or required. The controlling factor is not the length of time of any "discontinuation of employment." What is required is that the employee must stop work and seek medical treatment for an injury.

For example, if an employee suffers a repetitive trauma injury but never stops work and never seeks medical treatment, the employee has not established an identifiable point in time when an accident occurred for purposes of defining the second element, "suddenly and violently." If an employee stops work and seeks medical treatment, then the employee has established the identifiable point in time when the injury occurred.

Both accidental injuries and occupational diseases have specific requirements which must be met in order for compensation to be received. *Jordan v. Morrill County, supra*. One requirement is common to both. The injury must result in a disability, and the disability must be such that the employee can no longer perform the work required. *Id*.

After Vonderschmidt experienced difficulty operating the clutch on the spreader, he used ice and heat to reduce the

swelling and pain in his knee. He consulted his family physician on November 29, 1996. He was diagnosed as suffering from "[o]veruse syndrome with secondary effusion and tendonitis in knee" as a result of using the clutch, but Dr. Tramp did not recommend any restriction of Vonderschmidt's work activities.

When the spring spraying season began in April 1997, Vonderschmidt resumed using a spreader with a clutch, and the pain in his left knee recurred and grew worse. When Vonderschmidt returned to Dr. Tramp on June 24, Dr. Tramp stated that the recurring pain in Vonderschmidt's knee was related to renewed use of the clutch at work. Vonderschmidt was diagnosed as suffering from "[left] knee acute arthralgia and tendonitis secondary to overuse." When Vonderschmidt was examined by Dr. Heiser, an orthopedist, it was determined that Vonderschmidt suffered from "[l]eft knee strain very likely related to overuse." Dr. Heiser recommended that Vonderschmidt refrain from operating a vehicle with a heavy clutch and restrict his kneeling, squatting, and climbing. Vonderschmidt was fired after he notified Sur-Gro of his work restrictions.

The record clearly demonstrates that Vonderschmidt missed work to seek medical treatment. On June 24, 1997, he was absent from work to see Dr. Tramp. Vonderschmidt missed 2 hours of work to see Drs. Heiser and Tramp on June 30. On July 12, Vonderschmidt missed 1 hour of work to go to the hospital, and he missed another hour on July 14 to see Dr. Heiser. The law does not establish a minimum amount of time which must be missed from work for medical treatment in order for an employee to be eligible for workers' compensation benefits. The law requires only that the employee stop work and seek medical treatment.

[4] Vonderschmidt has established that he sustained a compensable injury as a result of his employment with Sur-Gro. "Discontinuation of employment" by an employee must be such that the employee can indicate an identifiable point in time where he or she had to stop work and seek medical treatment. After Vonderschmidt missed work in November 1996 and sought medical treatment, the injury recurred in June 1997. He again stopped work and sought medical treatment. On June 24, it was established that Vonderschmidt could no longer perform

the work required because he could not operate a spreader with a heavy clutch.

[5] 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. See *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000). We conclude that the Court of Appeals erred in reversing the Workers' Compensation Court review panel's affirmance of the trial judge's award of benefits because the second element of an accident was satisfied in that Vonderschmidt can identify a point in time when the injury occurred and he sought medical treatment. Therefore, we reverse the decision of the Court of Appeals and remand the cause to that court with directions to affirm the judgment of the Workers' Compensation Court review panel.

Vonderschmidt also assigns as error that the Court of Appeals erred in failing to conclude there was no reasonable controversy regarding his injury. Because the Court of Appeals reversed the judgment of the review panel, it was not required to decide whether Vonderschmidt was entitled to attorney fees and waiting-time penalties, an issue raised in his cross-appeal. Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000) 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.

We conclude that a reasonable controversy did exist. Two appellate courts have reached different conclusions as to whether Vonderschmidt suffered a compensable injury. Therefore, no waiting-time penalty is required.

Because we reverse the decision of the Court of Appeals, Vonderschmidt is entitled to attorney fees for proceedings in the Court of Appeals and this court. Section 48-125 provides that if an award is not reduced after the employer files an application for review by an appellate court, the employee shall be allowed a reasonable attorney fee for proceedings in that court. We therefore award Vonderschmidt attorney fees of $2,700 for the services of his attorney in the Court of Appeals and attorney fees of

$2,600 for the services of his attorney in this court, for a total award of $5,300 in attorney fees.

CONCLUSION

For the reasons set forth herein, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to affirm the judgment of the Workers' Compensation Court review panel. Vonderschmidt is awarded attorney fees as set forth above.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating.

MILLER-LERMAN, J., concurring.

I concur and write separately to address the formula stated in *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). The instant case was tried as an "accident," see Neb. Rev. Stat. § 48-151(2) (Reissue 1998), and the single judge of the Workers' Compensation Court found that an accident and injury had occurred on November 29, 1996. The elements of an accident are "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the same time objective symptoms of an injury." *Id*. At issue in this case is whether an accident had occurred "suddenly and violently" and whether the facts amounting to "suddenly and violently" had been proved by Vonderschmidt, such that the finding by the single judge was not clearly erroneous. See *Guico v. Excel Corp*., 260 Neb. 712, 619 N.W.2d 470 (2000).

In order for an accident to have occurred "suddenly and violently," the following facts must be demonstrated: (1) The worker must have sustained an injury at an identifiable point in time arising out of and in the course of his or her employment, (2) the worker must have discontinued employment because of the injury, and (3) the worker must seek medical treatment because of the injury. See *Jordan v. Morrill County, supra*.

Although there are other fact patterns which could meet the definition of "suddenly and violently," evidence of the foregoing facts will ordinarily meet the definition of "suddenly and violently." Although the foregoing set of facts requires that the worker cease working, no set amount of time from work must be missed. Although the discontinuance of work may be for the

purpose of seeking medical treatment due to an injury, which discontinuance would satisfy the foregoing set of facts, the discontinuance of work due to an injury need not be for the particular purpose of seeking medical treatment.

I agree with the majority that the finding by the single judge of an accident is not clearly erroneous. Therefore, the affirmance of the single judge's decision by the review panel should have been affirmed, rather than reversed, by the Nebraska Court of Appeals.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MARK D. FREDERIKSEN, RESPONDENT.

635 N.W. 2d 427

Filed September 21, 2001. No. S-00-459.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to a referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
4. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 4 (rev. 2001), the Nebraska Supreme Court may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
6. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.

7. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Michael L. Smart, of Tiedeman, Lynch, Smart & Kampfe, for respondent.

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

PER CURIAM.

NATURE OF CASE

The Nebraska State Bar Association (NSBA) filed formal charges against Mark D. Frederiksen. In an amended answer, Frederiksen admitted all of the allegations contained in the formal charges. We conclude that Frederiksen should be suspended from the practice of law for 3 years.

SCOPE OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001).

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.*

FACTS

Frederiksen was admitted to the practice of law in the State of Nebraska on September 12, 1983. From October 1985 until May 1998, Frederiksen practiced law with the firm of Zarley, McKee, Thomte, Voorhees & Sease, P.L.C. (Zarley, McKee). Zarley, McKee is based in Des Moines, Iowa, but Zarley, McKee maintains an office in Omaha, Nebraska, where Frederiksen worked. From 1991 until May 1998, Frederiksen was a partner at Zarley, McKee.

Over the course of his final 3 years at Zarley, McKee, Frederiksen reportedly worked long hours and spent much time away from his family. As a result, he became increasingly disenchanted with his compensation. According to the referee, "[i]n order to give himself 'his due' and abate his anger toward his partners," Frederiksen retained for his own use approximately $15,000 in fees that were paid directly to him by Zarley, McKee's clients. Although the partnership agreement required that these funds be paid to the firm, Frederiksen retained the majority of the funds for his own use.

Frederiksen ultimately justified his actions by referring to them as "moonlighting," apparently because some of the work for which he retained funds was done at his home rather than at his office. According to Frederiksen, he misappropriated the funds solely out of anger. He claims no mental disorder, no chemical dependency, no marital discord, and no economic distress. The referee found that Frederiksen was "merely angry at his partners and took the money to appease his discontent."

In May 1998, Frederiksen resigned from Zarley, McKee and joined the Omaha firm of Koley, Jessen, Daubman & Rupiper, P.C. (Koley, Jessen). Frederiksen did not expect to be compensated in any way by Zarley, McKee upon his departure, since he had not "bought into" the firm. However, Zarley, McKee paid Frederiksen "a whole lot of money" after he left. Frederiksen stated that this payment triggered guilty feelings and convinced him that he must discuss his misappropriations with members of Zarley, McKee.

Frederiksen was also admitted to practice law in Iowa. On March 11, 1999, he sent a letter to the Iowa authorities who regulate attorney disciplinary matters, with a copy to Zarley, McKee. The letter stated in part:

> The issue of my moonlighting has arisen as we are completing the terms of my buy-out from the Zarley law firm. While I do not believe that there has been any violation of any ethical obligations, I now disclose these past activities to you, in order to satisfy any duty of disclosure by myself or my former partners which may exist. I am discussing resolution of this matter with my former partners, and it is my anticipation, based on these discussions, that it will be

> resolved amicably between us. Because I am licensed to practice in both Iowa and Nebraska, I am sending this letter to the Disciplinary Committees in both states. Please advise if I can answer any questions you may have.

On June 21, 1999, the Iowa Supreme Court Board of Professional Ethics and Conduct issued the following reprimand:

> Following a review of the complaint, your response thereto, the Board's investigation, and the file, it was the determination of the Board that upon your departure from a Des Moines law firm to associate with an Omaha, Nebraska law firm, you volunteered information to the Des Moines firm that while a partner in that firm you accepted payment for legal services which you rendered at home or otherwise away from the office, and failed to advise your partners of those services or payments which you retained for yourself. That you accepted payments from clients which were not turned over to your firm nor did you report those payments to the firm. That you did, however, volunteer that information to the firm upon your pending departure and that your differences with the firm have been resolved although you and the firm felt compelled to report this matter to the Iowa Supreme Court Board of Professional Ethics and Conduct.
>
> It was the determination of the Board that you be and hereby are publicly reprimanded that your failure to report these fees received to the partnership and in depositing the same to your personal account, that you engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, contrary to DR 1-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers.

On March 12, 1999, Dennis L. Thomte, an attorney at Zarley, McKee, filed a complaint against Frederiksen with the NSBA. On September 14, John W. Steele, acting on behalf of the NSBA Counsel for Discipline, filed charges against Frederiksen with the Committee on Inquiry of the Second Disciplinary District (Committee). A hearing to determine whether there were reasonable grounds to believe that Frederiksen was guilty of misconduct which would require the filing of formal charges was requested before the Committee.

At the hearing on November 30, 1999, Frederiksen testified that Zarley, McKee probably would not have discovered his misappropriations had he not brought them to Zarley, McKee's attention. To the contrary, Thomte testified that in the year following Frederiksen's departure from Zarley, McKee, two different clients questioned their account statements because they believed they had paid Frederiksen more money than the amount for which Zarley, McKee had given them credit. Upon investigation, Thomte and his partners determined that they could not account for certain funds the clients claimed they had paid to Frederiksen for Zarley, McKee. Frederiksen was thereafter questioned by Zarley, McKee regarding these discrepancies. At that time, Frederiksen told a Zarley, McKee partner, Michael G. Voorhees, that he had been moonlighting and admitted to the misappropriations. It appears that full restitution for the misappropriated funds was made by Frederiksen.

The Committee submitted to the Disciplinary Review Board a transcript of its hearing together with a copy of its proposed formal charges. Following a review of the transcript, the chairperson of the Disciplinary Review Board concluded that reasonable grounds existed for discipline of Frederiksen.

On May 1, 2000, formal charges were filed against Frederiksen in this court, alleging that he had violated the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession

of the lawyer and render appropriate accounts to the client regarding them.

On August 14, Frederiksen filed an amended answer in which he admitted all of the allegations contained in the formal charges.

A hearing was held before a referee on September 20, 2000. The transcript from the proceedings before the Committee was admitted upon stipulation. The referee recommended that Frederiksen "be suspended from the practice of law for a period of not less than 60 days nor more than 6 months" and that upon his return to the practice of law, Frederiksen should be placed on probation for a period of 2 years. Frederiksen appealed to this court.

ASSIGNMENT OF ERROR

In his brief to this court, Frederiksen assigns that the referee erred in recommending a sanction that is excessive under the circumstances of the case.

ANALYSIS

Frederiksen filed his exception to the referee's report with this court on November 13, 2000, stating that he did not take exception to the findings of fact in the report, but that he took exception to the referee's recommendation that he be suspended from the practice of law for a period of not less than 60 days nor more than 6 months.

[3] Because neither party has filed exceptions to the referee's findings of fact, we consider them final and conclusive pursuant to Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, this court may, at its discretion, adopt the findings of the referee as final and conclusive. *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). We therefore adopt the referee's findings and conclude that clear and convincing evidence establishes that Frederiksen violated Canon 1, DR 1-102(A)(1) and (4), and Canon 9, DR 9-102(B)(3).

[4] We next proceed to determine the appropriate sanction. Under Neb. Ct. R. of Discipline 4 (rev. 2001), the court may consider any of the following as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time;

(3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. See *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000).

[5-7] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). For the purpose of determining the proper discipline, we consider Frederiksen's acts both underlying the events of the case and throughout the disciplinary proceeding. See *id*. The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors. *Id*. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *Id*.

Frederiksen has admitted his misconduct and acknowledged responsibility for his actions. These actions reflect positively upon his attitude and character and are a factor that we consider in determining the appropriate discipline, bearing in mind that the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice. See *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000).

With respect to the factors for determining whether and to what extent discipline should be imposed, we note that the nature of Frederiksen's offense was serious. The conduct occurred over a period of 3 to 4 years and involved approximately $15,000. We also note the importance of imposing a disciplinary sanction that will deter other attorneys from such conduct and will maintain the reputation of the bar.

With respect to the protection of the public, we note that no harm came to the public because of Frederiksen's actions. Although two clients contacted Zarley, McKee to question their bills, thus expending some time to determine whether their

payments had been correctly applied by Zarley, McKee, all of Frederiksen's clients apparently received the legal services for which they had paid.

Finally, we take into consideration Frederiksen's attitude and his fitness to continue in the practice of law. The referee, who observed Frederiksen and heard his testimony, found that Frederiksen is genuinely remorseful and noted that "[h]e is embarrassed by his actions and vows that they will never be repeated."

> Mr. Frederiksen has given his assurance that his dishonesty will be neither repeated nor replicated. He has furthermore presented, through testimony and affidavits, the opinions of many who know him well that he is a man of integrity. He has apparently given tirelessly of himself to the community, his church and the bar association through board memberships, teaching and pro bono work. There is every reason to believe that Mr. Frederiksen is an excellent lawyer.

The referee also found "there is every chance" that Frederiksen will provide excellent legal services and will not repeat his offense. In order to ensure such service, the referee recommended supervision of Frederiksen's activities after he returns to the practice of law.

The Iowa Supreme Court determined that a public reprimand was the appropriate sanction to be levied against Frederiksen. He argues that a similar sanction, such as "censure with probation or supervision by a qualified attorney," is the appropriate discipline here as well. See brief for respondent at 24.

We must evaluate each discipline case individually in light of its particular facts and circumstances while also considering sanctions imposed in prior cases presenting similar circumstances. This is a case of first impression in Nebraska. Courts in other states have imposed a variety of sanctions in cases where an attorney misappropriated fees from his own law firm. The discipline imposed has ranged from no sanction to public reprimand to suspension. As the Washington Supreme Court noted in a case which did not involve misappropriation of client funds, "the need for discipline [in such cases] is less clear." *In re Rice*, 99 Wash. 2d 275, 277, 661 P.2d 591, 593 (1983). In *In re Rice*,

the attorney did not properly record all payments made to him and retained some client funds for his own use. The court stated:

> Because protection of the public and preservation of the public's confidence in the legal profession are the primary purposes of attorney discipline, the misappropriation of client funds usually warrants a severe sanction. . . . These interests are not served, however, in the resolution of internal problems of a law firm. Resolution of a dispute between members of a law firm is usually sought in a civil suit. . . . Accounting practices for client funds are strictly regulated by a specific provision in the Code of Professional Responsibility, but no such rule governs accounting procedures for law firm funds.

Id. at 277-78, 661 P.2d at 593.

The Iowa Supreme Court imposed a public reprimand on an attorney who failed to remit court-appointed attorney fees to his law partnership. See *Com. on Pro. Ethics v. McClintock*, 442 N.W.2d 607 (Iowa 1989). Over a 9-year period, the attorney had retained checks totaling $6,990.70, which he agreed belonged to the law partnership. The court stated:

> An attorney cannot resort to self-help to rectify what may be perceived to be an inequity in the division of law partnership earnings. Most law partnerships are founded upon a total trust and confidence among the partners. A breach of this exceedingly close relationship merits disciplinary action. Although McClintock's conduct did not involve an attorney-client relationship, his conduct is governed by the Code of Professional Responsibility.
>
> Although severe sanctions may be justified in cases involving attorneys' conduct with members of their law firms or partnerships, we agree with the commission's recommendation in this case. McClintock has no prior disciplinary record. He reported the violation and fully cooperated with the committee.

Id. at 608.

In a Minnesota case, an attorney was placed on 2 years' probation when he, over a 5-year period, retained approximately $6,300 in fees which belonged to his firm's partnership. See *In re Holly*, 417 N.W.2d 263 (Minn. 1987).

A 30-day suspension was ordered for a Florida attorney who engaged in moonlighting by accepting cases without the knowledge or consent of the law firm with which he was associated. See *The Florida Bar v. Cox*, 655 So. 2d 1122 (Fla. 1995). The attorney requested that the clients' payments be made to him, and he kept the payments for his own personal use. He initially denied such conduct, but when evidence was presented, he admitted to having collected the fees. The attorney "continued to engage in unauthorized legal employment even after he was specifically warned against it, and, even more importantly, willfully deceived the firm about his conduct." *Id.* at 1123.

In *Disciplinary Action Against Haugan*, 486 N.W.2d 761 (Minn. 1992), an attorney was found to have misappropriated law firm funds when he agreed to accept a portion of a client's settlement proceeds as payment in full for outstanding attorney fees. The agreement was made without the knowledge or consent of the law firm's shareholders. The attorney deposited into his personal checking account $25,000 in settlement proceeds and attempted to hide the payment by asking the firm to "write off" the client's outstanding attorney fees. The attorney did not disclose his misappropriation until the law firm sued him for allegedly converting law firm property. The Minnesota Supreme Court held that the attorney should be suspended from the practice of law for a period of 30 days.

A 30-day suspension was also entered in a case in which the attorney misappropriated law firm funds and opened client files in his own name in order to keep the files secret from the firm. See *Disciplinary Action Against Bremseth*, 456 N.W.2d 246 (Minn. 1990). The attorney asserted that his conduct was not misappropriation but arose out of "a hostile and bitter financial dispute among the members" of the firm. *Id.* at 247. The 30-day suspension was stayed and ordered dismissed if the attorney abided by disciplinary rules for 1 year.

A 60-day suspension was imposed by the Wisconsin Supreme Court in *Disciplinary Proceedings Against Casey*, 174 Wis. 2d 341, 496 N.W.2d 94 (1993). The attorney, on three separate occasions, appropriated client retainers to his own use rather than giving them to the law firm where he was employed. Two years later, the Wisconsin court suspended an attorney

from the practice of law for 18 months for more severe misconduct, including misappropriating firm funds, manipulating the firm's computer system to conceal his crime, denying any misappropriation when confronted by the firm, refusing to make restitution, and failing to demonstrate remorse. See *Disciplinary Proceedings Against Brunner*, 195 Wis. 2d 89, 535 N.W.2d 438 (1995).

The Florida Supreme Court found a referee's recommended 12-month suspension excessive and imposed a 90-day suspension in a case in which an attorney accepted client funds and deposited less than the full amount of those funds in the firm's accounts. See *The Florida Bar v. Stalnaker*, 485 So. 2d 815 (Fla. 1986). The court found that although the attorney's actions demonstrated "extremely poor judgment . . . his actions [fell] short of a deliberate attempt to steal" from the firm. *Id.* at 817.

An attorney who converted $80,000 of his firm's funds to his own use was placed on suspension for 3 years in a Louisiana case. See *In re Kelly*, 713 So. 2d 458 (La. 1998). The attorney asked clients to make checks payable to him and deposited them in his personal account. However, " '[t]he firm was the sole victim of Mr. Kelly's appropriation.' " *Id.* at 459. Although the court noted that "[t]he baseline sanction for conversion is disbarment," it recognized several mitigating factors, including the attorney's lack of any prior disciplinary record, acknowledgment of the wrongful nature of the actions, cooperation in the disciplinary investigation, and payment of full restitution. *Id.* at 461. The attorney's actions did not harm any clients, and his partners testified in favor of a more lenient sanction.

Although courts have ordered disbarment for activities somewhat similar to Frederiksen's, additional factors weighed in favor of the more severe sanction. In *State ex rel. Oklahoma Bar Ass'n v. Gray*, 948 P.2d 1221 (Okla. 1997), the attorney was disbarred after he misappropriated law firm funds by depositing payments received from clients into a personal account and using the funds for personal expenses. In addition, the attorney borrowed $15,000 from a client and asked the client to keep the loan a secret from the firm. The attorney later defaulted on the note and had not made any arrangement for repayment.

An Iowa attorney's license was revoked based on several ethical violations in *Comm. on Professional Ethics v. Piazza*, 405 N.W.2d 820 (Iowa 1987). There, the attorney recorded several checks on the partnership checking account as payable for court-related expenses when the checks were actually made payable to the attorney. He also recorded the checks for amounts less than the amount for which the checks were actually payable. For example, a $500 check made payable to the attorney was recorded in the checkbook as a $10 check for filing fees. The attorney also wrote a check payable to himself from a reserve account and attempted to conceal the check by executing a check out of numerical sequence. In addition, he failed to deposit a portion of a retainer into the firm's trust account. In another case, he recommended a client seek review in an unemployment matter and accepted a retainer for the review even though the time for filing the review had already expired. In revoking the attorney's license, the court noted that he had failed to respond to the disciplinary complaint and that his license had been suspended on two prior occasions.

The New Jersey Supreme Court disbarred an attorney who retained a portion of a settlement fee for himself and falsified a check request form by indicating it was for reimbursement of expert witness fees, when it was actually a referral payment to another law firm. See *Matter of Greenberg*, 155 N.J. 138, 714 A.2d 243 (1998). The attorney continued to obtain law firm funds for his personal use by submitting false disbursement requests. He deposited some of the checks into the corporate checking account of an entity which he had incorporated, and he forged signatures. The court found that the attorney had created a complex plan to defraud his law firm.

As noted earlier, no other Nebraska cases have dealt with an attorney's misappropriation of funds from a law firm. However, we have held that "disbarment is inappropriate in the absence of specifically delineated injuries" to a client as the result of an attorney's misconduct. See *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 16, 374 N.W.2d 833, 838 (1985). In cases involving misappropriation of a *client's* funds, we have ordered that the attorney be disbarred. See, *State ex rel. NSBA v. Howze*, 260 Neb. 547,

618 N.W.2d 663 (2000); *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997).

We acknowledge that this court has ordered disbarment in two cases where the attorney was found to have misappropriated nonclient funds. In *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994), an attorney misappropriated funds from the Lincoln Darts Association while serving as treasurer. We accepted the attorney's surrender of his license to practice law and ordered him disbarred. An attorney who served as the secretary-treasurer of the Madison County Bar Association was disbarred after he withdrew $1,500 from the association's library fund without authorization. See *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981). However, neither of these cases concerning nonclient funds related to misappropriation of funds from the attorney's firm.

Before imposing a disciplinary sanction, we must review the mitigating factors present. See *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). Mitigating factors found by the referee in the present case include:

> [Frederiksen] is, I believe, genuinely sorry for his actions. It appears highly unlikely that he will ever again commit such an act. He is admired by others for his professional competence and his concern for the betterment of his community and the bar. From all outward appearances Mr. Frederiksen is an excellent lawyer and is firmly dedicated to his family, his community, his church and his profession.

Frederiksen is currently practicing law with an Omaha law firm and has practiced there for 3 years with no apparent difficulties. Partners of the firm have expressed support for him and a willingness to have him continue practicing with them. Letters of support were submitted by several attorneys who have worked with Frederiksen on NSBA committees and activities, including continuing legal education. Frederiksen has taught law classes at Creighton University School of Law, and he offered letters of support from its faculty. The NSBA Counsel for Discipline did not request disbarment, and the Iowa Supreme Court, presented with the same facts, entered an order of public reprimand.

CONCLUSION

We conclude that although this case merits a serious sanction which will serve to inform Frederiksen and other attorneys that such behavior is not condoned, disbarment is not required. No client was harmed as a result of Frederiksen's actions, and there are mitigating circumstances that weigh in his favor. Frederiksen has expressed sincere remorse for his actions and has made full restitution. He is respected by members of the legal profession for his work. The referee found that Frederiksen is dedicated to his family, his community, and his profession. In addition, he has the support of the law firm with which he now practices.

For the reasons set forth herein, Frederiksen is suspended from the practice of law in the State of Nebraska for 3 years, effective immediately.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

CONNOLLY, J., dissenting.

Frederiksen filed no exceptions to the referee's findings of fact in this case. Thus, it is undisputed that because he was dissatisfied with his compensation, Frederiksen stole approximately $15,000 from his firm over a period of 3 to 4 years. Although he stated that the firm would not have learned of his actions had he not disclosed them, at least two clients had complained about discrepancies in their accounts. Furthermore, one of the firm's partners testified that he had asked Frederiksen about a discrepancy before his disclosure. Also, at the referee hearing, Frederiksen admitted that he would not have disclosed the misappropriations had the firm not treated him so fairly upon his departure.

The majority opinion acknowledges the serious nature of Frederiksen's conduct but holds that disbarment in this case is not required. This holding is based on the majority's determination that no client was harmed as a result of Frederiksen's actions and that there are mitigating circumstances that weigh in his favor. I dissent.

We have disbarred attorneys for misappropriating nonclient funds. In fact, we specifically rejected an attorney's argument that his misappropriation of funds from a bar association was distinguishable from cases in which attorneys had been disbarred

for converting the funds of clients to their own use, stating that "[t]his court has uniformly imposed the sanction of disbarment in cases of embezzlement or like defalcation by lawyers, and that sanction has not depended upon whether the funds taken were those of a client." *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 100, 313 N.W.2d 241 (1981).

Similarly, we accepted an attorney's voluntary surrender of his license after he misappropriated funds from a nonlegal association for which he served as treasurer. *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994). We again stated that "[a]s Rosno was no doubt aware, this court has uniformly imposed the sanction of disbarment in cases of misappropriation, even when the funds did not belong to a client." *Id.*

The majority distinguishes this case from *McConnell* and *Rosno*, stating that "neither of these cases concerning nonclient funds related to misappropriation of funds from the attorney's firm." The implication of the majority's reasoning is that stealing from an attorney's own firm is not as serious as the misappropriation of other types of nonclient funds. I disagree.

There is "no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners." *Matter of Siegel*, 133 N.J. 162, 167, 627 A.2d 156, 159 (1993). Accord *Attorney Griev. Comm'n v. Nothstein*, 300 Md. 667, 480 A.2d 807 (1984). The majority's holding sends the wrong message to the legal community and is contrary to our stated policy considerations of deterring others and maintaining the reputation of the bar as a whole. See *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001).

Clients often entrust lawyers with large sums of money, and they are entitled to have trustworthy lawyers. A lawyer who steals jeopardizes that trust, regardless of whether the theft is from a client or a firm. Frederiksen was wholly unable to account for the money he misappropriated over 3 to 4 years because he kept no records. While he may have been entitled to a share of the client payments had he remitted them to his firm, he nonetheless repeatedly breached his fiduciary duties to his firm by stealing his partners' shares of the payments. I would hold that in the absence of compelling mitigating factors, misappropriation of

firm funds warrants disbarment. See, e.g., *Kaplan v. State Bar of California*, 52 Cal. 3d 1067, 804 P.2d 720, 278 Cal. Rptr. 95 (1991); *In re Maier*, 664 S.W.2d 1 (Mo. 1984); *Matter of Siegel, supra*; *Matter of Krob*, 123 N.M. 652, 944 P.2d 881 (1997); *In re Allen*, 274 A.D.2d 182, 710 N.Y.S.2d 389 (2000); *Matter of Salinger*, 88 A.D.2d 133, 452 N.Y.S.2d 623 (1982); *In re Murdock*, 328 Or. 18, 968 P.2d 1270 (1998).

It is true that we have held disbarment was inappropriate in a case where the client had not been harmed because of the lawyer's misappropriation of the client's bond receipt. See *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985). In *Kelly*, the attorney admitted to securing a forged endorsement for his client's bond receipt and depositing the $1,500 bond proceeds in his office account rather than a trust account. He allowed the balance to drop below the $1,500 amount and refunded the money only after the client had retained another attorney.

But, since *Kelly* was decided, we have held on numerous occasions that "[t]he fact that no client suffered any financial loss does not excuse the misappropriation of client funds and does not provide a reason for imposing a less severe sanction." *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 272, 561 N.W.2d 237, 243 (1997), citing *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996), *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996), and *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995). For these reasons, I believe the majority has incorrectly extended the holding in *Kelly* to stand for the proposition that disbarment is an inappropriate sanction for stealing funds from an attorney's own firm. Moreover, I note that at least two clients were forced to make inquiries about discrepancies in their accounts. After an investigation was initiated, other accounts with discrepancies were found. Frederiksen also agreed to pay for any additional misappropriations that the firm discovered in the future because he had not kept records and, therefore, had no way of knowing which accounts would be affected.

The majority notes that Frederiksen claims no mental disorder, no chemical dependency, no marital discord, and no economic distress. Nonetheless, the majority cites as mitigating factors Frederiksen's remorsefulness, his participation in bar association committees and activities, his teaching at the

Creighton University School of Law, and letters of support from Creighton's faculty and other attorneys.

Frederiksen's achievements and reputation as a lawyer, lecturer, and adjunct law professor are commendable, as is his concern for the betterment of his community and the bar. But they should not serve to mitigate thefts from his own law firm. "The egregiousness of respondent's dishonesty should have been readily apparent to so distinguished a practitioner. Although good reputation, prior trustworthy professional conduct, and general good character are often considered as mitigating factors . . . their importance is diminished 'where misappropriation is involved.' " (Citation omitted.) *Matter of Siegel*, 133 N.J. 162, 171, 627 A.2d 156, 161 (1993).

We have held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000). The referee did find that Frederiksen was genuinely remorseful. But given the extended and extensive nature of Frederiksen's thefts, I would hold that the aggravating factors in this case substantially outweigh any mitigating factors in Frederiksen's favor.

Because I believe that *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994), and *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981), are controlling and that stealing from fellow lawyers is no less a flagrant violation than stealing from a client, I conclude that Frederiksen should be disbarred.

GERRARD, J., joins in this dissent.

THE COUNTY OF DOUGLAS, NEBRASKA, APPELLANT, V. NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION, APPELLEE.

635 N.W.2d 413

Filed September 21, 2001. No. S-00-529.

1. **Taxation: Appeal and Error.** Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000) provides that appellate review of a decision by the Tax Equalization and Review Commission shall be conducted for error on the record of the commission.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Taxation: Presumptions: Proof.** It is presumed that the Tax Equalization and Review Commission faithfully performed its duties, and the burden is upon the appellant to prove that the commission's actions were erroneous, arbitrary, capricious, and contrary to law.
5. **Taxation.** An adjudication that property is exempt from taxation in any 1 year is not res judicata on the question of whether the property is exempt in any succeeding year.
6. ____. While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity.
7. **Taxation: Valuation: Constitutional Law.** The object of Nebraska's uniformity clause is accomplished if all of the property within a taxing jurisdiction is assessed and taxed at a uniform standard of value.
8. **Taxation: Valuation: Public Policy.** No difference in the method of determining the valuation or rate of tax to be imposed can be allowed unless separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

James S. Jansen, Douglas County Attorney, and Christine A. Lustgarten for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

WRIGHT, J.

NATURE OF CASE

Douglas County appeals from an order of the Tax Equalization and Review Commission (TERC) that increased the value of the commercial property in Douglas County by 7 percent.

SCOPE OF REVIEW

[1-3] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000) provides that appellate review of a decision by TERC shall be conducted

for error on the record of TERC. 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. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). However, in instances where an appellate court is required to review cases for error appearing on the record, questions of law are reviewed de novo on the record. *Id.*

FACTS

We first review the procedural steps which preceded this appeal. Pursuant to Neb. Rev. Stat. § 77-1514 (Supp. 1999), the Douglas County assessor timely filed his abstract of assessment for real property for tax year 2000 with the Property Tax Administrator (PTA). On April 5, 2000, the PTA prepared statistical and narrative reports informing TERC of the level of value and the quality of assessment of the classes and subclasses of real property in the state and certified her opinion regarding the level of value and quality of assessment in each county, pursuant to Neb. Rev. Stat. § 77-5027 (Cum. Supp. 2000).

For the 2000 tax year, the statistical reports for the commercial class of property were to be determined by use of sales during the 3-year period from July 1, 1996, through June 30, 1999. However, for Douglas, Lancaster, and Sarpy Counties, the PTA's reports and opinions included calculations based on sales of commercial property using only 1 year's worth of data (July 1, 1998, through June 30, 1999).

Under the Nebraska Administrative Code, TERC is authorized to use several statistical measures, practices, and definitions in the evaluation of assessments. See 442 Neb. Admin. Code, ch. 9, § 007.06 (1999) (version in effect for tax year 2000; currently at § 008.06). The purpose of this evaluation is to determine whether assessments are just, equitable, and legal, as required by state law and professionally accepted mass appraisal methods. *Id.* The assessment-sales ratio is one tool used under professionally accepted mass appraisal methods to measure and evaluate the accuracy and uniformity of assessed values. § 007.06A. The ratio is determined by dividing the assessed value of real property by the sales price of that property expressed in terms of a percent-

age. *Id*. The assessment-sales ratio may also refer to the total assessed value of all real property of a particular class or subclass of property which was sold during a particular timeframe compared to the total sales price of all real property of that class or subclass which was sold during the particular timeframe, again expressed as a percentage. *Id*. The acceptable range for the median assessment-sales ratio for the residential and commercial classes of property is between 92 and 100 percent. See Neb. Rev. Stat. § 77-5023(3) (Cum. Supp. 2000).

The uniformity and proportionality of assessment (or quality of assessment) is measured through the use of the price related differential (PRD) and the coefficient of dispersion (COD). The PRD is used under professionally accepted mass appraisal methods to determine whether properties of differing values are treated uniformly. § 007.06B. The PRD may indicate assessment bias and inequity between lower-valued properties and higher-valued properties. *Id*. More specifically, a PRD that is under 1.00 indicates that higher-valued properties are valued at a higher assessment level than lower-valued properties. *Id*. When the PRD is over 1.00, it indicates lower-valued properties are valued at a higher assessment level than higher-valued properties. *Id*. The acceptable range for the PRD is .98 to 1.03. *Id*.

The COD is also used under professionally accepted mass appraisal methods to measure the uniformity of assessments. § 007.06C. The COD is the average absolute deviation from the median stated as a percentage. *Id*. The COD is calculated by dividing the average absolute deviation by the median assessment-sales ratio and multiplying by 100 to convert the ratio to a percentage. *Id*. For the classes of property at issue in this case, the acceptable range for the COD is 20 percent or less. *Id*.

For Douglas County, the PTA rounded the median assessment-sales ratio for commercial property and reported it to be 90 percent. This calculation was based on a "trimmed profile" that included 464 sales in Douglas County between July 1, 1998, and June 30, 1999. A trimmed profile is a summary of statistical studies provided in the PTA's reports and opinion that utilizes only sales with an assessment-sales ratio between 25 and 200 percent. Accordingly, the reported median assessment-sales ratio of 90 percent was calculated based on the number of sales of

commercial property in Douglas County from July 1, 1998, to June 30, 1999, which had assessment-sales ratios between 25 and 200 percent. Those sales that fell outside the ratio were not considered. The report showed that the PRD was 1.0071, which was within the acceptable range of .98 to 1.03. The report further showed, however, that the COD was 23.17 percent, which was outside the acceptable range of 0 to 20 percent.

In an attempt to "make Douglas County comparable with other counties," the PTA applied a 4-percent increase to the reported median assessment-sales ratio of 90 percent, "which represent[ed] a twelve month adjustment to the midpoint of the time frame established by the Nebraska Tax Equalization and Review Commission in Title 442, Neb[.] Administrative Code, Chapter 9, Section 007 for commercial/industrial real property." The median assessment-sales ratio of 90 percent was adjusted to 94 percent, although the COD and PRD remained the same. The PTA opined that adjusting the median assessment-sales ratio of 90 percent to 94 percent brought the existing commercial values in Douglas County within the statutorily acceptable range of 92 to 100 percent, but the quality of assessment was not acceptable because the reported 23.17 percent COD was above the acceptable range of 0 to 20 percent.

On April 18, 2000, TERC commenced its equalization proceedings, receiving into evidence the PTA's reports and opinions for tax year 2000 for all 93 counties in Nebraska, including Douglas County. TERC adopted a motion to use a trimmed profile as the basis for its review of the level of uniformity and proportionality of assessment practices within the 93 counties.

TERC sought the assistance of an expert witness to evaluate the PTA's reports and opinion for Douglas County. TERC retained John Bredemeyer, a licensed certified general real estate appraiser and the chair of the Nebraska Real Estate Appraiser Board, as its expert regarding the validity of certain adjustments made by the PTA in her reports and opinion for Douglas County. Bredemeyer testified that the methodology used by the PTA on the commercial property in Douglas County was not consistent with professionally accepted mass appraisal standards and that the mathematical calculation used by the PTA was not appropriate.

Relying upon Bredemeyer's opinion, TERC concluded that there was no credible evidence to support the PTA's 4-percent time adjustment of the median assessment-sales ratio from 90 percent to 94 percent. TERC found that the COD was outside the statutorily acceptable range of 0 to 20 percent, although the PRD was within the statutorily acceptable range of .98 to 1.03. The level and quality of assessments within Douglas County for tax year 2000 for the commercial property were determined to be unjust and inequitable.

TERC concluded that an order directing the PTA to adjust commercial property values was necessary to ensure compliance with the uniformity and proportionality provisions of article VIII, § 1, of the Nebraska Constitution and § 77-5023. TERC issued an order directing Douglas County to show cause why the value of the commercial property in Douglas County should not be increased by 7 percent, which would in effect raise the reported median assessment-sales ratio of 90 percent to 96 percent, the midpoint of the range required by § 77-5023(2).

At the hearing on the show cause order, Roger Morrissey, who had assumed the duties of Douglas County assessor on January 7, 1999, testified that the 4-percent time adjustment made by the PTA to bring the median assessment-sales ratio to 94 percent was "warranted." However, Morrissey was unable to cite any authority for making a time adjustment to the assessment-sales ratio or to any figure other than the sales price.

Morrissey stated that in an appreciating real estate market, applying a time adjustment to an individual sale causes the assessment-sales ratio to decrease. He described the real estate market for commercial property in Douglas County as "strong" and "increasing."

Morrissey stated that the PTA's report indicated a median assessment-sales ratio of 94 percent for the period of July 1 to September 30, 1998, and 93.18 percent for the period of October 1 to December 31, 1998. In the following two quarters, after Morrissey had taken office, the reported median assessment-sales ratio was 84.12 percent for January 1 to March 31, 1999, and 80.20 percent for April 1 to June 30, 1999. Morrissey admitted that the level of assessment for those two quarters was considerably lower than previous quarters.

Douglas County offered the testimony of Len Buckwalter, the chief field deputy in the Douglas County assessor's office, who stated that he found 76 errors on the sales roster for Douglas County that had to be corrected. Based on his corrections, Buckwalter calculated a median assessment-sales ratio of 91.81 percent. He stated that this number would normally be rounded to 92 percent, thus falling within the acceptable statutory range. He also believed that a time adjustment should be applied to that figure, since it was based upon a 1-year sales roster, rather than the 3-year sales roster used to analyze most other counties.

The PTA prepared additional statistical reports reflecting the corrections submitted by Buckwalter. The amended trimmed profile, based on sales from July 1, 1998, to June 30, 1999, showed a median assessment-sales ratio of 90.48 percent, which the PTA rounded to 90 percent. The PTA then applied a 4-percent time adjustment to this number and arrived at a median assessment-sales ratio of 94 percent. Buckwalter stated that in professionally accepted mass appraisal practice, time adjustments should be made to the sales price, although he indicated that applying a percentage time adjustment to the assessment-sales ratio appeared to be appropriate.

Buckwalter opined that Douglas County was in a "boom market," that the commercial real estate market was strong, and that commercial values within the county were "appreciating." He estimated that the value of commercial property in Douglas County was increasing at a rate of 4 percent per year.

Buckwalter noted that the PTA's 1999 reports and opinion for Douglas County indicated a "flat" market. The reports showed that the commercial real estate market from July 1, 1996, to June 30, 1998, reflected a consistent median assessment-sales ratio at or near 94 percent. Only one quarter during this period, October 1 to December 31, 1997, varied. It registered a median assessment-sales ratio of 90.45 percent.

According to Buckwalter, "sales chasing" could account for the discrepancy between his testimony that the commercial real estate market in Douglas County was increasing at a rate of 4 percent per year and the evidence from the PTA's 1999 reports and opinion for Douglas County, which showed that the commercial real estate market was flat. Buckwalter acknowledged

that "sales chasing," at least until the end of 1998, provided a "logical hypothesis" and the "most probable scenario." "Sales chasing," also known as selective reappraisal, is the practice of selectively changing values for properties that have been sold, while leaving other values alone. The issue of "sales chasing" will be discussed in more detail later in this opinion.

The PTA explained that during the process of collecting data for tax year 2000, her office realized that it would be "extraordinarily difficult" to maintain full 2- and 3-year databases for the largest counties in the state. In an effort to more efficiently and expeditiously handle the process, only 1 year's worth of data was used for the PTA's 2000 statistical and narrative reports for Douglas, Lancaster, and Sarpy Counties. The PTA explained that in order to ensure uniform and proportionate treatment of the classes of property in all counties, her office "reviewed and developed a measure — a statistical adjustment to trend backwards in time the one year's worth of sales information to a — to a comparable three-year time frame to attempt to ensure a uniform and proportionate treatment of the classes of property by county." This resulted in the 4-percent time adjustment made to those median assessment-sales ratios that were based upon only 1 year's worth of sales.

The PTA confirmed that Buckwalter's corrections had been incorporated into the sales data and that the statistical reports for commercial property had been rerun. The PTA opined that a time adjustment to the results of the report that used only 1 year's worth of sales "would be appropriate."

The PTA testified that applying a 4-percent time adjustment decrease to individual sales of commercial property in Douglas County during the period of July 1, 1998, to June 30, 1999, resulted in a median assessment-sales ratio of 93.9829 percent. A recalculation of the median assessment-sales ratio based on 1 year's sales adjusted by 4 percent on a monthly basis showed a median assessment-sales ratio of 93.8763 percent. The PTA noted that the calculations of the COD and PRD were not correct on the statistical reports containing the recalculations.

On May 10, 2000, TERC filed its "Findings and Orders Adjusting Values." TERC rejected the PTA's 4-percent time adjustment to the median assessment-sales ratio because none

of the standard reference works identified this adjustment as a professionally accepted mass appraisal method. TERC concluded that the PTA's 4-percent time adjustment to the median assessment-sales ratio was not recognized, reliable, or credible.

TERC found that for the 3-year period of July 1, 1995, to June 30, 1998, the profile for commercial property based on the quarterly assessment-sales ratio studies indicated a flat real estate market, while the uncontroverted testimony established that the commercial real estate market in Douglas County was strong. TERC concluded that the adjustments which resulted in a profile indicating a flat commercial real estate market demonstrated a clear intent to circumvent the uniformity and proportionality provisions of article VIII, § 1, of the Nebraska Constitution. TERC noted that when adjustments were made only to sold commercial properties, an undervaluation of commercial property resulted, which impermissibly shifted the tax burden in Douglas County to residential property. The trimmed profile for commercial property in Douglas County indicated a 14-percent decrease in the median assessment-sales ratio between the last quarter of 1998 and the first two quarters of 1999.

Based upon the undisputed fact that the commercial real estate market in Douglas County was increasing, TERC found that the assessment-sales ratios for periods prior to the second quarter of 1999 were not representative of the level and quality of assessment for commercial property in the county and were the result of "sales chasing." TERC concluded that the median assessment-sales ratio for the 1-year study period which was not tainted by "sales chasing" was 80.20 percent. TERC found the statistical profile showing 1 year of trimmed sales incorporating corrections to the sales roster by Douglas County, which included 6 months of sales data from 1998 that were affected by "sales chasing," to be "the most representative of the level of assessment of the commercial class of property within the County, since it incorporate[d] all corrections to the Sales Roster requested by the County and implemented by the Property Tax Administrator."

TERC found that a time adjustment was not required to equalize Douglas County with the other counties in the state even though Douglas County values were analyzed based on 1

year's worth of sales. The median assessment-sales ratio for Douglas County had been artificially inflated by at least 14 percent due to "sales chasing" prior to January 1999, and this 14-percent inflation factor compensated for the 4-percent increase in the commercial real estate market testified to by experts.

TERC concluded that a just and equitable assessment of the commercial property in Douglas County could not be made without increasing the value of property by a percentage. TERC ordered an increase of 7 percent in the assessed value of the commercial property in Douglas County. This 7-percent adjustment was to be applied to all commercial and industrial real property in Douglas County, including both land and improvements. TERC found that this increase would bring the median assessment-sales ratio to 96 percent, the midpoint of the acceptable range required by § 77-5023. On May 22, 2000, Douglas County filed an appeal with the Nebraska Court of Appeals, and we granted Douglas County's petition to bypass.

ASSIGNMENTS OF ERROR

Douglas County asserts (1) that TERC's findings with respect to Douglas County were arbitrary, unsupported by the evidence before TERC, and not in conformity with the law; (2) that TERC's actions violated the uniformity clause of the Nebraska Constitution; (3) that TERC's actions violated the concept of separation of powers guaranteed by the Nebraska Constitution; and (4) that TERC's actions violated the Due Process Clause of the Nebraska Constitution.

ANALYSIS

TERC is empowered to "review and equalize assessments of property for taxation within the state." See Neb. Const. art. IV, § 28. Specifically, TERC is required to "annually equalize the values of all real property as submitted by the county assessors on the abstracts of assessments and equalize the values of real property which is valued by the state." Neb. Rev. Stat. § 77-5022 (Cum. Supp. 2000). TERC fulfills this requirement by determining whether it is necessary to "increase or decrease the value of a class or subclass of real property of any county or tax district . . . so that all classes or subclasses of real property in all

counties fall within the acceptable range." See § 77-5023(1). For nonagricultural real property, the acceptable range is from 92 to 100 percent of actual value. § 77-5023(3). Any increase or decrease is made by a percentage which results in an average level of assessment for the class or subclass adjusted at 96 percent of actual value. § 77-5023(2).

The PTA is required to prepare reports and opinions concerning the level of value and the quality of assessment of the classes and subclasses in each county on or before April 5 of each year. § 77-5027. According to § 77-5027, "[TERC] shall, pursuant to section 77-5026, raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve equalization." Neb. Rev. Stat. § 77-5026 (Cum. Supp. 2000) provides:

> [I]f [TERC] finds that a just, equitable, and legal assessment of the property in the state cannot be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by any county, the commission shall issue a notice to the counties which it deems either undervalued or overvalued and shall set a date for hearing . . . . At the hearing the legal representatives of the county may appear and show cause why the value of a class or subclass of the property of the county should not be adjusted. At the hearing, [TERC] may receive testimony from any interested person.

State law also provides that "[a]ny party aggrieved by a final decision in a case appealed to [TERC] and any county or other political subdivision aggrieved by an order of [TERC] issued pursuant to section 77-1504.01 or 77-5028 shall be entitled to judicial review in the Court of Appeals." § 77-5019(1).

Prior to the creation of TERC, the State Board of Equalization and Assessment (Board) was responsible for equalizing the values of all real property located in the state. See Neb. Rev. Stat. § 77-505 (Reissue 1996). See, also, *Hall County v. State Bd. of Equal.*, 250 Neb. 323, 549 N.W.2d 164 (1996). In *Hall County*, 250 Neb. at 330-31, 549 N.W.2d at 170, we stated that the Board "has a wide latitude of judgment and discretion in equalizing the assessment of property. . . . ' "[T]he presumption is that the Board faithfully performed its duties and the burden is upon the

appellant to prove that the action of the Board was erroneous, arbitrary, capricious, and contrary to the law." ' "

[4] Since TERC performs essentially the same functions that were performed by the Board, we will consider such appeals under the same standards and principles that we applied to appeals from equalization proceedings before the Board. See *id*. It is presumed that TERC faithfully performed its duties, and the burden is upon Douglas County to prove that TERC's actions were erroneous, arbitrary, capricious, and contrary to law. Our review of the appeal is the same. Appellate review of a TERC decision shall be conducted for error on the record of TERC. See § 77-5019(5). 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. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). However, in instances where an appellate court is required to review cases for error appearing on the record, questions of law are reviewed de novo on the record. *Id*. We now consider each of Douglas County's assigned errors.

TERC's Findings

Douglas County argues that TERC's findings were arbitrary, unsupported by the evidence, and not in conformity with the law in several respects. Douglas County first claims that TERC acted in an arbitrary fashion by accepting a time adjustment to the residential property in Douglas County, but not to the commercial property.

Our review of the record indicates that TERC accepted the median level of value for residential property in Douglas County without any type of time adjustment. In its argument, Douglas County refers to a statistical adjustment in which the PTA stated that the median ratio for residential property was 92.8 percent, which would be adjusted for time by 2 percent to 94.68 percent. However, we find that the actual statistics using the trimmed profile show that the median value was 95 percent. Thus, TERC did not accept the PTA's statistical adjustment to the residential class of property. The analysis of the statistical reports states:

> The calculated median ratio was rounded to and reported at 95%, indicating the level of value of the residential real property to be within the range of 92-100%. . . . Now referring to the "Statistical Adjustment" page the median level of value is at 97 indicating the level of value of residential real property to be within the range of 92-100%.

Regardless of the interpretation of the statistical analysis or the statistics, we do not find that TERC's actions were arbitrary. Even without a time adjustment, the median value of real property was within the acceptable range of 92 to 100 percent, and TERC correctly concluded that it was not necessary to order a percentage adjustment to the residential property in Douglas County.

Douglas County next argues that TERC lacked sufficient evidence to issue the order to show cause. Pursuant to § 77-5023, TERC is given the authority to issue an order to show cause why the value of a class of property should not be adjusted. See § 77-5026. In considering the show cause order, TERC relied upon Bredemeyer's expert testimony that the 4-percent time adjustment that the PTA applied to the median assessment-sales ratio for commercial property in Douglas County was not consistent with a professionally accepted mass appraisal standard. Without the application of the PTA's 4-percent time adjustment, the median assessment-sales ratio for commercial property was 90 percent, which was outside the statutorily acceptable range of value required by § 77-5023.

Sufficient evidence was presented to support TERC's actions, and TERC did not act arbitrarily in issuing the show cause order to Douglas County. This argument is without merit.

Douglas County also objects to TERC's findings in its May 10, 2000, order as arbitrary, unsupported by the evidence, and not in conformity with the law. The county claims that a number of analyses could have been used by TERC which showed that the median level of value for commercial property in Douglas County was within the statutorily acceptable range. Instead, the county argues, TERC based its findings on the unsupported theory that "sales chasing" had occurred prior to January 1999.

Among the analyses that TERC allegedly ignored was Buckwalter's recalculation after he corrected 76 errors in the sales roster. The new median for commercial property in

Douglas County was 91.81 percent, which Buckwalter stated would normally be rounded to 92 percent and would fall within the statutorily acceptable range.

In addition, the PTA recertified her statistical report for commercial property in Douglas County on May 9, 2000, showing a median of 90.48 percent, which was rounded to 90 percent. The PTA then applied a 4-percent time adjustment and arrived at a median of 94 percent, which she asserted was within the statutorily acceptable range. Another analysis by the PTA, using Buckwalter's corrections and 3 years' worth of sales from July 1, 1996, to June 30, 1999, resulted in a median of 97.67 percent, which was rounded to 98 percent. No time adjustment was made to this figure because it was based on 3 years' worth of sales. According to the PTA, analyses purporting to apply a 4-percent time adjustment to individual sales of commercial property in Douglas County during the period of July 1, 1998, to June 30, 1999, resulted in a median of 93.9829 percent. A recalculation of the median based on adjusting sales by 4 percent on a monthly basis resulted in a median of 93.8763 percent.

Douglas County argues that these analyses were competent to demonstrate that TERC should not adjust the commercial property values by 7 percent. The county asserts that even though TERC, the PTA, and the county's own witness all agreed that "sales chasing" could be evidenced, it was not conclusively shown by a comparison between the percent in sales base value to the percent change in assessed base value.

TERC claims that the analyses were unreliable because the data used included sales information from periods during which the prior Douglas County assessor engaged in the unacceptable assessment practice of "sales chasing." As noted earlier, "sales chasing" occurs when values for properties that have been sold are changed while values for unsold properties remain constant. The practice is unprofessional because it creates inequities between properties and, unless adjusted for, renders sales ratio studies invalid. This is important because

> [t]he objective of ratio studies is to determine appraisal performance for the population of properties, that is, both sold and unsold parcels. As long as standardized schedules and formulas are used in the valuation process, there

> is little reason to expect any significant difference in appraisal performance between sold and unsold parcels. If, however, sold parcels are selectively reappraised based on their sales prices or other criterion, the appraised values used in ratio studies will not be representative and ratio statistics will be distorted.

International Association of Assessing Officers, Mass Appraisal of Real Property 309 (1999).

In addition,

> [i]f sold and unsold parcels are similarly appraised, they should experience similar changes in value over time. Accordingly, it is possible to compute the average change in value over a selected period for sold and unsold parcels and, if necessary, test to determine whether observed differences are significant. If, for example, values for vacant sold parcels in an area have increased by 45 percent since the previous reappraisal, but values for vacant unsold parcels have increased only 10 percent, clearly sold and unsold parcels have not been equally appraised.

Id. at 311.

TERC argues that evidence of "sales chasing" is shown in the assessment-sales ratio data contained in the profile prepared by the PTA. This data reflected a marked decrease in the assessment-sales ratio for commercial property in Douglas County between the last two quarters of 1998 (94 and 93.18 percent) and the first two quarters of 1999 (84.12 and 80.20 percent), with a net drop in the median of 14 percent in 6 months. TERC asserts that the practice of "sales chasing" tainted the sales data prior to January 1, 1999.

We are required to review decisions by TERC for error on the record. Therefore, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). In this review, TERC is entitled to the presumption that it faithfully performed its duties, and the burden is upon Douglas County to prove that the action of TERC was erroneous. See *Hall County v. State Bd. of Equal.*, 250 Neb. 323, 549 N.W.2d 164 (1996).

The quarterly assessment-sales ratio studies in the profile for commercial property offered by Douglas County showed that a flat real estate market existed in Douglas County for the 3 years between July 1, 1995, and June 30, 1998. However, the evidence is undisputed that the commercial real estate market in Douglas County was strong and increasing at a rate of 4 percent per year. As TERC noted, under these circumstances, the quarterly assessment-sales ratios listed in the profile should have decreased. No witness provided any explanation for the dramatic change in the median after the former assessor left office in January 1999, and Douglas County presented no evidence to explain the inconsistency.

As sale prices increase in a strong market and assessment values lag behind, the assessment-sales ratio should decrease. For example, if a property is assessed at $90,000 and is sold for $100,000, the assessment-sales ratio is 90 percent. If the assessed value of this property remained at $90,000 and at a later date the property sold for $110,000, the assessment-sales ratio would decrease to 81.82 percent. The 1999 percent change report for Douglas County showed that for commercial property, the 1998 to 1999 increase in sales base value was 21.33 percent. However, the 1998 to 1999 increase in assessed base value was only 3.98 percent. Contrary to Douglas County's argument, these figures were relevant to the determination of whether "sales chasing" had occurred during this time period.

"Sales chasing" was demonstrated by the 14-percent decrease in the median level of assessment between the last quarter of 1998, when the prior assessor was in office, and the first two quarters of 1999, when Morrissey took office, based on the trimmed profile for commercial property. As TERC found, this 14-percent change was not representative of changes in the commercial real estate market during this period when the real estate market was strong. If the sales utilized by Douglas County in the ratio studies were representative of the entire commercial real estate market, the market in Douglas County, after remaining stagnant for 2½ years, changed more than 14 percent in 6 months. Douglas County did not provide any evidence to explain the dramatic change in the median assessment-sales ratio after the former assessor left office in January 1999.

Buckwalter, Douglas County's expert witness, testified that the assessment rolls and the property record cards showed a flat real estate market in Douglas County for 3 years, although the real estate market had been increasing 4 percent per year. This supports a finding that "sales chasing" had occurred in Douglas County at least until the end of 1998.

TERC also found that the median assessment-sales ratio for the study period which was not tainted by "sales chasing" was 80.20 percent for the second quarter of 1999, or April 1 to June 30. Therefore, TERC determined that as a result of "sales chasing" by the previous administration in the Douglas County assessor's office, commercial property in Douglas County was and continues to be undervalued.

We conclude that TERC's determination that "sales chasing" had occurred in Douglas County during this time period was supported by competent evidence. TERC's findings with respect to "sales chasing" were neither arbitrary, capricious, nor unreasonable.

TERC's finding that a time adjustment was not necessary in order to equalize Douglas County with other counties is also supported by the record. According to § 007.08 of the Nebraska Administrative Code then in effect (currently at § 008.08), "[TERC] will give consideration to the methodology used by the counties in determining time adjustments and to the impact time adjustments may have on the overall statistical analysis results." The PTA's determination to apply a 4-percent increase to the reported median assessment-sales ratio of 90 percent is not supported by the Nebraska Administrative Code or the evidence.

Section 007.08A provides: " 'Time adjustments' are changes made to the sales price of real property sold during a particular time frame in order to account for inflationary or deflationary changes in market value. These changes impact the assessment/sales ratio, and also the PRD and COD." Section 007.08B requires the assessing body to justify its time adjustment practices based on evidence. The PTA adjusted the assessment-sales ratio by 4 percent with no justification. Bredemeyer, TERC's expert witness, testified that it was not appropriate to adjust the median assessment-sales ratio. Therefore, the evidence

supported TERC's determination that the 4-percent time adjustment applied by the PTA was inappropriate.

Douglas County also argues that it was improper for TERC to draw any conclusions that were inconsistent with its prior findings and orders regarding previous years' equalization proceedings because such determinations were res judicata. Douglas County claims that any findings made or relied upon in the 2000 order that were inconsistent with TERC's 1999 order must be stricken. According to the county, if TERC was concerned that the 1999 values reflected "sales chasing," the concerns could have been addressed during the 1999 equalization proceedings.

TERC argues that res judicata is not applicable in matters involving different tax years. TERC further asserts that it was required to address different issues with respect to the 2000 equalization proceedings, namely the propriety of the PTA's time adjustment, and was presented with new evidence establishing the unreliability of the sales data for the prior periods.

The record shows that Douglas County did not adjust the commercial property values in 1999. TERC's 1999 order was based upon the PTA's 1999 reports for the county, which showed a median value of 94 percent for commercial property. Therefore, the values were not considered previously.

[5] In *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961), we concluded that an adjudication that property is exempt from taxation in any 1 year is not res judicata on the question of whether the property is exempt in any succeeding year. Applying the same rationale, TERC is not barred from using past sales data found in certified PTA reports to make adjustments in a later tax year. Thus, TERC was not precluded from using such evidence to determine that the statistical analysis by Douglas County was not reliable.

Uniformity Clause

Douglas County argues that TERC violated the uniformity clause of the Nebraska Constitution by failing to treat Douglas County in a manner that was uniform with other counties within the state. In particular, the county asserts that it was improper to analyze Douglas County on 2 quarters, or one-half of 1 year, while analyzing the rest of the counties using a 3-year timeframe.

Douglas County relies on *Brandeis Inv. Co. v. State Board of Equalization & Assessment*, 181 Neb. 750, 150 N.W.2d 893 (1967). There, in an appeal from an order of the Board, the valuation of industrial and commercial property in Douglas County was increased by 24 percent. Sales for the entire 1965 tax year were considered in all counties using the sales-assessment ratio except for Douglas County, which considered sales for approximately the last 5 months of 1965. We held that there was no satisfactory explanation for the difference in procedure and no showing that the sales used were representative samples for the entire year. Thus, the order of the Board was determined to be arbitrary, unreasonable, and capricious.

In this case, Douglas County contends that it was treated differently than Lancaster County, which was permitted to provide 3 years' worth of sales information. However, the record shows that the PTA's reports and opinions for both Douglas and Lancaster Counties used only 1 year's worth of sales data.

[6-8] The uniformity clause of the Nebraska Constitution, article VIII, § 1, provides in part: "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution." "[W]hile absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity." *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 873, 606 N.W.2d 786, 792 (2000). The object of the uniformity clause is accomplished " 'if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.' " *Id.* No difference in the method of determining the valuation or rate of tax to be imposed can be allowed unless "separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified." *Id.* at 874, 606 N.W.2d at 793.

We therefore examine whether there is a substantial difference of situation or circumstance or some public policy reason that would justify why Douglas County was not evaluated using a 3-year timeframe as were other counties within the state.

TERC argues that the different timeframe was justified by the evidence of "sales chasing." In contrast to *Brandeis Inv. Co.* and *Constructors, Inc.*, where there was no substantial explanation to support the differential treatment, the record in the case at bar contains substantial evidence that "sales chasing" had occurred in Douglas County and that the "sales chasing" affected the 3-year sales information. The data for Lancaster County did not indicate that the sales information for Lancaster County was contaminated by the type of "sales chasing" that had occurred in Douglas County. Therefore, we conclude that the evidence of "sales chasing" justified the differential treatment accorded to Douglas County.

Upon finding that the data for the periods prior to 1999 was inaccurate because of the prior Douglas County assessor's "sales chasing," TERC was required to determine a valid median assessment-sales ratio for the commercial property in the county. The International Association of Assessing Officers, Standard on Ratio Studies 31 (1999), provides:

> Once it is determined that "sales chasing" probably has occurred and probably is reducing the validity of ratio study statistical measures of level or uniformity, it is necessary to redo the ratio study to establish valid measures before any other recommendations, such as reappraisal or equalization action, can be made. If feasible, probably the best approach is to select a sample period that effectively precludes sales chasing.

In an attempt to follow this procedure, TERC used the values for commercial property reported in the PTA's amended statistical adjustment. Half of the sales studies were from the last 6 months of 1998, and half were from the first 6 months of 1999. In spite of the fact that the 1998 sales were affected by "sales chasing," TERC determined that the amended statistical adjustment was the most representative of the level of assessment of commercial property within Douglas County, since it incorporated all corrections to the sales roster requested by Douglas County and implemented by the PTA. No evidence was presented of "sales chasing" in other counties.

Professionally accepted mass appraisal techniques permit the use of only 1 year of sales to measure the level of assessment in

counties where a large number of sales are available for review. In Douglas County, there were more than 400 qualified sales for the period in question. Based upon the factual situation presented, we cannot say that TERC erred in using only 1 year of sales data to evaluate the level of assessment of the commercial property in Douglas County. We conclude this assignment of error is without merit.

Remaining Assignments of Error

We have considered the remaining assignments of error, and we conclude they are without merit.

CONCLUSION

For the reasons set forth herein, we affirm TERC's order, as it conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Affirmed.

State of Nebraska, appellee, v. Gary J. Brunzo, appellant.

634 N.W. 2d 767

Filed September 28, 2001. No. S-00-181.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. ____: ____: ____. The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Effectiveness of Counsel: Proof.** In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

6. **Indictments and Informations.** The function of an information is twofold. With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
7. **Criminal Law: Indictments and Informations.** Generally, to charge a defendant with the commission of a criminal offense, the information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged.
8. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
9. **Indictments and Informations: Due Process.** When the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.
10. **Indictments and Informations.** An information is deemed sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
11. **Criminal Law: Homicide: Lesser-Included Offenses.** In an information charging felony murder, it is not necessary for the elements of the underlying or predicate felony to be set out in the information.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Gary J. Brunzo, pro se.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This matter is an appeal from an order of the district court for Douglas County denying a verified motion for postconviction relief by Gary J. Brunzo. The motion arose out of Brunzo's 1994 conviction for first degree felony murder. Brunzo alleges that constitutional errors in his 1994 trial made his conviction and sentence for first degree murder void or voidable. Brunzo previously appealed his conviction and sentence to this court. In an

opinion filed June 2, 1995, this court found Brunzo's complaints to be without merit. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). We now affirm the trial court's denial of Brunzo's verified motion for postconviction relief.

BACKGROUND

The facts of this case are set out in detail in *State v. Brunzo, supra*, but are summarized as follows:

Brunzo's conviction resulted from a series of events that occurred in December 1993. Brunzo was a member of the "Lomas" street gang. Michael Campbell, a fellow Lomas member, was shot in a gang-related incident at the Crossroads Mall in Omaha. Campbell died on December 5, 1993. That evening, 40 to 50 people gathered at the home of Angelita DeLeon. Among those in attendance were Brunzo, Daniel Eona, Angel Huerta, Juan Carrera, and Doug Mantich. Carrera was a former member of the Lomas gang, and the other four were current members. Carrera testified that both Eona and Brunzo carried guns at the gathering. There was talk of retribution for Campbell's death at the gathering. In particular, there was some discussion of doing a "drive-by shooting" of a rival gang member believed to be involved in the shooting of Campbell.

At approximately 2 a.m. on December 6, 1993, two men were observed "car-jacking" a minivan in the vicinity of DeLeon's home. They drove away with the original driver still inside. A minivan soon thereafter appeared near DeLeon's home with Eona in the driver's seat and Brunzo in the passenger seat. At some point, Carrera, Huerta, and Mantich entered the minivan. Shortly after getting into the minivan, Huerta noticed the person from whom the minivan had been car-jacked, Henry Thompson, hunched over between the two front seats with his hands behind his head.

Carrera also noticed Thompson between the two front seats and saw Eona poke Thompson in the back of the head with what could have been Eona's gun. Eona continued to drive for approximately 10 minutes, when a gunshot was then fired into the back of Thompson's head. Huerta and Carrera both testified that they did not see who fired the gunshot. Huerta testified that a couple of minutes after Thompson was shot, he saw

Thompson's body fall out of the minivan from the front passenger door. Carrera testified that after the gunshot, Eona pulled the minivan over and stopped. Brunzo opened the front passenger door and pulled the body from the minivan, with a helping push from Eona, leaving the body lying in the street. Eona then drove the minivan away, whereupon Carrera said, " ' "Let me go get mine," ' " referring to his gun. Eona drove to Carrera's house, and Carrera retrieved his gun and returned to the minivan. After Carrera had climbed back into the minivan, Eona drove a " 'block or two' " and stopped. *State v. Brunzo*, 248 Neb. at 181, 532 N.W.2d at 302.

At approximately 2:44 a.m. on December 6, 1993, Carrera and Huerta shot at a house at which Nacho Palma resided. Palma was known to be a member of a rival street gang that was allegedly involved in the shooting of Campbell.

Following the driveby shooting at the Palma residence, Eona drove the minivan from the scene and a discussion ensued about putting the minivan in the river. Eona drove the minivan to the Missouri River, and he, Brunzo, Carrera, Huerta, and Mantich got out of the minivan and rolled it into the river. The group then walked away from the river through the woods. Mantich and Huerta took the guns from Carrera, Eona, and Brunzo and then walked to Huerta's house to hide them. Huerta was tired, so Mantich left Huerta's house. Meanwhile, Carrera, Eona, and Brunzo returned to where Thompson's body lay. After walking past the body, they continued to Huerta's house, where they stayed the remainder of the night. Thompson's body was found between 3 and 3:20 a.m.

Brunzo was charged by information with the first degree murder of Thompson in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1989) and "use [of] a firearm to commit a felony" in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). The information, as it related to the first degree murder charge, provided in pertinent part: "[O]n or about the 6th day of December, 1993, GARY J. BRUNZO . . . did then and there purposely and with deliberate and premeditated malice, or during the perpetration of, or attempt to perpetrate a robbery or kidnapping, kill Henry Thompson." The information did not list the elements of robbery, kidnapping, or criminal attempt. Brunzo's counsel did

not move to quash the information, nor did Brunzo challenge the sufficiency of the same on appeal. During the course of the trial, the jury was repeatedly cautioned not to consider evidence of the driveby shooting at the Palma residence as it related to Brunzo.

After the parties rested their cases and during the instructions conference, Brunzo's counsel requested an instruction on proximate cause/intervening cause regarding the connection of the original robbery to the shooting of Thompson. The trial court denied that request. Brunzo's counsel did not assign that decision as error or argue the same on appeal. Among the jury instructions given, however, was instruction No. 11, which dealt with the intent required for felony murder. It stated:

> You are instructed that in a prosecution for homicide in the perpetration of or attempt to perpetrate a robbery or kidnapping, as herein charged, proof is not required of premeditation and deliberation or a purpose to kill.
>
> The turpitude involved in the robbery or kidnapping takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for robbery or kidnapping.
>
> A homicide committed while perpetrating or attempting to perpetrate a robbery or kidnapping is Murder in the First Degree, even though no intent to commit homicide is alleged or proven.

Brunzo's counsel did not object to that instruction, nor did Brunzo assign as error or argue on direct appeal the giving of this instruction.

Following a jury trial, Brunzo was found guilty of first degree murder under a felony murder theory and was sentenced to a term of life imprisonment. The charge of "use [of] a firearm to commit a felony" was dismissed by the trial court. Brunzo appealed his conviction, and this court affirmed. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

Brunzo filed a verified motion for postconviction relief in the district court for Douglas County. The trial court overruled Brunzo's motion in its entirety. Brunzo appealed that ruling to this court. The State moved for summary affirmance, which this court denied.

ASSIGNMENTS OF ERROR

Brunzo, in the appeal of the trial court's order denying his verified motion for postconviction relief, assigns that the trial court erred in (1) not finding that the information in this case was facially defective, (2) finding that the jury was properly instructed, (3) finding that there were no lesser-included offenses to the offense of murder in the first degree, (4) not finding that Brunzo was denied effective assistance of counsel during trial and sentencing, and (5) not finding that Brunzo was denied effective assistance of counsel on direct appeal.

STANDARD OF REVIEW

[1] A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997); *State v. Massey*, 252 Neb. 426, 562 N.W.2d 542 (1997).

[2] The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Caddy, ante* p. 38, 628 N.W.2d 251 (2001); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Boppre, supra*.

[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Caddy, supra*; *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000).

ANALYSIS

[4] Brunzo's first three assignments of error are procedurally barred as a matter of law. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Suggs, supra*. All three of these assignments of error are of the type that could have been raised on direct appeal. Since they were not raised at that time, we determine that Brunzo is barred from raising the issues now. See *id*. See, also, *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

In his fourth and fifth assignments of error, Brunzo argues that the trial court erred by not finding he was denied effective

assistance of counsel during his trial, sentencing, and appeal. Specifically, Brunzo argues that (1) the information charging him was defective, and counsel was ineffective for failing to move that the information be quashed and for failing to assign as error and argue its defectiveness on appeal; (2) jury instruction No. 11 was unconstitutional, and counsel was prejudicially ineffective for failing to object to it at trial and for failing to assign as error and argue its unconstitutionality on appeal; (3) his trial counsel was prejudicially ineffective for failing to tender a jury instruction on lesser-included offenses to first degree felony murder and to the applicable predicate felonies listed in the statute; (4) his counsel on direct appeal was prejudicially ineffective for failing to assign and argue as error the trial court's refusal to charge the jury with a proximate/intervening cause instruction; and (5) his counsel on direct appeal was prejudicially ineffective for failing to cite constitutional bases for the issues raised on direct appeal.

[5] In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999).

In this case, before Brunzo can argue that his counsel was prejudicially ineffective, he must demonstrate the validity of his underlying claim. He must first demonstrate that the information charging him in this case was legally insufficient.

[6] The function of an information is twofold. With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense. *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991); *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

[7,8] Generally, to charge a defendant with the commission of a criminal offense, the information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime, or in language equivalent to the statutory terms defining the crime charged. *State v. Willett*, 233 Neb. 243, 444 N.W.2d 672 (1989). Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

[9,10] However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process. *Jungclaus v. State*, 170 Neb. 704, 104 N.W.2d 327 (1960). Nonetheless, an information is deemed sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. *State v. Bowen, supra*.

The question presented is therefore whether an information which charges a defendant with felony murder must list the elements of the predicate felonies.

We previously touched upon this question in *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999). In that case, Palmer argued that the information charging him with felony murder was defective because it did not list the elements of the underlying felony, robbery. Palmer argued that counsel was therefore ineffective for failing to argue the defectiveness of the information by a plea of abatement. *Id.* This court did not agree. The information filed against Palmer stated that " 'Palmer . . . in the perpetration of a robbery of Eugene William Zimmerman, did kill Eugene William Zimmerman.' " *Id.* at 724, 600 N.W.2d at 774. We held that since the allegation was nearly a verbatim recitation of the language of § 28-303, which states that "[a] person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any . . . robbery [or] kidnapping," it was sufficient to charge and convict Palmer. *State v. Palmer, supra*.

The information instructed Palmer that the underlying felony which would be alleged at trial was robbery. *Id.* We found that the charge in the information was a fair means of informing Palmer of what he would have to defend against. Therefore, Palmer's assignment of error based on this issue was without merit. *Id.*

The information charging Brunzo was likewise a nearly verbatim recitation of the language of § 28-303. It also instructed Brunzo as to what the underlying felonies were: robbery, kidnapping, and/or criminal attempt. Under our reasoning in *Palmer*, the information would be sufficient to charge and convict Brunzo, and the charge contained in it was a fair means of informing Brunzo of what he would have to defend against.

[11] Based on our previous decision in *State v. Palmer, supra*, we conclude that it is not necessary for the elements of the underlying or predicate felony to be set out in the information. Brunzo was not charged with the underlying crimes of robbery, kidnapping, and/or criminal attempt, and the intent to commit the underlying crime does serve as a substitute for the intent to kill. See *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997). Furthermore, the information charging Brunzo with felony murder did give him fair notice of the charges he would face and the crime he was later convicted of.

Brunzo's argument is thus without merit. Because the information was valid, Brunzo's counsel was not ineffective for failing to move that it be quashed at trial or for not assigning as error and arguing on appeal its invalidity. Accordingly, there is no need to discuss whether Brunzo was actually prejudiced by his counsel's actions or inactions. We have considered all other assignments of error, including those based upon associated federal law, and conclude that these are without merit.

CONCLUSION

Having found that the information charging Brunzo was not defective and that Brunzo's other assignments of error are either procedurally barred or without merit, we accordingly affirm the trial court's order denying postconviction relief to Brunzo.

AFFIRMED.

LEROY KIRCHNER, APPELLANT, V. LARRY J. WILSON, APPELLEE.

634 N.W. 2d 760

Filed September 28, 2001. No. S-00-254.

1. **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.
2. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
3. **Expert Witnesses: Appeal and Error.** An appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.
6. ____. A party cannot complain of an error which that party has invited the court to commit.
7. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine if there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
8. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

James E. Harris and Britany S. Shotkoski, of the Harris, Feldman Law Offices, for appellant.

Michael F. Coyle, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This is an appeal from a personal injury trial limited to the issue of damages. Leroy Kirchner appeals from a jury verdict entered by the district court for Douglas County which found in favor of Larry J. Wilson and against Kirchner on Kirchner's claim for damages arising out of an automobile accident. Based on the jury's verdict, no damages were awarded and Kirchner's petition was dismissed. We affirm.

STATEMENT OF FACTS

This is the second appearance of this case in this court. See *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996). A detailed statement of facts is set forth in that case.

Briefly summarized, on November 25, 1990, a vehicle operated by Wilson collided with the rear of an automobile operated by Kirchner in the intersection of 66th and Maple Streets in Omaha, Nebraska. Kirchner sued Wilson for negligence, alleging, inter alia, that he had sustained personal injuries as a result of the automobile accident, including injuries to his neck and lumbar spine, which injuries necessitated cervical spine surgery as well as a laminectomy to correct a herniated lumbar disk.

Kirchner's lawsuit against Wilson initially went to trial in September 1994 (the first trial). In the first trial, the district court determined as a matter of law that Wilson was negligent, that his negligence was the proximate cause of the collision, and that Wilson was liable to Kirchner for any damages Kirchner sustained which were proximately caused by the collision.

During the first trial, the court received into evidence testimony that established that Kirchner had had four laminectomies prior to the November 1990 automobile accident. Wilson introduced into evidence the testimony of two expert witnesses, Dr. Bernard Kratochvil, an orthopedic surgeon, and Dr. Richard Howard, a physician and biomedical engineer. Kratochvil and Howard testified, inter alia, that the November 1990 automobile accident did not cause Kirchner's cervical and lumbar injuries.

After deliberating, the jury in the first trial returned a verdict in favor of Kirchner and awarded him $3,161.90 in damages. Dissatisfied with that award, Kirchner appealed, asserting that

the district court erred in, among other things, giving one of its instructions to the jury. In *Kirchner, supra*, we concluded that Kirchner's assignment of error regarding the jury instruction had merit, and we reversed, and remanded for a new trial limited to the issue of damages.

On May 18, 1998, following remand, Kirchner filed a motion to conduct a hearing to determine under the *Frye* standard the admissibility of expert scientific testimony from Howard, and "derivative or related opinions" from Kratochvil, regarding the mechanics of the November 1990 automobile accident and the injury, if any, to Kirchner as a result of such accident. In *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001), this court recently described the *Frye* standard, first set forth by the U.S. Court of Appeals for the District of Columbia in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *In Schafersman*, we observed that for expert scientific testimony to be admissible under the *Frye* test, "the proponent of the evidence must prove general acceptance [of the principles contained in the proposed testimony] by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists." *Ante* at 222, 631 N.W.2d at 870.

We note that in *Schafersman*, we held prospectively that for trials commencing on or after October 1, 2001, the admissibility of expert opinion testimony under the Nebraska Evidence Rules would no longer be based upon the *Frye* test, but instead would use the analysis set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The *Daubert* test requires, inter alia, proof of the scientific validity of the principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion. Because the instant case was tried prior to October 1, 2001, the *Frye* test governs.

Kirchner's motion came on for hearing on March 2, 1999. Sixteen exhibits were received into evidence, and both parties presented oral arguments. At the hearing, Kirchner argued, inter alia, that Howard's opinions based upon biomechanics and

injury causation analysis "are so farfetched that they don't even come close to the . . . standard required under Frye." In an order filed March 19, the district court rejected Kirchner's argument and found that the testimony offered by Howard with regard to injury causation analysis was generally accepted in the scientific community and that Howard was qualified under the *Frye* test to testify as an expert witness.

On February 14, 2000, Kirchner filed a motion in limine in which he renewed his *Frye* objection to Howard's testimony and also sought to prohibit Kratochvil from testifying at trial on the issue of causation. On February 16, the district court overruled Kirchner's motion in limine. Thereafter, commencing on February 16, and continuing through February 18, the second jury trial (the second trial) was held, limited solely to the issue of damages. See *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996). This appeal stems from the second trial.

Prior to the commencement of the second trial, the parties had stipulated that if Howard's testimony was deemed admissible, Howard's testimony from the first trial could be used in lieu of Howard's appearing live and testifying during the second trial. At some point after the parties made opening statements during the second trial, Wilson informed Kirchner that he would not be offering Howard's testimony.

As part of his case, Kirchner intended to present the videotaped testimony of his expert, Dr. Michael Freeman, a substantial portion of whose testimony consisted of a challenge to the credibility of Howard's opinions. Accordingly, in the second trial, after Wilson decided not to offer Howard's testimony, Kirchner called Howard as one of his witnesses in his case in chief and read portions of Howard's testimony from the first trial into the record. Wilson then in effect "cross-examined" Howard, without objection, by reading into the record of the second trial additional portions of Howard's testimony from the first trial. Thereafter, Kirchner played for the jury Freeman's videotaped deposition consisting, in part, of an attack on Howard's testimony.

During the second trial, a total of 7 witnesses testified and 29 exhibits were received into evidence. Among the witnesses called by Wilson was Kratochvil. Kratochvil, a physician specializing

in orthopedics with over 38 years of experience, testified, inter alia, that he had examined Kirchner and Kirchner's medical records and that Kirchner's neck injury was not caused by the November 1990 automobile accident.

At the close of all the evidence, the case was submitted to the jury. On February 22, 2000, after deliberation, the jury returned a verdict in which it stated that it found for the "defendant on plaintiff's petition." On May 16, the district court entered judgment on the jury's verdict, dismissing Kirchner's petition.

Kirchner appeals.

ASSIGNMENTS OF ERROR

On appeal, Kirchner has assigned two errors. Kirchner claims the district court erred (1) in concluding that Wilson met his burden under the *Frye* test with respect to his "proffered novel scientific testimony, which is not generally accepted in the relevant scientific community" and (2) in failing to exclude the causation opinions of Howard and Kratochvil which were "not probative, irrelevant, too generic, lacking in foundation, without sound or reasonable basis, ignored actual facts, and/or based on speculation and conjecture."

STANDARDS OF REVIEW

[1-4] 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. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001); *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. See, *Genetti, supra*; *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000). Similarly, an appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to

act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

Admission of Howard's Expert Testimony Under Frye *Test.*

[5] In his first assignment of error, Kirchner claims that the district court erred in admitting expert witness testimony which did not meet the *Frye* test. In the assignment of error, Kirchner does not identify the testimony he finds objectionable. We note, however, that Kirchner's brief regarding the first assignment of error is limited to a discussion of the admission of Howard's testimony. We have previously stated that a claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief. See, *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001); *Carroll v. Chase County*, 259 Neb. 780, 612 N.W.2d 231 (2000). Thus, we construe Kirchner's first assignment of error as challenging only the admissibility of Howard's testimony under the *Frye* test. So construed, we conclude there is no merit to Kirchner's first assignment of error.

[6] It is undisputed that Wilson decided during the second trial not to call Howard as an expert defense witness and that Howard's testimony was introduced into evidence by Kirchner during his case in chief. According to counsel for Kirchner, Kirchner elected to call Howard for the purpose of "attack[ing] Dr. Howard's credibility. Both by his own testimony and by the testimony of [Kirchner's] expert, Dr. Freeman." It is a well-established principle that a party cannot complain of an error which that party has invited the court to commit. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). Because Kirchner introduced Howard's testimony into evidence at trial, on appeal, he cannot claim error from the trial court's admission of such testimony. See, also, *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991)

(concluding that litigant cannot introduce evidence and later complain that it was error to consider such evidence). By introducing Howard's testimony, Kirchner has waived any *Frye* objection he had to such testimony. Accordingly, we find no merit to Kirchner's first assignment of error.

Admission of Causation Opinions of Howard and Kratochvil.

In his second assignment of error, Kirchner claims that the district court erred in admitting the causation opinions of Howard and Kratochvil. Kirchner argues generally that the opinions of Howard and Kratochvil are flawed and not reasonable. We conclude that this assignment of error is without merit.

[7-8] It is within the trial court's discretion to determine if there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Walkenhorst, supra*.

As to Kirchner's claim that the district court erred in admitting Howard's causation testimony, we have previously concluded that because Kirchner offered such testimony, he waived any objection to the same, and accordingly, we conclude that there is no merit to that portion of Kirchner's second assignment of error in which he claims that Howard's testimony should have been excluded. As to Kirchner's argument that the district court erred in admitting Kratochvil's causation testimony because such testimony was unreasonable and flawed, we conclude there is no merit to such assignment of error.

Wilson called Kratochvil as an expert witness. Kratochvil testified generally that Kirchner's condition was not caused by the November 1990 automobile accident. The record discloses that Kratochvil is a physician, specializing in orthopedic medicine. At the time of trial, he had specialized in orthopedics for 38 years. He is licensed to practice medicine in the states of Nebraska,

Iowa, Minnesota, and California. Kratochvil is on either the active or the consulting staffs of Bergan Mercy Medical Center, St. Joseph Hospital, Children's Hospital, Methodist Hospital, the University of Nebraska Medical Center, and Immanuel Medical Center, all in Omaha. He is a member of a number of professional medical societies, including the American Academy of Orthopedic Surgeons and the Clinical Orthopaedic Society.

With respect to Kirchner's complaints of injury allegedly sustained in the November 1990 automobile accident, Kratochvil examined Kirchner on March 4, 1992. Prior to his examination of Kirchner, Kratochvil reviewed certain of Kirchner's medical records. Kratochvil reviewed additional medical records concerning Kirchner after the March 4 examination. Based upon his education, training, experience, and examination of Kirchner and Kirchner's medical records, Kratochvil testified, inter alia, that Kirchner's neck injury was not caused by the November 1990 automobile accident.

As argued in his brief, Kirchner's assignment of error goes to the weight and credibility of Kratochvil's testimony rather than to its admissibility. We have recently stated that

> [w]hile recognizing the principle that an expert's opinion must have a sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture . . . an appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.

Nebraska Nutrients v. Shepherd, 261 Neb. 723, 770, 626 N.W.2d 472, 510 (2001). Given the sound and reasonable basis behind Kratochvil's testimony and the certainty with which his opinion was expressed, we find no abuse of discretion in the district court's admission of Kratochvil's causation testimony.

Because Kirchner waived the objection he might have had to Howard's testimony and because there is ample basis in the record for the admission of Kratochvil's testimony which was expressed with sufficient certainty, we conclude there is no merit to Kirchner's second assignment of error.

CONCLUSION

For the reasons set forth above, we affirm the decision of the district court entering judgment in conformity with the jury verdict in favor of Wilson and against Kirchner and dismissing Kirchner's petition.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, V. ROBERT O. WHITLOCK AND PATRICIA WHITLOCK, HUSBAND AND WIFE, JOINT TENANTS, APPELLEES.

634 N.W. 2d 480

Filed September 28, 2001. No. S-00-340.

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. **Rules of Evidence: Hearsay.** The admission of hearsay is controlled by the Nebraska Evidence Rules.
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. **Evidence: Hearsay.** An expert's written appraisal report is hearsay and is not admissible unless it falls within a recognized exception.
5. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded.
6. **Trial: Evidence: Expert Witnesses: Appeal and Error.** The admission into evidence of an expert's appraisal report is prejudicial error.

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

Don Stenberg, Attorney General, and Kenneth W. Payne for appellant.

Laurice M. Margheim, of Curtiss, Moravek, Curtiss & Margheim, for appellees.

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

CONNOLLY, J.

The State of Nebraska, Department of Roads, condemned 21.75 acres of Robert O. Whitlock and Patricia Whitlock's farmland property for the construction of a highway. The Whitlocks' property is located in three separate sections and is now severed by the new highway. A jury returned a verdict in the amount of $65,250. The State appeals, contending that the district court erred in various respects. We hold that the district court erred in admitting the Whitlocks' expert's written appraisal report and supplemental report into evidence because they were hearsay. We reverse, and remand.

BACKGROUND

At trial, the Whitlocks' appraiser, Larry Dean Radant, testified to his background and experience and to the generally accepted methodologies that he used to appraise the property. His written appraisal report contained two appraisals: one for the value of the property before the taking and one for the value of the property after the taking. The appraisal report contained details for the cost, income, and sales comparison approaches he had used and his final valuation for each method.

The appraisal report included descriptions of the 19 comparable sales he had relied upon for his sales comparison approach, as well as maps, photographs, and soil legends. He testified that he had visited the property and gave a general description of the farm. He also prepared a one-page supplemental report separating the value of the property taken based on the information contained in the appraisal report. Relying more heavily on the cost and sales comparison approaches, he opined that the value of the property before the taking was $245,000.

The State objected to the admission of the appraisal report, exhibit 9, and supplemental report, exhibit 10, on various grounds, including hearsay and foundational objections. The court overruled the objections, and the exhibits were received. Radant then opined that the value of the Whitlocks' property after the taking was $190,000, resulting in a total loss of $55,000. Of that total loss, he believed $9,264 was attributable to the value of the property taken. The balance, $45,736, was for damages to the value of the remainder because the property was

now divided by a highway. At the close of Radant's direct examination, the court overruled the State's motions to strike his testimony and exhibits 9 and 10, consisting of his appraisal report and supplemental report.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred by (1) striking the testimony of its expert witness, (2) admitting into evidence the appraisal report and supplemental report of Radant, (3) admitting the valuation testimony of Radant because there was insufficient foundation for his opinion of value and it was based on an improper measure of damages, and (4) failing to sustain the State's motion to strike the valuation testimony of Robert Whitlock.

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. *Mobeco Indus. v. City of Omaha*, 257 Neb. 365, 598 N.W.2d 445 (1999).

ANALYSIS

Because the evidentiary issue of the admission of Radant's appraisal report is dispositive, we do not decide the State's other assignments of error.

The State contends that the trial court erred by admitting exhibits 9 and 10 into evidence. The State argues that the appraisal report contained inadmissible hearsay not testified to by Radant. The State also contends the appraisal report and the supplemental report unduly emphasized Radant's conclusions. The Whitlocks contend that the court did not err in admitting the reports. They argue that evidence of comparable sales is admissible even if those comparisons are based upon hearsay or the appraiser lacks personal knowledge.

The Whitlocks argue two points: (1) Appraisal reports are admissible under our holding in *Anderson v. State*, 184 Neb. 467, 168 N.W.2d 522 (1969), and (2) Neb. Rev. Stat. § 25-12,115 (Reissue 1995) specifically allows the admission of composite reports prepared by an expert without calling as witnesses the persons furnishing the information.

[2] The admission of hearsay is controlled by the Nebraska Evidence Rules. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995).

[3] 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. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Hearsay "is not admissible except as provided by [the Nebraska Evidence Rules] or by other rules adopted by the statutes of the State of Nebraska." Neb. Rev. Stat. § 27-802 (Reissue 1995).

We have held that an expert's *testimony* on comparable sales is admissible over a hearsay objection. *Anderson v. State, supra*. We have also held that under Neb. Rev. Stat. § 27-703 (Reissue 1995), an expert may rely on hearsay facts or data reasonably relied upon by experts in that field. See, e.g., *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996). Finally, we have held that direct evidence of other recent and comparable sales of real estate is admissible as substantive proof of the value of the condemned property or as foundation and background for an expert's opinion of value. See *Clearwater Corp. v. City of Lincoln*, 207 Neb. 750, 301 N.W.2d 328 (1981). The Whitlocks confuse the admissibility of an expert's opinion testimony with the admissibility of the expert's report.

[4] An expert's written appraisal report is an out-of-court statement offered for the truth of the matter asserted. It is hearsay and is not admissible unless it falls within a recognized exception.

Kliment v. National Farms, Inc., 245 Neb. 596, 514 N.W.2d 315 (1994), affirmed the exclusion of an expert's technical report, which was commissioned by the defendant in a nuisance suit, on a hearsay objection when the expert did not testify. When an expert is employed for no other purpose other than to give technical advice, his or her employment does not include

making statements on behalf of the principal. Thus, such a report is hearsay and not subject to any exception.

Vacanti v. Master Electronics Corp., 245 Neb. 586, 514 N.W.2d 319 (1994), affirmed the trial court's refusal to admit a medical report into evidence. We held that the defendant had failed to show that the report fell within the "medical diagnosis" exception, and it was therefore inadmissible hearsay. *Id.* at 593, 514 N.W.2d at 324.

Howells Elevator v. Stanco Farm Supply Co., 235 Neb. 456, 455 N.W.2d 777 (1990), affirmed the exclusion of a written estimate of damages to personal property.

In *Vacanti*, the plaintiff's medical expert testified that he had read the report and relied upon it in forming his opinion. We stated:

> An expert medical witness may base an opinion on the medical records of another treating doctor . . . . The mere fact that an expert relied on medical records, however, does not transform those records from inadmissible hearsay into admissible evidence. . . . To allow such a transformation "would deprive opposing parties of an opportunity to cross-examine on the background, competency and completeness of the report and the qualifications of the doctor."

(Citations omitted.) 245 Neb. at 593, 514 N.W.2d at 324.

[5] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000).

Radant's testimony on 19 comparable sales was superficial at best. He stated that the details of the comparable sales he relied upon were in his appraisal report. In fact, a substantial portion of his testimony focused on explaining to the jury the contents of his appraisal report and where to find pertinent information in it. Furthermore, the appraisal report also defines "market value" in a different manner than this court has defined that term. See, e.g., *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 413, 576 N.W.2d 797, 803 (1998) ("[f]air market value is the price which property will bring when offered for sale upon the open

market as between a willing seller and buyer, neither being obligated to buy or sell"). Finally, the report contains a number of photographs and maps for which no foundation was laid. Moreover, in his closing argument, the Whitlocks' counsel repeatedly encouraged jurors to refer to Radant's appraisal report and to check the details, and he specifically instructed the jury to refer to Radant's supplemental report for Radant's estimate of the decrease in the value of the remainder.

Radant's written appraisal report and supplemental report essentially amounted to a continued and more thorough testimony of his opinion during jury deliberations, without the benefit of cross-examination or opposing opinion. This is the mischief this court sought to eliminate when we reversed the district court's decision in a condemnation action partially because of the court's admission into evidence of two one-page summaries of the appraiser's valuations. "[A]dmission of evidence of this type is prejudicially erroneous because during its deliberations, the jury might place more weight on written summaries than on its collective recollection of the actual testimony." *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 31, 547 N.W.2d 484, 499 (1996).

The Whitlocks, however, argue that a summary unfairly emphasizes parts of the expert's opinion testimony and that the admission of a complete appraisal report is distinguishable from the facts in *Westgate Rec. Assn*. Contrary to the Whitlocks' contention, the reasoning in *Westgate Rec. Assn*. applies even more to the admission of a complete appraisal report, not less. In addition, the first page of exhibit 9 and the sole content of exhibit 10 are summaries of Radant's conclusions, which type of information we specifically held is inadmissible in *Westgate Rec. Assn*.

[6] We conclude that Radant's appraisal report was hearsay and unfairly prejudiced the State's case.

The Whitlocks next argue that even if the appraisal report is hearsay, it is admissible under the Uniform Composite Reports as Evidence Act, § 25-12,115, and Neb. Rev. Stat. §§ 25-12,116 to 25-12,119 (Reissue 1995). Section 25-12,115 provides:

> A written report or finding of facts prepared by an expert . . . and containing the conclusions resulting wholly or partly from written information *furnished by*

> *the cooperation of several persons acting for a common purpose*, shall, insofar as the same may be relevant, be admissible when testified to by the person . . . making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based . . . .

(Emphasis supplied.)

This act preceded the Nebraska Evidence Rules by almost 25 years, and the language indicates that it was intended to operate much the same as § 27-703. In other words, it allows an expert to base an opinion on hearsay which is not itself admissible in evidence. Without deciding on the statute's continued application, we conclude that the Whitlocks have failed to satisfy the requisites of § 25-12,115. That section provides that the written information relied upon by an expert is to be furnished by the cooperation of several persons acting for a common purpose.

In this case, Radant was acting alone in the preparation of his report, and any persons who might have provided information to him cannot be said to have been acting for a common purpose. See, *Gateway Bank v. Department of Banking*, 192 Neb. 109, 219 N.W.2d 211 (1974) (affirming district court's admission of expert's feasibility report when facts and information contained in report were accumulated by persons acting under expert's direction); *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965) (affirming admission of pathologist's report when expert relied upon information provided by technicians working under his direction). Thus, § 25-12,115 is inapplicable to these facts.

We conclude that the district court's admission into evidence of the Whitlocks' expert's appraisal report was reversible error which unfairly prejudiced a substantial right of the State.

REVERSED AND REMANDED.

JIM O. KEEF ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

634 N.W. 2d 751

Filed September 28, 2001. No. S-00-343.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
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. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **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.
5. **Actions: Words and Phrases.** A "claim for relief" within the meaning of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) is equivalent to a separate cause of action, as opposed to a separate theory of recovery.
6. **Actions: Parties: Final Orders.** Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action.
7. **Actions: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.
8. **Actions: Pleadings.** Two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action.
9. **Actions.** Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief.
10. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
11. ____: ____. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
12. **Actions: Statutes.** A "special proceeding," within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995), entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.

13. **Actions: Final Orders.** A special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) must be one that is not an action and is not and cannot be legally a step in an action as part of it.
14. ____: ____. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
15. **Summary Judgment: Actions: Final Orders.** A partial summary judgment proceeding is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
16. **Class Actions.** The availability of a class action is encompassed within chapter 25 of the Nebraska Revised Statutes and is not in and of itself an action, but is a step or proceeding within the overall action; therefore, class certification is not a special proceeding.
17. **Limitations of Actions: Final Orders: Appeal and Error.** An order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order, and any error in the ruling made may be presented in an appeal taken after final disposition of the case.
18. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

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

Don Stenberg, Attorney General, Jodi M. Fenner, and, on brief, Jason W. Hayes, for appellant.

David W. Rowe, of Kinsey, Ridenour, Becker & Kistler, and Robert J. Antonello and Robert G. Fegers, of Antonello, Fegers & Cea, and J. Davis Connor and Stephen R. Senn, of Peterson & Myers, P.A., for appellees.

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

GERRARD, J.

NATURE OF CASE

The State of Nebraska, Department of Motor Vehicles (State), appeals from a partial summary judgment entered by the district court, which enjoined the State from collecting fees for handicapped parking permits, but reserved the issue of monetary damages for later disposition. Because the district court's partial

summary judgment was not a final, appealable order, we dismiss the State's appeal.

PROCEDURAL BACKGROUND

Nebraska law provides for the issuance of parking permits for handicapped or disabled persons. See, generally, Neb. Rev. Stat. § 18-1736 et seq. (Reissue 1997 & Cum. Supp. 2000). A fee of $3 is charged for each permit. See § 18-1740(3).

The plaintiffs, on behalf of themselves and all others similarly situated, brought this action against the State, alleging that the permit fee violated title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (1994 & Supp. V 1999) (ADA). The enabling regulations for title II of the ADA provide:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA] or this part.

28 C.F.R. § 35.130(f) (2000).

The plaintiffs' petition sought (1) a declaratory judgment that the State cannot lawfully require payment for handicapped parking permits, (2) an injunction preventing the State from requiring payment from future applicants for such parking permits, (3) reimbursement for permit fees to members of the plaintiff class for amounts charged for permits since the effective date of the ADA, and (4) attorney fees and costs. The plaintiffs also sought class certification to represent the approximately 50,000 Nebraskans who use handicapped parking permits.

The parties filed cross-motions for summary judgment on several issues. After hearing, the district court first sustained the plaintiffs' motion for class certification. Reaching the merits of the parties' summary judgment motions, the district court first noted that the State had conceded that Nebraska's handicapped parking permit fee violates the ADA. The district court then determined that Congress, in abrogating state sovereign immunity under the ADA, had acted validly pursuant to U.S. Const. amend. XIV, § 5. The district court rejected the State's argument

that the plaintiffs' action was barred by a statute of limitations, concluding that a statute of limitations cannot limit claims where the defendant is guilty of an ongoing, persistent, and systemic violation of law. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). Finally, the district court concluded that injunctive relief was appropriate under the circumstances.

Based on those determinations, the district court entered a partial summary judgment, declaring that the permit fee violated the ADA and its regulations and enjoining the State from charging such a fee. The district court also stated:

> The Court further finds and orders pursuant to Neb. Rev. Stat. § 25-705(6) [Cum. Supp. 1998] that this order of partial summary judgment is a final order on fewer than all of the claims of the plaintiffs and that there is no just reason for delay of an appeal from the entry of this order. The issues of class certification, sovereign immunity, statute of limitations and appropriateness of injunctive relief are all issues that will need appellate review. It would be prudent to allow appellate review of these issues before the Court and counsel expend additional resources in litigating the remaining issues in this lawsuit. . . .
>
> . . . [P]laintiffs are directed to submit briefing to this court . . . to determine the issues of prejudgment interest, attorney fees, manner of reimbursement, and form of notice to the class concerning reimbursement. . . . In the event an appeal is taken from any portion of this order, the [time to respond] will commence at the resolution of that appeal, if such be consistent with the mandate (if any) of the appellate court.

The State appealed and, as restated, assigned that the district court erred in concluding that (1) the State's sovereign immunity had been appropriately abrogated by the ADA, (2) there was no statute of limitations that would limit the plaintiffs' cause of action, and (3) the plaintiffs should be certified as class representatives.

This court's preliminary review of this appeal raised a question regarding whether the district court's order of partial summary judgment was a final, appealable order. In addition, the

U.S. Supreme Court issued an opinion, after the parties' briefs in this case were filed, addressing whether the ADA was a valid abrogation of state sovereign immunity. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). In an order filed July 11, 2001, we directed the parties to file supplemental briefs on the questions whether (1) the district court's partial summary judgment of March 1, 2000, was a final, appealable order pursuant to either Neb. Rev. Stat. § 25-1902 (Reissue 1995) or Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) and (2) the district court's decision with respect to sovereign immunity was consistent with the U.S. Supreme Court's decision in *Board of Trustees of Univ. of Ala. v. Garrett, supra.*

The parties filed supplemental briefs, in which they agreed that the district court's partial summary judgment was not a final, appealable order and that this court lacked appellate jurisdiction. On August 28, 2001, the plaintiffs filed a motion to dismiss for lack of appellate jurisdiction, to which the State did not object. On September 4, this court took the plaintiffs' motion under advisement and ordered that the case be submitted without oral argument pursuant to Neb. Ct. R. of Prac. 11B(1) (rev. 2000).

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

[2,3] 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. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

[4] 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. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000). The district court's order of partial summary judgment reserved issues for later disposition, including the issues of monetary damages and attorney fees. The initial issue presented to this court is whether the district court's order was a final order from which an appeal could be taken.

§ 25-1315

Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998), now codified at § 25-1315(1), provides:

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

[5,6] The district court relied upon this statute in attempting to direct the entry of a final judgment. This court has determined, however, that a "claim for relief" within the meaning of § 25-1315(1) is equivalent to a separate cause of action, as opposed to a separate theory of recovery. See *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000). Thus, by its terms, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties

or causes of action. See, *Chief Indus. v. Great Northern Ins. Co., supra*; *Scottsdale Ins. Co. v. City of Lincoln, supra*. Those conditions are not satisfied in the instant case.

[7-9] It is initially evident that there is only one defendant—the State—and that the partial summary judgment entered by the trial court did not resolve all issues pertaining to the State. Neither does this case present multiple causes of action. A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). Thus, two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action. *Id.* Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief. *Id.*

In the instant case, it is clear that the plaintiffs' ADA claim presents one cause of action, in which they have requested declaratory and injunctive relief and compensatory damages. Since the plaintiffs' petition presents only one cause of action, § 25-1315(1) is not implicated.

We take this opportunity to remind trial courts and the practicing bar that § 25-1315 permits a judgment to become final only under the limited circumstances set forth in the statute. Prior to the enactment of § 25-1315, an order that effected a dismissal with respect to one of multiple parties was a final, appealable order, and the complete dismissal with prejudice of one of multiple causes of action was a final, appealable order, but an order dismissing one of multiple theories of recovery, all of which arose from the same set of operative facts, was not a final order for appellate purposes. See, generally, *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). Section 25-1315 was an evident attempt by the Legislature to simplify the issue and clarify many of the questions regarding

final orders when there are multiple parties and claims. See *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999).

Section 25-1315 does not, however, provide "magic words," the invocation of which transforms any order into a final judgment for purposes of appeal. As previously noted, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved and a final judgment is entered as to one of the parties or causes of action. Because those conditions were not present in this case, the district court's order of partial summary judgment could not be a final judgment pursuant to § 25-1315(1).

§ 25-1902

[10] Although the district court's invocation of § 25-1315 was ineffective, the question remains whether a final order is presented as defined in § 25-1902. That section provides that an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. See, *id.*; *Bargmann v. State, supra*. It is clear that this case presents neither the first nor the third category. See, generally, *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998). Thus, we are presented with the question whether the district court's partial summary judgment was an order affecting a substantial right made in a special proceeding.

[11] The most significant effect of the district court order was that it enjoined the State from the collection of permit fees. For purposes of this appeal, we assume, without deciding, that the district court order affected a substantial right of the State. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

[12-15] The partial summary judgment issued in this case, however, was not a special proceeding. Generally, a "special proceeding" entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). In *O'Connor v.*

Kaufman, 255 Neb. 120, 582 N.W.2d 350 (1998), the defendants appealed from a district court order which, like the order in the instant case, established liability and a permanent injunction but reserved the issue of monetary damages for later disposition. In determining whether the partial summary judgment entered in that case was a special proceeding within the meaning of § 25-1902, we stated that

> " '[a] special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute.' "

O'Connor v. Kaufman, 255 Neb. at 123, 582 N.W.2d at 353. We concluded that

> while a motion for partial summary judgment is not in and of itself an "action," such an order is merely a step or proceeding within the overall action. The grant of a motion for partial summary judgment merely resolves one or several of the issues involved in the entire action or the "main case." . . . A motion for partial summary judgment is not a special remedy or a special application to the court, as is a special proceeding, but, rather, is merely one particular tool that may be used to resolve certain issues in the case. Therefore, we find that the district court's order was not a final, appealable order under the second category because the motion for partial summary judgment did not involve a special proceeding.

Id. at 124, 582 N.W.2d at 353-54.

Our decision in *O'Connor v. Kaufman, supra*, is controlling in the instant case. Even though the basis for the plaintiffs' underlying cause of action is found in the U.S. Code, and thus well outside chapter 25 of the Nebraska Revised Statutes, the partial summary judgment rendered by the district court, like the order at issue in *O'Connor v. Kaufman*, was merely a step or proceeding within the overall action. Consequently, it was not a special proceeding within the meaning of § 25-1902.

[16,17] Neither are the aspects of the district court's order dealing with class certification or the statute of limitations final and appealable under § 25-1902. The district court's approval of class certification did not affect a substantial right. Compare *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982) (stating that denial of class action status did not affect substantial right because merits of claim were not determined). Furthermore, the availability of a class action is encompassed within chapter 25 of the Nebraska Revised Statutes and is not in and of itself an action, but is a step or proceeding within the overall action; therefore, class certification is not a special proceeding. See, Neb. Rev. Stat. § 25-319 (Reissue 1995); *O'Connor v. Kaufman, supra*. Similarly, we have held that an order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order and that any error in the ruling made may be presented in an appeal taken after final disposition of the case. *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972). See, also, Neb. Rev. Stat. § 25-221 (Cum. Supp. 2000).

The district court's partial summary judgment was not a final order as defined by § 25-1902, as none of the issues determined by the partial summary judgment were resolved in the context of a special proceeding. As, under the circumstances presented in this case, neither § 25-1315 nor § 25-1902 confers appellate jurisdiction on this court, the State's appeal must be dismissed.

CONCLUSION

[18] We are aware that the U.S. Supreme Court held, during the pendency of this appeal, that suits in federal court by state employees by reason of the State's failure to comply with title I of the ADA are barred by U.S. Const. amend. XI. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). However, in the absence of a judgment or final order disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). Because the district court's order of partial summary judgment was not a final, appealable order, we are without jurisdiction to address the substantive issue whether the

district court's determination in the instant case is consistent with *Board of Trustees of Univ. of Ala. v. Garrett, supra*, and we, therefore, dismiss the State's appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. HUGH I. ABRAHAMSON, RESPONDENT.

634 N.W. 2d 462

Filed September 28, 2001. No. S-00-692.

1. **Disciplinary Proceedings: Proof: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a complaint in a disciplinary proceeding against an attorney, a complaint must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
7. ____. In an attorney disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
8. ____. An attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for respondent.

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

PER CURIAM.

INTRODUCTION

On July 3, 2000, formal charges were filed by the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association, relator, against attorney Hugh I. Abrahamson, respondent. The formal charges alleged, inter alia, that Abrahamson violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (5), and Canon 9, DR 9-102(A)(2) and (B)(3).

DR 1-102(A)(1) and (5) provide: "(A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice." DR 9-102(A)(2) and (B)(3) provide:

> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> . . . .
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

The formal charges also alleged Abrahamson violated his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

On August 29, 2000, Abrahamson filed an answer to the formal charges, admitting certain of the allegations, but denying that he had violated either the disciplinary rules or his oath as an attorney. On September 7, this court appointed a referee to hear

evidence and make a recommendation as to the appropriate sanction to be imposed. A referee hearing was held on November 21, at which hearing evidence was adduced and argument was made.

On January 18, 2001, the referee filed his report and found Abrahamson had violated DR 1-102(A)(1) and (5) and DR 9-102(A)(2) and (B)(3) of the Code of Professional Responsibility and his oath of office as an attorney, and recommended Abrahamson's suspension from the practice of law for 1 year. On January 26, Abrahamson filed his exceptions to the referee's report, challenging, inter alia, the referee's findings that he violated DR 9-102(A)(2).

FACTS

The referee's factual findings may be summarized as follows: Abrahamson, a solo practitioner, was admitted to practice law in the State of Nebraska on February 1, 1985, and at all times relevant hereto has practiced in Omaha, Nebraska. On June 30, 1994, Abrahamson was retained by Beverly A. Doyle to represent her in a legal separation from her husband, Wayne Oppenheim. As a result of his representation of Doyle, Abrahamson sent Doyle monthly statements for his attorney fees, which statements she did not pay. Pursuant to the terms of his engagement agreement with Doyle, Abrahamson was entitled to deduct his attorney fees from any moneys he received on behalf of Doyle.

At some point in time after June 30, 1994, the separation action changed to a divorce proceeding. As a result of the divorce proceeding, the marital house was sold. Net proceeds from the sale amounted to $46,337.81. Doyle and Oppenheim disputed entitlement to the sale proceeds. Doyle claimed the entirety of the net proceeds from the sale of the house, and Oppenheim claimed one half of the net proceeds. Accordingly, on March 8, 1996, the net sale proceeds of $46,337.81 were deposited into a trust account Abrahamson maintained, awaiting a court order directing distribution.

At the time he represented Doyle, Abrahamson maintained two trust accounts in separate banks: FirsTier trust account 322-0342 and First Bank trust account 424-8700 (8700). The two banks merged in February 1996, under the name of First

Bank, and Abrahamson's former FirsTier trust account number was changed to 3220-3424 (3424). First Bank gave Abrahamson new deposit slips to use for the 3424 account, but mistakenly encoded the account number for the 8700 account on the deposit slips.

After February 20, 1996, all deposits Abrahamson intended to make into the 3424 account were made into the 8700 account, including the deposit of the $46,337.81 net proceeds from the sale of the house. Checks written on the 3424 account, however, continued to be honored on that account. First Bank sent Abrahamson monthly statements for each account, which statements would have alerted Abrahamson to the depositing error. It is undisputed that Abrahamson did not open the statements and did not reconcile the trust account balances. Accordingly, Abrahamson did not note the mistake. Because of the confusion with respect to the 3424 and 8700 accounts, for purposes of our consideration of the allegations against Abrahamson, we will consider the accounts jointly as one account which we will refer to hereafter as "the trust account."

On August 31, 1996, the trial court entered its memorandum decision in the divorce proceeding. The decision awarded Doyle the entire net proceeds from the sale of the house. After allowing the applicable appeal period to run, Abrahamson issued a check to Doyle in the amount of $21,701.58, representing the net sale proceeds of the house minus Abrahamson's attorney fees and costs incurred in the divorce proceeding which amounted to $24,636.23.

Doyle was displeased that she did not receive the entirety of the sale proceeds and, after failing in her attempt to negotiate a final fee with Abrahamson, sent a letter to the Counsel for Discipline's office concerning Abrahamson's handling of the proceeds from the sale of the house.

The Counsel for Discipline notified Abrahamson of Doyle's grievance, and during the course of responding to the grievance, Abrahamson notified the Counsel for Discipline regarding his trust account balance. Although the balance had fluctuated for several days in July and August 1996, we note that the record shows that the amount in the trust account did not drop below $21,701.58, representing Doyle's interest in the proceeds from

the sale of the house, after deducting Abrahamson's attorney fees and costs.

It is undisputed that Abrahamson did not open the bank statements or reconcile his check registers, that he failed to maintain separate ledgers for his individual client accounts, and that he failed to reference client accounts on deposits and withdrawals from the trust account. Indeed, according to Abrahamson's own accountant, who testified at the referee's hearing, on a scale of 1 to 10, with 10 being good bookkeeping practices, Abrahamson's accounting practices merited a grade of 1. In the referee's report, he found that Abrahamson had since corrected his accounting practices and now maintains his trust account in accordance with required standards. The referee also found that Abrahamson cooperated fully with the Counsel for Discipline's investigation and was remorseful.

The referee found that within the bar and the community, Abrahamson had a reputation of competence, professionalism, integrity, honesty, hard work, and fitness to practice law and that this reputation was demonstrated through numerous affidavits and letters from judges, lawyers, and clients. The referee also found that Abrahamson had demonstrated a record of service to the bar and to the indigent community through the Nebraska State Bar Association's pro bono Volunteer Lawyers Project.

The referee noted that Abrahamson had been the subject of a prior disciplinary proceeding, involving allegations unrelated to Abrahamson's attorney trust account, for which Abrahamson had received a private reprimand.

In his report, the referee found by clear and convincing evidence that Abrahamson had violated DR 1-102(A)(1) and (5), DR 9-102(A)(2) and (B)(3), and his oath as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations and considering the aggravating and mitigating factors the referee found present in the case, the referee recommended that Abrahamson be suspended from the practice of law in the State of Nebraska for 1 year.

Abrahamson filed his exceptions to the referee's report. In Abrahamson's exceptions, he claimed that the referee erred (1) in finding that Abrahamson violated DR 9-102(A)(2), (2) in finding that he unethically "withdrew" and "misappropriated"

funds belonging to Doyle, (3) in failing to find that Abrahamson's written fee agreement with Doyle justified Abrahamson's use of Doyle's funds on deposit in the trust account, (4) in finding that Abrahamson violated DR 9-102(A) and (B) and his oath of office as an attorney, and (5) in recommending an excessive disciplinary sanction. In argument to the court, Abrahamson focused on the appropriate discipline.

ANALYSIS

Violation of Disciplinary Rules and Attorney's Oath.

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). To sustain a complaint in a disciplinary proceeding against an attorney, a complaint must be established by clear and convincing evidence. *Id.*

Based on our de novo review of the record, *id.*, we conclude that the above-related facts establish by clear and convincing evidence that Abrahamson has failed to maintain complete and accurate records of client funds coming into his possession and has failed to render appropriate accounts of client funds, in violation of DR 9-102(B)(3). We further conclude that Abrahamson has violated DR 1-102(A)(1) and (5) and the attorney's oath of office. We further conclude, however, under our standard in which a proceeding to discipline an attorney is a trial de novo on the record, see *Mefferd, supra*, that the record does not demonstrate by clear and convincing evidence that Abrahamson violated DR 9-102(A)(2).

Imposition of Attorney Discipline.

[3-5] We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. NSBA v. Brown*, 251 Neb. 815, 821, 560 N.W.2d 123, 128 (1997). Accord *State ex rel. NSBA v.*

Gridley, 249 Neb. 804, 545 N.W.2d 737 (1996). With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). We have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

> To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

State ex rel. NSBA v. Rothery, 260 Neb. at 766, 619 N.W.2d at 593. Accord, *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Mefferd, supra*.

[6,7] We have noted that "[t]he determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors." *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 631, 599 N.W.2d 592, 601 (1999). For example, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation. See *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996).

[8] The evidence in the present case establishes that Abrahamson failed to maintain complete and accurate records of client funds coming into his possession. As mitigating factors, we note Abrahamson's cooperation during the disciplinary proceedings, including the fact that he reported the condition of his trust account to the Counsel for Discipline. We also note Abrahamson's continuing commitment to the legal profession and the community. Furthermore, we note that the banking error

in mislabeling Abrahamson's deposit slips exacerbated Abrahamson's poor accounting practices. We are aware of the previous reprimand, but note that it did not involve allegations regarding Abrahamson's trust account.

CONCLUSION

We conclude that the appropriate judgment is to suspend Abrahamson from the practice of law in the State of Nebraska for 90 days, effective immediately. In addition, Abrahamson is ordered to retain, at his expense, an accountant to audit his trust account every 6 months, for a period of 3 years, and submit the results of these audits to the Counsel for Discipline. Pursuant to Neb. Ct. R. of Discipline 23 (rev. 2001), the costs of these proceedings are assessed against Abrahamson.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH TAYLOR, APPELLANT.

634 N.W. 2d 744

Filed September 28, 2001. No. S-00-1139.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
3. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
4. ____: ____: ____. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater offense but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.
5. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned.
6. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

7. **Prior Convictions: Habitual Criminals: Sentences: Statutes.** A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute.
8. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
9. **Criminal Law: Statutes.** Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. Penal statutes are to be strictly construed.
10. **Criminal Law: Prior Convictions.** Under Neb. Rev. Stat. § 28-931 (Reissue 1995), the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement.

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

James R. Mowbray and Kelly S. Breen, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

HENDRY, C.J.

I. INTRODUCTION

On July 27, 2000, Joseph Taylor, an inmate at the Department of Correctional Services (DCS), was found guilty by a jury of third degree assault pursuant to Neb. Rev. Stat. § 28-931 (Reissue 1995) (assault upon "a peace officer or employee of the Department of Correctional Services"). On October 5, at a separate enhancement hearing pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995), Taylor was found by the court to be a habitual criminal. Taylor was sentenced to not more than nor less than 10 years in prison.

II. FACTUAL BACKGROUND

On December 23, 1998, Taylor was charged pursuant to Neb. Rev. Stat. § 28-930 (Reissue 1995) with one count of second degree assault upon Joseph Manley, an employee of DCS. Taylor was also charged with being a habitual criminal. On July

15, 1999, after initially pleading guilty, Taylor submitted a motion requesting leave from the court to withdraw his guilty plea and a motion to quash both counts of the indictment. The court granted both motions. At the hearing on the motion to quash, Taylor's counsel contended that charging Taylor as a habitual criminal constituted improper double enhancement of the assault charge. The court overruled the motion to quash.

At trial, Manley testified that on February 18, 1998, the date of the incident, he was employed at the Lincoln Correctional Center as a unit caseworker in the "Protective Custody Unit" or "A Unit." Manley explained that the A Unit is divided into two sections or sides, A-1 and A-2, with each unit housing approximately 60 prisoners. On February 18, Manley was assigned to section A-2 of the A Unit. His responsibilities included supervising the inmates during exercise time, getting the inmates in and out of their cells, and lining the inmates up to be escorted to the cafeteria. On the day of the incident, he was working a 6 a.m. to 2 p.m. shift.

At 8:20 a.m., Manley was sitting in the section A-2 office, working at his desk. Taylor came to the doorway and asked about some paperwork Taylor needed which was being prepared by Manley's supervisor. Taylor was holding a plastic tumbler of hot coffee in his hand. Manley told Taylor he knew nothing about the paperwork. Taylor became upset and told Manley that "he didn't like [his] attitude." Manley stood up and asked Taylor to leave. Taylor instead came inside the office and called Manley a "chicken shit."

Manley removed the radio microphone from his belt and called for assistance. As Manley was looking down to replace the microphone on his belt clip, Taylor threw his coffee in Manley's face. Taylor then began striking Manley with his fists and kicking him until another inmate pulled Taylor away from Manley. A response team responded to Manley's call for assistance and arrived shortly after Taylor had been pulled from Manley. Manley suffered first and second degree burns over the left side of his face and neck, and additional minor injuries to his head. He was treated at a Lincoln hospital.

Taylor testified in his own defense. In substance, Taylor testified that the coffee was accidentally spilled after Manley placed his hands on Taylor to remove him from the office.

At the conclusion of the evidence, the trial court instructed the jury, inter alia, on the elements of second degree and third degree assault of an officer pursuant to §§ 28-930 and 28-931. Taylor requested an additional instruction on general third degree assault pursuant to Neb. Rev. Stat. § 28-310 (Reissue 1995). Section 28-310 states:

> (1) A person commits the offense of assault in the third degree if he:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Threatens another in a menacing manner.
>
> (2) Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.

A Class I misdemeanor is punishable by up to 1 year's imprisonment, a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1995). The court denied Taylor's request for an instruction on general third degree assault.

The jury found Taylor guilty of third degree assault pursuant to § 28-931, which at the time of Taylor's offense stated:

> (1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.
>
> (2) Assault on an officer in the third degree shall be a Class IV felony.

A Class IV felony is punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1995).

A separate habitual criminal enhancement hearing was held pursuant to § 29-2221(1), which states in relevant part:

> 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

> and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

At the enhancement hearing, the State offered undisputed evidence showing that Taylor had three previous convictions which satisfied the criteria set out in § 29-2221. The court found that Taylor was a habitual criminal and sentenced Taylor to not more than nor less than 10 years' imprisonment pursuant to § 29-2221. Taylor appeals.

III. ASSIGNMENTS OF ERROR

Taylor asserts, rephrased and renumbered, that the trial court erred in (1) failing to instruct the jury on third degree assault pursuant to § 28-310 and (2) failing to quash the indictment against Taylor as violating due process, equal protection, and this court's holding in *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). For the sake of completeness, we note that although Taylor mentions due process in his assignments of error, he fails to present any argument regarding due process in his brief. Accordingly, we will not address this issue. Generally, errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dunster, ante* p. 329, 631 N.W.2d 879 (2001).

IV. STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[2] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. See *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

V. ANALYSIS

1. Jury Instructions

[3,4] Taylor contends the trial court committed prejudicial error in failing to instruct upon general third degree assault, pursuant to § 28-310, as a lesser-included offense of third degree assault under § 28-931. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an

instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Johnson, supra*. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater offense but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *Id*.

In *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997), the defendant asserted that the trial court should have instructed the jury on third degree assault under § 28-310 as a lesser-included offense of third degree assault under § 28-931. In *Cebuhar*, 252 Neb. at 805, 567 N.W.2d at 135, we stated:

> Assuming that third degree assault may, under certain circumstances, be a lesser-included offense of third degree assault on a peace officer, we have held that it is not prejudicial error to not instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.

We then went on to conclude in *Cebuhar* that because there was no dispute in the evidence at trial that the victim was a peace officer engaged in his official duties at the time of the assault, the district court correctly refused to instruct the jury on assault under § 28-310.

The undisputed evidence at trial in this case establishes that Manley was an employee of DCS and that Manley was working as a DCS caseworker at the time of the assault. Nonetheless, Taylor argues that there was a question of fact as to whether Manley was engaged in his official duties when the incident occurred. Taylor asserts that during the incident, Manley attempted to remove Taylor by placing his hands upon Taylor. Taylor then argues that because Manley was not "trained nor authorized by his employer to lay his hands upon inmates to control or compel inmate compliance," brief for appellant at 13, Manley was not engaged in his official duties. Assuming for the purpose of argument that Manley did place his hands on Taylor, such a fact would raise only an issue as to the effectiveness of

Manley's response when Taylor did not leave the office. It does not constitute proof that Manley was engaged in something other than his official duties as a caseworker at the time of the incident. The evidence conclusively shows that Manley was performing his official duties when the incident occurred.

The district court correctly refused to instruct the jury on general third degree assault. This assignment of error is without merit.

2. Motion to Quash

(a) Equal Protection

Taylor also asserts that his motion to quash should have been granted because his right to equal protection under the Nebraska and U.S. Constitutions was violated by the application of both §§ 28-931 and 29-2221 to his crime.

[5] The record does not reflect that the issue of equal protection was ever raised by Taylor before the district court. In his motion to quash, Taylor cites to "U.S. Const. amend. V" and "Neb. Const. Art. I, sec. 12 and sec. 15," neither of which pertains to equal protection. Furthermore, there is no discussion of the Equal Protection Clause of either the Nebraska Constitution or the U.S. Constitution in the motion to quash. Finally, because no record was made of the hearing on the motion to quash, there is no indication as to what arguments were presented to the district court. It is incumbent upon the appellant to present a record which supports the errors assigned. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

[6] In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995). See, also, *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999). Accordingly, finding no plain error, we decline to address Taylor's equal protection argument.

(b) *State v. Hittle*

Taylor also asserts that he should not have been found guilty under § 28-931 and sentenced as a habitual criminal under

§ 29-2221 because this results in improper double enhancement, which this court specifically disapproved of in *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). See, also, *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980). Both *Chapman* and *Hittle* involved repeat offenses under Nebraska's driving under the influence of alcoholic liquor statutes, and in both cases, the holdings were based on state statutory interpretation rather than "constitutional grounds." *Chapman*, 205 Neb. at 370, 287 N.W.2d at 699. Accord *State v. Hittle, supra*.

In *Hittle*, the defendant had been previously convicted of driving under the influence on at least two occasions under Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993). As a result, his driver's license was suspended. Afterward, the defendant was twice convicted of driving on a suspended license under § 60-6,196(6), which stated in part, " 'Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section shall be guilty of a Class IV felony.' " *Hittle*, 257 Neb. at 355, 598 N.W.2d at 29.

At the operative time in Hittle's case, driving on a suspended license was a misdemeanor offense unless § 60-6,196(6) applied, in which case the crime was a felony. Because of the enhancement provisions of § 60-6,196, both of Hittle's offenses for driving on a suspended license were felony crimes.

After the second conviction for driving on a suspended license under § 60-6,196(6), Hittle was sentenced under the habitual criminal statute. The trial court found that Hittle qualified as a habitual criminal based on his two enhanced convictions under § 60-6,196(6). On appeal, Hittle argued that it was improper to sentence him under the habitual criminal statute found at § 29-2221 because § 60-6,196(6) contained its own specific penalty enhancement mechanism.

[7] This court agreed, concluding that it was improper to sentence Hittle under the habitual criminal statute. The court reasoned that "[a] defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute." *Hittle*, 257 Neb. at 355, 598 N.W.2d at 29. See, also, *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *State v.*

Lobato, 259 Neb. 579, 582, 611 N.W.2d 101, 104 (2000) (" ' "special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict" ' ").

Taylor bases his double enhancement argument on the assumption that § 28-931 is an enhanced penalty statute, similar to the driving under the influence statutes at issue in *State v. Hittle, supra*. Taylor points out that general third degree assault under § 28-310 is a misdemeanor offense, while third degree assault under § 28-931 is a felony offense. Taylor also asserts that the only difference between §§ 28-310 and 28-931 is the status of the victim. Therefore, Taylor reasons, § 28-931 constitutes an enhanced penalty for third degree assault based on the status or employment of the alleged victim.

[8,9] Taylor's argument presents a question of statutory interpretation as to whether the Legislature enacted § 28-931 as a "specific subsequent offense statute" for general third degree assault, or as a separate crime. See *State v. Hittle*, 257 Neb. 344, 355, 598 N.W.2d 20, 29 (1999). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Hochstein and Anderson, ante* p. 311, 632 N.W.2d 273 (2001). Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *Id.* Also, penal statutes are to be strictly construed. See *id.*

[10] Nothing contained in the plain language of § 28-931 enhances the penalties for third degree assault upon a DCS employee based on subsequent offenses. A comparison of the plain language of §§ 28-310 and 28-931 indicates that the Legislature enacted these statutes to punish two separate and distinct crimes with separate and distinct elements. Under § 28-931, the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement.

The reasoning of *Hittle* is inapplicable to the facts of this case because § 28-931 is not a specific subsequent offense statute. See *State v. Hittle, supra*. This assignment of error is without merit.

VI. CONCLUSION

Based on the foregoing, we conclude that Taylor's assignments of error are without merit. The conviction and sentence imposed by the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT E. HUNT, JR., APPELLANT.

634 N.W. 2d 475

Filed September 28, 2001. No. S-00-1230.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Effectiveness of Counsel.** A prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding.
4. **Postconviction: Constitutional Law.** Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of the rights of the prisoner, rendering the judgment void or voidable under the Constitution of this state or the Constitution of the United States.
5. **Postconviction: Constitutional Law: Right to Counsel.** Any right to effective assistance of postconviction counsel provided by Neb. Rev. Stat. § 29-3004 (Reissue 1995) is statutory only and cannot render a prisoner's conviction void or voidable under the U.S. or Nebraska Constitution.
6. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Mark D. Albin, of the Albin Law Office, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CONNOLLY, J.

Robert E. Hunt, Jr., appeals the dismissal of his amended postconviction petition. Hunt alleges that he received ineffective assistance of counsel in a postconviction action. We have previously held that Nebraska does not recognize a claim for ineffective assistance of postconviction counsel. But Hunt argues that Neb. Rev. Stat. § 29-3004 (Reissue 1995) provides a claim for ineffective assistance of postconviction counsel. We affirm because a postconviction claim must be based on a deprivation of a federal or state constitutional right rendering the judgment void or voidable. Section 29-3004 is a statutory provision that does not render a judgment void or voidable.

BACKGROUND

In 1985, Hunt appealed his conviction for first degree murder and death sentence. On appeal, we affirmed the conviction, but vacated, and remanded for resentencing. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). On remand, Hunt was resentenced to life imprisonment.

In September 1996, Hunt filed a motion for postconviction relief which was later amended in 1997. The amended motion alleged, rephrased and summarized, that Hunt either was denied due process or received ineffective assistance of trial counsel because of the following:

(1) Counsel failed to pursue an insanity defense.

(2) Counsel threatened to withdraw from the case if Hunt insisted on entering a plea of not guilty by reason of insanity.

(3) Counsel referred to Hunt in a derogatory manner during closing arguments.

(4) Counsel admitted certain facts and elements of the crime during closing arguments.

(5) Without objection from Hunt's counsel, the prosecutor was allowed to ask questions about statements Hunt did not make to police and comment on the lack of evidence regarding those statements at closing.

(6) The original prosecutor, Richard W. Krepela, falsified a police report.

(7) Hunt's counsel failed to make a motion to disqualify Krepela, failed to report Krepela's actions to the Nebraska State Bar Association, failed to call Krepela as a witness, and failed to preserve and raise the issue on appeal.

(8) The prosecutor failed to properly disassociate himself with Krepela after Krepela withdrew from the case.

The amended motion did not raise various issues that Hunt had included in his first motion for postconviction relief.

Following a hearing in which both Hunt and his trial counsel testified, the district court found all of Hunt's arguments to be without merit and dismissed the petition. Hunt's appellate counsel filed an appeal assigning only the derogatory statements made by trial counsel. We affirmed. See *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998).

POSTCONVICTION COUNSEL

After the appeal was decided, Hunt filed the amended petition that is the subject of this appeal. The amended petition alleges that because of his court-appointed appellate counsel in his first postconviction action, he was denied due process, equal protection, a fair postconviction hearing, and effective assistance of counsel. The petition alleges, summarized and rephrased, that Hunt's postconviction counsel failed (1) to include claims when he amended Hunt's original petition for postconviction relief, (2) to seek recusal of the district court judge presiding over the action, (3) to assign issues as error on appeal and told Hunt that some issues were frivolous, (4) to explain the consequences of interviews Hunt had with psychiatrists, and (5) to object to certain statements made at trial. Hunt also alleges that trial counsel's involvement with the trial judge concerning a false police report was prejudicial.

The State filed a motion for summary judgment and a motion to dismiss. The district court sustained the State's motions and denied postconviction relief. Hunt appeals.

ASSIGNMENTS OF ERROR

Hunt assigns, rephrased, that the district court erred in sustaining the State's motions for summary judgment and to dismiss and in failing to grant an evidentiary hearing.

STANDARD OF REVIEW

[1] A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Caddy, ante* p. 38, 628 N.W.2d 251 (2001).

ANALYSIS

Hunt alleges that he received ineffective assistance of postconviction counsel and concedes that we have previously held that Nebraska does not recognize such a claim in a postconviction action. See *State v. Gray, supra*. But Hunt argues that under a 1993 amendment to § 29-3004, counsel appointed in postconviction proceedings are required to provide effective counsel. Hunt contends that this amendment allows him to bring a postconviction action for ineffective assistance of postconviction counsel. A prisoner's right to postconviction relief as set out in Neb. Rev. Stat. § 29-3001 (Reissue 1995) which provides in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that 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, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Section 29-3004 provides: "The district court may appoint not to exceed two attorneys to represent the prisoners in all proceedings under sections 29-3001 to 29-3004. . . . The attorney or attorneys shall be competent and shall provide effective counsel."

[3] Although we did not address § 29-3004, we have held that under the U.S. Constitution, a defendant in a criminal case has a right to effective assistance of counsel. But the assistance of counsel provision in the U.S. Constitution applies to direct appeals only. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524

(1993), citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). We then stated:

> As the *Finley* court stated, postconviction relief is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide a postconviction relief procedure, and when they do, the fundamental fairness mandated by the Due Process Clause of the U.S. Constitution does not require that the State supply a lawyer as well.

State v. Stewart, 242 Neb. at 719, 496 N.W.2d at 529. Thus, the U.S. Supreme Court has held that because there is no constitutional right to an attorney in state postconviction proceedings, a prisoner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *id.*, citing *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). We held in *Stewart* that the Nebraska Constitution's provision for assistance of counsel was no broader than its counterpart in the U.S. Constitution. Furthermore, a prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding. We reaffirmed our holding in *Stewart* in *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

[4,5] Relying on § 29-3004, Hunt contends that he has a right to bring a postconviction action for ineffective assistance of postconviction counsel. Hunt's argument fails. Section 29-3001 provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of the rights of the prisoner, rendering the judgment void or voidable under the Constitution of this state or the Constitution of the United States. Any right to effective assistance of postconviction counsel provided by § 29-3004 is statutory only and cannot render the prisoner's conviction void or voidable under the U.S. or Nebraska Constitution. Thus, our reasoning in *Stewart* and *Gray* continues to be valid. Hunt's arguments regarding ineffective postconviction counsel are without merit.

[6] Hunt has also raised issues regarding actions of his original trial counsel. These issues either were raised in Hunt's first

postconviction proceeding or could have been raised at that time. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). We find Hunt's arguments regarding these issues to be without merit.

CONCLUSION

We determine that § 29-3004 does not provide a postconviction claim for ineffective assistance of postconviction counsel. Because all of the issues raised in Hunt's petition for postconviction relief were related to ineffective assistance of postconviction counsel or either were raised or could have been raised in earlier proceedings, we determine that the district court did not err in dismissing Hunt's petition. Accordingly, we affirm.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOSEPH LOPEZ WILSON, RESPONDENT.

634 N.W. 2d 467

Filed September 28, 2001. No. S-01-122.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
5. ____. Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following

factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

7. **Courts: Attorney and Client.** Courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.
8. **Attorneys at Law.** Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability.
9. **Disciplinary Proceedings.** The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Joseph Lopez Wilson, pro se.

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

PER CURIAM.

NATURE OF CASE

This is an original proceeding seeking to discipline respondent, Joseph Lopez Wilson, for violating his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (6), of the Code of Professional Responsibility. Relator, the Counsel for Discipline of the Nebraska Supreme Court, initially filed charges with the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association (NSBA). A hearing panel of the Committee on Inquiry heard testimony on September 21, 2000, at which hearing both relator, through counsel, and respondent, pro se, were present. Testimony was given, and evidence was presented. The panel concluded there were reasonable grounds to believe respondent had engaged in conduct that violated the Code of Professional Responsibility.

Pursuant to Neb. Ct. R. of Discipline 27 (rev. 2001), all formal charges pending before the Disciplinary Review Board on January 1, 2001, were to be filed with the Clerk of the Supreme Court. The formal charges in this case were filed with the clerk on January 26, 2001, and a summons was issued and, together with the formal charges, served upon respondent.

Respondent filed an answer admitting the essential factual allegations of the formal charges, but denying that his conduct violated the Code of Professional Responsibility. The answer raised only issues of law. Therefore, under Neb. Ct. R. of Discipline 10(K) (rev. 2001), the Supreme Court did not appoint a referee, and by order of this court, the matter was to proceed to briefing. Oral argument was waived by respondent.

BACKGROUND

Respondent was admitted to the practice of law in the State of Nebraska on September 17, 1986. At all times relevant hereto, respondent engaged in the private practice of law in Douglas County, Nebraska. In 1995, respondent obtained an "H-1B1" professional visa for Carlos Moreno to work for U.S. Software, Inc. (USSI). Respondent was paid for his services. A few years later, the company that Moreno was working for subsequently underwent reorganization, and Moreno no longer worked for USSI.

In 1996, Moreno and his wife decided to obtain a divorce. Respondent represented Moreno in the divorce, and a decree was entered on June 13, 1997. Respondent was paid for his services. Over the years, respondent and Moreno became close friends, a friendship which, in the words of respondent, was "as close as brothers." During these years, respondent provided legal services to Moreno in a number of other matters. Respondent did not charge Moreno for these services because of their friendship.

During this time period, respondent and his wife separated, and unbeknownst to respondent, his ex-wife and Moreno began an intimate relationship. When respondent eventually learned of the relationship between his ex-wife and Moreno, he threatened to report information to the Immigration and Naturalization Service (INS) that Moreno's job status had changed.

Respondent further threatened to reopen the Moreno divorce case and report to the court that Moreno had misstated his assets and thus committed a fraud upon the court and Moreno's ex-wife. Respondent conditioned his not carrying through with the threats by insisting that Moreno pay respondent $5,000 for the professional services respondent had previously provided to Moreno at no charge. Respondent subsequently lowered his demand to $3,000. Later, at the Committee on Inquiry hearing,

respondent testified that he believed that certainly fraud was a ground to reopen the case.

In December 1999, Moreno eventually obtained a protection order against respondent. In the petition and affidavit to obtain the harassment protection order, Moreno wrote that respondent's

> [i]ntention [was] clear that [respondent] is trying to harrash [sic] me with the legal cases he have [sic] been representing me. This makes me think that he is trying to performe [sic] a personal vendeta [sic] against me because of a personal situation. [Respondent] has been trying to scare me with faxes, phone calls, and comming [sic] to my apartment.

In the petition and affidavit to obtain the harassment protection order, Moreno stated respondent came to his apartment on several occasions. Respondent came to Moreno's apartment on November 25, 1999, at approximately 10 p.m., at 10:30 p.m., and again at 11 p.m. Respondent was "kno[c]king [on] the door in a very hard way," but Moreno did not answer the door due to respondent's hostile behavior. Respondent also called Moreno at 10:45 p.m. on November 25. Respondent left a paper on Moreno's front door reading, "[Y]ou have been busted. You better seek a new attorney."

On November 26, 1999, at approximately 4:30 a.m., respondent went to Moreno's apartment and "knock[ed] strongly at the front door." Moreno opened the door, and respondent came in "acting in [a] way that made [Moreno think respondent] was out of control." Respondent wanted to know what was going on between Moreno and respondent's ex-wife. Respondent threatened to drop Moreno's INS case. Respondent also sent a fax to Moreno on November 26, which had attached to it a copy of a letter from respondent to the INS advising that he was withdrawing, effective immediately, as Moreno's attorney of record. The letter further stated:

> I respectfully request that you review Mr. Moreno's status in the US and revoke same because Mr. Moreno no longer is employed by USSI as it no longer exists. It is my understanding that Mr. Moreno now works for ACI worldwide at 330 South 108 in Omaha, NE. in a totally different capacity than approved under the original labor certification

> through the Iowa department of labor. I submit to you that his H-1 is also through USSI and should be revoked as well.

Moreno testified at the Committee on Inquiry hearing that respondent was threatening him with several faxes asking for money. If the money was not received, respondent threatened to destroy Moreno's INS case or reopen Moreno's divorce case.

One of these faxes, dated November 25, 1999, contains respondent's request for $5,000. If the $5,000 was not paid on that day, respondent wrote he would advise the INS that Moreno no longer worked for USSI. Respondent also stated, "I will be looking to reopen your divorce case and ask the court to grant your ex[-wife] ½ of your assetts [sic] since you failed to fully disclose your assetts [sic] during your divorce proceeding."

Moreno testified that respondent "didn't have authorization to disclose any information from any of the clients, which are myself and my company." Moreno felt that respondent was trying to "blackmail" him and felt threatened, so Moreno decided he should file a complaint with the proper disciplinary entity in the NSBA.

Respondent admitted that it "looks bad to have a restraining order against your lawyer." Respondent testified that he did not show up for the show cause hearing because he felt it was ridiculous and did not merit a response and that he also had a conflict on the morning of the hearing. Respondent said that he denied about 90 percent of Moreno's allegations in the application for the protection order.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. NSBA v. Flores, supra*.

ANALYSIS

Relator argues that the foregoing acts of respondent constitute a violation of his oath of office as an attorney licensed to

practice law in the State of Nebraska, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1997). Relator further argues that respondent's actions are in violation of DR 1-102(A)(1) and (6) of the Code of Professional Responsibility. DR 1-102 states in pertinent part: "Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

Respondent argues he was not notified of the Committee on Inquiry's decision within 30 days, in violation of the Nebraska Supreme Court Rules of Discipline. Respondent also argues he was denied due process allowed under rule 10 of those rules, wherein a referee could be appointed to review this matter. Respondent asserts that any violation was an isolated incident which will never happen again, but also maintains it would be "a gross imposition by the client to not pay for services rendered." Brief for respondent at 6.

Neb. Ct. R. of Discipline 9(H) (rev. 2001) states in pertinent part:

> Upon receipt of the Complaint and file from the Counsel for Discipline, the Chairperson of the Committee on Inquiry shall appoint an Inquiry Panel pursuant to Rule 7(F) which shall within thirty days review the Complaint and . . . :
>
> . . . .
>
> (4) Determine that there are reasonable grounds for discipline of the Respondent and that a public interest would be served by the filing of a Formal Charge. The Counsel for Discipline shall thereafter prepare and sign Formal Charges for filing with the Court.

The Nebraska Supreme Court Rules of Discipline do not require that respondent be notified of the Committee on Inquiry's decision within 30 days. Rule 9 requires the Committee on Inquiry only to determine within 30 days whether there are reasonable grounds for discipline. If the Committee on Inquiry does determine there are reasonable grounds for discipline, a formal charge would thereafter be filed against respondent, of which respondent would be notified. It is noted that the record reveals that respondent was personally served a copy of the formal charges on February 5, 2001, and that respondent filed his answer to the formal charges on February 7.

Respondent also argues he was denied due process because a referee was not appointed in this case. Rule 10(K) states, "Upon the filing of an answer raising an issue of law only, the Court may, in its discretion, refer the matter to a member as referee for such action in relation thereto as the Court may by its order of reference direct." Under rule 10(K), it is within this court's discretion to forgo the appointment of a referee when the answer raises an issue of law only.

Respondent received notice of the Committee on Inquiry hearing. Respondent personally appeared, representing himself, at the Committee on Inquiry hearing. Respondent had the right to examine and cross-examine witnesses with the right of subpoena and subpoena duces tecum. Respondent was permitted to file exhibits and other evidence at the Committee on Inquiry hearing. Therefore, due process through notice, an appearance, and the chance to question witnesses and present evidence was provided to respondent.

In addition, respondent's answer admitted to the essential factual allegations against him. However, respondent denied that his acts violated his oath as an attorney or the provisions of the Code of Professional Responsibility. Therefore, the only issues are issues of law. This court was within its authority under rule 10(K) to order the parties in this matter to proceed directly to briefing before this court. Our decision to bypass the appointment of a referee under rule 10(K), as the only issue remaining in this case, is a question of law and did not deny due process to respondent.

Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). The record in this matter consists of the court's transcript containing, inter alia, the formal charges, respondent's answer, and the transcript from the September 21, 2000, hearing before the Committee on Inquiry. Based on this record, we find, in our de novo review, by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (6).

[3-5] Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Mefferd*, 258

Neb. 616, 604 N.W.2d 839 (2000). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997); *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996). Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995).

[6] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Flores, supra*; *State ex rel. NSBA v. Freese, supra*.

Canon 4, EC 4-5, of the Code of Professional Responsibility states in pertinent part, "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client . . . ." The nature of the offense in this case encompasses respondent's coercive threats to force Moreno to pay him money. Respondent threatened disclosure of confidential information if this money was not paid. Respondent argues he performed valuable services for Moreno and "[i]t would be a gross imposition by the client to not pay for services rendered." Brief for respondent at 6. Respondent further states that "[s]ometimes an attorney must take steps to collect the fee to prevent gross imposition by the client," citing Canon 2, EC 2-23, of the Code of Professional Responsibility. Brief for respondent at 6.

Ethical code 2-23 states, "A lawyer *should be zealous in his or her efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject*. The lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." (Emphasis supplied.) Threatening telephone calls, faxes, and

visits to a client's home are not efforts which should be used to comply with the letter or the spirit of EC 2-23.

Disciplinary rule 4-101(C) of the Code of Professional Responsibility states in pertinent part, "A lawyer may reveal: . . . (4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." However, a disciplinary rule prohibiting disclosure of client confidences except in certain limited circumstances, including when an attorney reasonably believes disclosure is necessary for resolution of a fee dispute, does not permit an attorney to threaten a former client with disclosure of client confidences in order to resolve a fee dispute. See *Discipline of Boelter*, 139 Wash. 2d 81, 985 P.2d 328 (1999).

An attorney such as respondent is expected to use legal means to enforce his rights, not violent threats. See *In re Rosenblatt*, 253 A.D.2d 106, 687 N.Y.S.2d 23 (1999).

Respondent's conduct has a chilling effect on the public's perception of attorneys and the NSBA in general. The maintenance of the reputation of the NSBA as a whole depends in part on the client's ability to be able to fully confide in his or her attorney. If clients do not believe they can do this, then attorneys will no longer be able to fully and zealously represent their clients.

[7] With regard to the protection of the public, we have stated that " 'courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.' " *State v. Hawes*, 251 Neb. 305, 310, 556 N.W.2d 634, 638 (1996).

In addition, EC 4-1 states in pertinent part,

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her. A client must feel free to discuss whatever the client wishes with his or her lawyer . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of

the client but also encourages laypersons to seek early legal assistance.

Respondent's threats in this case undermine the confidential and fiduciary nature of the attorney-client relationship and lessen the public's confidence in the legal profession.

[8] The next factor to be considered is the offender's present or future fitness to continue in the practice of law. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability. *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996). An attorney's conduct which includes progressively abusive language, demeanor, and threats violates disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law. See *Disciplinary Counsel v. Levin*, 35 Ohio St. 3d 4, 517 N.E.2d 892 (1988).

Respondent's actions against Moreno were motivated by what he perceived to be a violation of an interpersonal relationship. The fact respondent was an attorney and used his position as an attorney to exact this vengeance on Moreno involves the disciplinary process. Respondent's conduct adversely reflects on his present fitness to engage in the practice of law.

The attitude of respondent generally, as projected from his brief and the record in this case, shows respondent felt that he was used by Moreno at the most vulnerable point in his life. Respondent believes that Moreno utilized their friendship to such an extent that Moreno was able to seduce respondent's ex-wife while she and respondent were trying to reconcile. Based on the record before us, we believe respondent's actions appear to be an isolated incident.

CONCLUSION

[9] The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997); *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997).

Based on the above, we find in our de novo review that respondent should be suspended from the practice of law for a period of 2 years from the date of this opinion.

The Clerk of the Supreme Court is directed to cause a copy of this opinion and judgment of suspension from the practice of law to be served upon respondent by certified U.S. mail.

JUDGMENT OF SUSPENSION.

BARBARA R. MONDELLI, APPELLANT AND CROSS-APPELLEE, V. KENDEL HOMES CORPORATION, A NEBRASKA CORPORATION, AND CITY OF PAPILLION, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS.
VITO B. MONDELLI, APPELLANT AND CROSS-APPELLEE, V. KENDEL HOMES CORPORATION, A NEBRASKA CORPORATION, AND CITY OF PAPILLION, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS.

641 N.W. 2d 624

Filed October 5, 2001. Nos. S-00-296, S-00-297.

SUPPLEMENTAL OPINION

Appeals from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

W. Craig Howell and Nora M. Kane, of Domina Law, P.C., for appellants.

Richard C. Gordon and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Kendel Homes Corp.

Thomas M. Locher and Thomas M. Braddy, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee City of Papillion.

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

PER CURIAM.

Cases Nos. S-00-296 and S-00-297 are before this court on the motion for rehearing of the appellee Kendel Homes

Corporation regarding our opinion reported at *Mondelli v. Kendel Homes Corp., ante* p. 263, 631 N.W.2d 846 (2001). We overrule the motion, but for purposes of clarification, modify the opinion as follows:

In that portion of the opinion designated "(c) Motion for Joinder," the last paragraph under that section, *id.* at 277, 631 N.W.2d at 858, is withdrawn, and the following paragraph is substituted in its place: "Joinder is discretionary. See Neb. Rev. Stat. § 25-705 (Cum. Supp. 1998). We conclude that based on the record, the district court did not abuse its discretion in refusing to join all of the claims into one action."

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL L. FRENCH, APPELLANT.

633 N.W. 2d 908

Filed October 5, 2001. No. S-00-516.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, 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. **Speedy Trial: Indictments and Informations: Complaints.** Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint.
4. **Speedy Trial: Complaints: Time.** In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.
5. **Speedy Trial: Indictments and Informations: Time.** The time chargeable against the State under Nebraska's speedy trial act commences with the filing of an initial information against a defendant.
6. ____: ____: ____. The time chargeable to the State under Nebraska's speedy trial act ceases, or is tolled, during the interval between the State's dismissal of an initial information and the refiling of an information charging a defendant with the same crime alleged in the previous, but dismissed, information.
7. ____: ____: ____. When the State dismisses an information and refiles another information charging a defendant with the same offense alleged in the previous information,

the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial act. Certain periods of time must be excluded pursuant to Neb. Rev. Stat. § 29-1207(4) (Reissue 1995).

8. **Indictments and Informations: Complaints.** An amended complaint or information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first complaint or information and acts as a dismissal of the same.
9. **Speedy Trial: Time.** The time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6-month time period set forth in Neb. Rev. Stat. § 29-1207 (Reissue 1995).
10. **Speedy Trial: Proof.** The primary burden is on the State to see that an accused is brought to trial within the time prescribed by Nebraska's speedy trial act.
11. **Speedy Trial: Proof: Time.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, ROBERT C. WESTER, Judge. Judgment of Court of Appeals affirmed.

Stuart J. Dornan, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

WRIGHT, J.

NATURE OF CASE

Michael L. French appeals the decision of the Sarpy County District Court which affirmed the county court's denial of his motion to dismiss based upon a claim that he had not been brought to trial within 6 months, as required by Nebraska's speedy trial act, Neb. Rev. Stat. § 29-1207 et seq. (Reissue 1995). The Nebraska Court of Appeals affirmed, see *State v. French*, 9 Neb. App. 866, 621 N.W.2d 548 (2001), and we granted French's petition for further review.

SCOPE OF REVIEW

[1] Generally, 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. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999).

[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. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

FACTS

On August 3, 1998, a criminal complaint was filed in Sarpy County Court under case No. CR98-3337 alleging that on or about August 1, French had committed the offenses of second-offense driving while under the influence of alcohol (DUI) and driving left of the centerline. French posted bond and was ordered to appear for arraignment on August 26. He did not appear and therefore forfeited his bond. A count of failure to appear was added to the complaint on September 10.

On June 22, 1999, French was arrested, and he posted bond. An amended criminal complaint was filed in case No. CR98-3337 on July 7 alleging that on or about August 1, 1998, French had committed the offense of possession of a controlled substance, a Class IV felony. No other charges were stated in the amended complaint.

At a preliminary hearing on July 22, 1999, the State moved for a continuance because its witness was unavailable. The county court denied the continuance, and the State moved to dismiss. The county court granted the motion to dismiss and ordered French's bond released.

The State refiled the possession of a controlled substance charge under a new case number, CR99-4121, on July 26, 1999. French was ordered to appear for arraignment on August 31, but he failed to appear. A probable cause hearing was held on September 15, and a warrant was issued.

French was arrested and posted bond on November 3, 1999. At the arraignment on November 18, with leave of court, the State amended the complaint to charge French with second-offense

DUI, driving left of the centerline, and failure to appear. These charges arose out of the incident of August 1, 1998. French entered a plea of not guilty, and trial was set for January 3, 2000.

On December 30, 1999, French moved to dismiss, alleging a speedy trial violation. French claimed that the DUI and driving left of the centerline charges were still pending after the complaint was amended on July 7, 1999, and that, therefore, he had not been brought to trial within 6 months as required by § 29-1207. The county court denied French's motion. On April 19, 2000, the district court determined that only 82 days had run and affirmed the decision of the county court. The Court of Appeals affirmed the decision of the district court. See *State v. French*, 9 Neb. App. 866, 621 N.W.2d 548 (2001). We granted further review.

ASSIGNMENT OF ERROR

French assigns as error that the Court of Appeals erred in affirming the decision of the district court.

ANALYSIS

[3,4] Section 29-1207(1) provides: "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." Although the speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint. *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed. See *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

[5-7] The time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992). The time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and the refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information. *Id*. When the State dismisses an information and refiles another

information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under the speedy trial act. Certain periods of time must be excluded pursuant to § 29-1207(4). *State v. Trammell, supra*.

Generally, 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. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). The issue presented is whether in the criminal context the filing of an amended complaint or information acts as a dismissal of the original complaint or information. Resolution of this issue presents a question of law. 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. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

In summary, on July 7, 1999, when French appeared for trial, the State filed an amended complaint in case No. CR98-3337 charging him with one count of possession of a controlled substance, a Class IV felony. No new trial date was set for the misdemeanor charges previously filed. French argues that the filing of the amended complaint did not toll the time for bringing him to trial pursuant to § 29-1207. In contrast, the State argues that amending the complaint to a different charge had the effect of dismissing the prior charges. The State asserts that the amended complaint charging possession of a controlled substance superseded the original complaint and therefore tolled the time for bringing French to trial on the charges of DUI, driving left of the centerline, and failure to appear.

Relying upon our decisions in *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963), and *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996), and dicta contained in *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999), and *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997), the Court of Appeals concluded that when an amended complaint or information is filed, the amended complaint or information supersedes or supplants the original

complaint or information. Applying that rule to the case at bar, the Court of Appeals stated that once the amended complaint was filed, the misdemeanor charges were no longer pending and were in effect dismissed. Thus, the Court of Appeals concluded that the district court correctly affirmed the county court's denial of French's motion to dismiss.

In *Midwest Laundry Equipment Corp.*, we held that an amended pleading supersedes the original pleading and that thereafter, the original pleading ceases to perform any office as a pleading. In *In re Interest of Rondell B.*, we held that after the filing of an amended petition, preceding petitions cease to have any function.

In the criminal context, we have not previously determined whether an amended complaint or information supersedes the original for purposes of the speedy trial act. This issue is a matter of first impression. In *Meers*, we referred to an amended information as superseding the original information filed against a defendant. In *Huddleson*, the district court held that the amended complaint constituted a dismissal of the original DUI charge pursuant to Neb. Rev. Stat. § 60-6,206(4)(b) (Reissue 1993) and that the defendant was entitled to have his operating privileges reinstated. In *Huddleson*, there was no bill of exceptions, and we affirmed the decision of the district court on the basis that the pleadings were sufficient to support the order. Neither *Meers* nor *Huddleson* dealt with the issue presented in the case at bar.

Other jurisdictions have recognized that the filing of an amended complaint or information supersedes the original complaint or information for purposes of the speedy trial rule. In *Salazar v. State*, 85 N.M. 372, 512 P.2d 700 (N.M. App. 1973), the court held that an amended information vitiates the original information as fully as though it had been formally dismissed by court order and constitutes the filing of a new instrument which supersedes its predecessor. In *State v. Vigil*, 114 N.M. 431, 839 P.2d 641 (N.M. App. 1992), the court stated that absent an intent to circumvent the 6-month rule for bringing a defendant to trial, an amended complaint would supersede the original complaint for purposes of the 6-month rule. The court pointed out that the State had the burden of demonstrating a good faith use of the

procedures involved and that such procedures were not used to circumvent the operation of the 6-month rule.

In *State v. Kinard*, 21 Wash. App. 587, 589, 585 P.2d 836, 838 (1978), the court stated: "We hold, and it has been uniformly held, that the filing of . . . an amended information constitutes an abandonment of the first information." In *State v. Oestreich*, 83 Wash. App. 648, 922 P.2d 1369 (1996), the court noted that the general rule was that an amended information supersedes the original, citing *State v. Navone*, 180 Wash. 121, 39 P.2d 384 (1934). Accord *State v. Kinard, supra*.

It is important to determine whether the amendment charges the same crime or a totally different crime. A distinction is made between an *amendment to* a complaint or information and an *amended* complaint or information. If the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act. If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information. The original charges have been abandoned or dismissed.

[8,9] We hold that an amended complaint or information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first complaint or information and acts as a dismissal of the same. The time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6-month time period set forth in § 29-1207. See *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

French was arrested on June 22, 1999, and on July 7, the State amended the complaint to charge French with possession of a controlled substance. The amended complaint charged a separate and distinct crime and did not contain the misdemeanor charges of DUI, driving left of the centerline, or failure to appear. At the preliminary hearing on July 22, the State moved for a continuance because its witness was unavailable. The motion was denied, the State's motion to dismiss was granted, and French's bond was released. Therefore, as of July 22, no charges were pending against French. Time began to run again on November 18, when

the State filed an amended complaint in case No. CR99-4121 charging French with second-offense DUI, driving left of the centerline, and failure to appear. Thus, we conclude that the district court correctly determined that the county court properly denied French's speedy trial claim, and the Court of Appeals' affirmance of the district court's judgment was proper.

With regard to whether French's right to a speedy trial was violated, the district court determined that 82 days were counted against the State for purposes of the speedy trial act. The district court calculated the time as follows: (1) 22 days from August 3 to 26, 1998 (date original complaint was filed until date French failed to appear); (2) 13 days from June 22 to July 7, 1999 (date of French's arrest and date of dismissal of original charges); and (3) 47 days from November 18, 1999, to January 3, 2000 (date original charges were refiled until date French's motion to dismiss was heard).

The district court was correct in determining that 47 days elapsed between November 18, 1999, and January 3, 2000. However, the period between August 3 and 26, 1998, includes 23 days, not 22 days, and the period between June 22 and July 7, 1999, includes 16 days, not 13 days. Adding these three time periods together results in a total of 86 days that should be counted against the State, not 82 days as determined by the district court.

[10,11] The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the speedy trial act. *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial.

CONCLUSION

French's right to a speedy trial has not been violated. The charges in the original complaint were dismissed when the amended complaint was filed. However, we note that 86 days had elapsed, rather than 82. The judgment of the Court of Appeals affirming the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARLYN P. ILDEFONSO, APPELLANT.

634 N.W. 2d 252

Filed October 5, 2001. No. S-00-1024.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, 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 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. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Search Warrants: Motions to Suppress: Judges: Affidavits.** Suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. If none of the aforementioned circumstances exist, the evidence should not be suppressed.
4. **Search Warrants: Affidavits: Probable Cause: Proof: Time.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
5. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, the Nebraska Supreme Court has adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
6. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be

found in a particular place. The question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause.

7. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
8. ____: ____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. **Criminal Law: Probable Cause.** A statement against penal interest, in and of itself, carries a sufficient indicia of reliability to support a finding of probable cause.
10. **Criminal Law: Search Warrants: Probable Cause.** Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That an informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.
11. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit to obtain a search warrant should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.
12. **Motions to Suppress.** The duty rests on the defendant, after his or her motion to suppress has been denied, to object to the admission of the evidence at trial and to state the specific grounds of the objection if not apparent from the context in which the objection was made.
13. **Effectiveness of Counsel: Proof.** To state a claim of ineffectiveness 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.
14. **Warrants: Affidavits: Probable Cause.** Under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), a challenger must attack the veracity of only the affiant and not of any other informant in order to be entitled to a hearing. The challenger must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. No hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause.
15. **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.
16. **Homicide: Sentences.** Upon being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time served in custodial detention pending

trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for time served against the consecutive sentence.

17. **Criminal Law: Sentences.** A sentencing judge must separately determine, state, and grant the amount of credit on a defendant's sentence to which the defendant is entitled.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed in part, and in part sentences vacated and cause remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

WRIGHT, J.

NATURE OF CASE

Arlyn P. Ildefonso appeals from his convictions for first degree murder and use of a firearm to commit a felony. Ildefonso was charged with killing Carr Hume on September 13, 1999. After a jury convicted Ildefonso on both charges, he was sentenced to life in prison without parole for first degree murder and to a consecutive sentence of 40 to 45 years in prison for the use of a firearm. He asserts on appeal that his motion to suppress should have been granted and that he received ineffective assistance of counsel at trial.

SCOPE OF REVIEW

[1] A trial court's ruling on a motion to suppress evidence, 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 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. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001), *cert. denied* 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754.

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

FACTS

At approximately 4 a.m. on September 13, 1999, Omaha police found the body of Hume, a retired minister, lying in the street and on the curb in front of 2527 South 42d Street. Hume had been shot in the right side of his face. His hands were still in the pockets of his sports coat, and his wallet contained $1,029. The blood evidence indicated that Hume had been shot at that location.

Based on the report of an informant, two suspects were identified and arrested. While preparing to interview one of the suspects, Officer Melvin McCowen of the Omaha Police Department received an anonymous call stating that the police had arrested the wrong persons. The caller, subsequently identified as Amy Taylor, said that Ildefonso was responsible for the shooting. Taylor called the police after she heard on the news that one of the suspects had been arrested for the Hume murder. Taylor told police that she was staying with Ildefonso at the Ben Franklin Motel and that Ildefonso had told her he shot Hume because Ildefonso was mad at his girl friend, Kristine Reh, and he "wanted the world to feel his pain." Taylor said she met Reh and a friend of Reh's, Christina Devore-Alexander, when they came to the motel to purchase drugs from Ildefonso. Devore-Alexander had also told Taylor that Ildefonso confessed to shooting Hume.

Taylor also told police that she had seen Ildefonso with several guns, including a .357-caliber revolver and a 9-mm handgun. At McCowen's request, Taylor obtained bullets from the guns in Ildefonso's backpack and left the bullets with a desk clerk at the Ben Franklin Motel. McCowen picked up the bullets, which included two expended shells, one live .357-caliber round, and one live 9-mm round. Because the .357-caliber bullet was simi-

lar to the bullet taken from Hume's body, McCowen requested a comparison by the crime laboratory.

Devore-Alexander testified at trial that she and Reh were high school friends and that on September 13, 1999, Reh had called her and asked for a ride because Reh and Ildefonso, Reh's boyfriend, were arguing. Ildefonso was upset because Reh had another boyfriend and the boyfriend was about to be released from a correctional center. Devore-Alexander picked up Reh and Ildefonso, and they drove around Omaha, with Ildefonso giving directions. Near 42d and Bancroft Streets, Ildefonso directed Devore-Alexander to stop the car. When Ildefonso got out, Devore-Alexander turned to talk to Reh, who was in the rear seat. Devore-Alexander said she heard a gunshot, turned around, and saw Ildefonso with his arm extended and a gun in his hand. Hume was lying on the ground.

Ildefonso returned to the car with the gun in his hand and told Devore-Alexander to drive. She drove to her grandmother's house on North 52d Street, where the group stayed for about 3 hours. Devore-Alexander stated that Ildefonso threatened to kill her and Reh if they said anything about the shooting and told them that his life was in their hands. At about 6 a.m., Devore-Alexander gave Ildefonso and Reh a ride to Reh's car. Devore-Alexander then returned to her grandmother's house. Devore-Alexander testified that prior to the shooting, Ildefonso told her "the only thing that would make him feel better is if he shot somebody."

Reh testified at trial that after Devore-Alexander stopped her car near 42d and Bancroft Streets, Reh heard a gunshot and saw a man lying on the sidewalk as they left the area. Reh also said that she, Devore-Alexander, and Ildefonso had taken drugs together and that Ildefonso was using methamphetamine the night of the shooting.

On October 1, 1999, police took steps to obtain a warrant to search Ildefonso, a blue 1991 Chevrolet Cavalier, and a room at the Ben Franklin Motel on Interstate 80. Officer Anthony Strong began surveillance of the motel at 8 a.m. At about 11:30 a.m., Strong saw Ildefonso and Taylor leave the motel room, load the car, and stop at the motel office. When they left the motel, Strong notified Sarpy County sheriff's officers that Ildefonso and Taylor

were northbound on Interstate 80. The Sarpy County officers pulled over the car at the Harrison Street overpass. The officers told Taylor, the driver, to turn off the car's engine and throw out the keys. Taylor and Ildefonso, who was sitting in the passenger's seat, were then removed from the vehicle. Strong saw a .357-caliber revolver under the passenger's seat of the car, and a 9-mm handgun was found in a backpack in the rear seat.

Daniel Bredow, senior crime laboratory technician and firearms toolmarks examiner with the Omaha Police Department, testified that the bullet from the .357-caliber revolver was consistent with the bullets left with the desk clerk at the motel and with the bullet removed from Hume's body.

The jury found Ildefonso guilty of first degree murder and use of a firearm to commit a felony. He was sentenced to life imprisonment without parole for the murder charge and to a consecutive term of 40 to 45 years' imprisonment for the use of a firearm charge.

ASSIGNMENTS OF ERROR

Ildefonso assigns four errors. First, he asserts that the district court erred when it failed to sustain his motion to suppress because the affidavit in support of the application for a search warrant failed to set forth sufficient probable cause to support issuance of the warrant. Second, if it is determined that trial counsel failed to properly preserve the suppression issue for appellate review, Ildefonso asserts that he was deprived of effective assistance of counsel by that failure. Third, he argues that trial counsel was ineffective in failing to challenge the search warrant's validity on the basis that "vitally important facts, shaking the reliability of the affidavit to its core, were omitted by the affiant officer." As his fourth assignment of error, Ildefonso asserts that trial counsel was ineffective in failing to object to hearsay statements by McCowen, who testified without objection as to statements given to the police by Devore-Alexander and Reh.

ANALYSIS

MOTION TO SUPPRESS

Ildefonso moved to suppress any and all items of personal property seized by law enforcement on October 1, 1999, from

his person, room No. 131 of the Ben Franklin Motel, or a 1991 Chevrolet Cavalier stopped at Interstate 80 and Harrison Street in Sarpy County. He argued that the evidence was seized without a warrant and was not obtained based on a valid stop and/or arrest. He asserted that the seizure based upon the warrant lacked probable cause, and he claimed that the stop was not based on exigent circumstances.

At the suppression hearing, Mark Trapp, a deputy with the Sarpy County sheriff's office, testified that he was assigned to a detail which planned to serve a warrant at the Ben Franklin Motel on October 1, 1999. Before the officers could serve the warrant, they were advised that the suspect was leaving the motel in a two-door blue Chevrolet, and the officers were told to stop the vehicle. Trapp located the vehicle and activated his cruiser's overhead lights on Interstate 80 between Harrison and 126th Streets. After an emergency response unit arrived, the individuals in the vehicle were placed in cruisers and the vehicle was searched.

The affidavit for the search warrant identified the following items as those being sought: (1) a .357-caliber revolver, "dark blue to black in color"; (2) a 9-mm semiautomatic handgun; (3) ammunition and accessories, including ammunition clips for the .357-caliber and 9-mm weapons; (4) any and all controlled substances, including but not limited to cocaine, methamphetamine, LSD, and their derivatives; (5) any and all homemade or manufactured equipment related to an illegal narcotics operation; (6) moneys and records pertaining to an illegal narcotics operation; and (7) venue items for Ildefonso.

Trapp observed a revolver under the passenger's seat of the vehicle and a backpack in the rear seat. The backpack contained a 9-mm handgun, a baggie of white powder, three baggies of "seed," and approximately $4,000 in cash.

As grounds for the warrant, the affidavit, which was sworn to by McCowen, stated:

> On Sunday, 26th September 1999, at 1220 hours ILDEFONSO, Arlyn P. entered the emergency room area of St. Joseph's Hospital in Omaha, Douglas County, Nebraska with a gunshot wound to his right upper arm. ILDEFONSO told staff members and responding officers of the Omaha Police Department that he was shot by the occupants of a

> "silver vehicle" while travelling eastbound on Interstate Highway 80 near 42nd Street. The incident was reported under Omaha Police RB# 09362S.
>
> TAYLOR Amy advised affiant officer during an interview on Tuesday, 28 September 1999 that she was a passenger in the vehicle at the time of the shooting and knew it was provoked when ILDEFONSO waved a .357 caliber handgun and flashed "gang signs" at the occupants of the second vehicle involved. ILDEFONSO, she said, always had in his possession two handguns, a .357 caliber revolver and a 9 mm semiautomatic. TAYLOR said she drove ILDEFONSO to the hospital after first depositing a green bookbag which contained two handguns and drugs described as "crank, acid, and cocaine" at 5145 N. 47th Street, her former residence. Following treatment at the hospital, TAYLOR said she reclaimed the bag and turned it over to ILDEFONSO.
>
> ILDEFONSO and TAYLOR went to Ben Franklin Motel and registered in Room #131. The weapons, she said, were in the room on Tuesday, 28 September 1999. On Wednesday, 29 September, 1999, she provided affiant officer with ammunition for the weapons which was taken from Room #131. The ammunition was booked into property after affiant officer picked it up at the Ben Franklin Motel.
>
> ILDEFONSO is a convicted felon. His record show [sic] a May 2nd 1995 conviction for "Theft 2nd Degree." And served five years in the Iowa Department of Corrections.
>
> Based on the investigation of the Omaha Police Department Homicide/Assault Unit and affiant officer it can be shown that ILDEFONSO, Arlyn P. is a convicted felon in possession [of] two firearms and illegal drugs and said property is kept or maintained in room #131 of the Ben Franklin Motel or the blue Chevrolet Cavalier which ILDEFONSO drives.

Based upon the information contained in the affidavit, a judge of the Douglas County District Court issued a search warrant for Ildefonso and room No. 131 of the Ben Franklin Motel, finding probable cause to believe that the items identified could be found on Ildefonso's person or in the motel room.

After hearing testimony at the suppression hearing, the district court found that there were exigent circumstances to merit the search of the vehicle and that the warrant was supported by probable cause. Taylor had told McCowen that Ildefonso was shot in the arm after he waved a .357-caliber revolver and flashed gang signs at the occupants of another vehicle. The court noted that although the officers did not know Ildefonso, they knew of the incident during which he was shot, and they knew that the man seen with Taylor had an injured arm. The court found that Taylor's veracity had not been attacked within the four corners of the affidavit and that the affidavit was proper and provided good and probable cause for issuance of the search warrant. The court overruled the motion to suppress, finding exigent circumstances in the evidence that Ildefonso and Taylor had packed up and left the motel.

[3] On appeal, Ildefonso argues that the affidavit failed to set forth sufficient facts that would establish probable cause to support issuance of the warrant. Therefore, we must examine the facts contained in the affidavit to determine whether the district court erred in finding probable cause. This court has held that suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. If none of the aforementioned circumstances exist, the evidence should not be suppressed. *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). Ildefonso's argument centers on the third basis for suppression—that the affidavit lacks indicia of probable cause.

[4] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of

probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

[5,6] In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause. *Id.*

[7] When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *Id.*

The affidavit in this case is based on two sources of information: (1) a police report of an earlier incident and (2) an interview with Taylor. The police report was filed after the incident in which Ildefonso waved a gun and flashed gang signs at another car and was shot. He was treated at a hospital for a gunshot wound after the hospital reported the incident. The affidavit is also based on information obtained during an interview with Taylor. She stated that Ildefonso always had two guns in his possession and that she was a passenger in the car when Ildefonso was shot. Taylor reported that she had dropped off a backpack containing illegal drugs at her former residence before taking Ildefonso to the hospital for treatment. She told officers that she and Ildefonso were registered in room No. 131 of the motel and

that she had seen Ildefonso's guns in the room on Tuesday, September 28, 1999.

[8] To rely upon the information provided by Taylor to support a finding of probable cause, the issuing magistrate must have found that Taylor's reliability as an informant had been demonstrated. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001), *cert. denied* 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754.

Reviewing the information within the four corners of the affidavit, there is no suggestion that Taylor had given reliable information to police officers in the past or that police officers independently investigated her reliability or the reliability of any information she had given, although police were aware of the earlier incident in which Ildefonso had been shot. Therefore, to establish Taylor's reliability, the affidavit must set forth that she made a statement against her penal interest or that she was a citizen informant.

We do not determine whether Taylor could be considered a citizen informant because her reliability was established by the fact that she made a statement against her penal interest. In providing information to the police about Ildefonso, Taylor told McCowen that she was with Ildefonso when he was shot and that before taking him to the hospital, she deposited "a green bookbag which contained two handguns and drugs described as 'crank, acid, and cocaine' at 5145 N. 47th Street, her former residence." Taylor said that after Ildefonso was treated at the hospital, "she reclaimed the bag and turned it over to ILDEFONSO." Taylor's statement was against her penal interest because it could have been used to charge her with possession of a controlled substance.

[9,10] "[A] statement against penal interest, in and of itself, carries a sufficient indicia of reliability to support a finding of

probable cause." *State v. Grimes*, 246 Neb. 473, 480, 519 N.W.2d 507, 514 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). See, also, *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). In *Harris*, the Court stated: "Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct." 403 U.S. at 583-84. We conclude that Taylor's statement against penal interest established her reliability and supported the finding of probable cause.

[11] After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). The affidavit provided sufficient information to find that there was probable cause to issue the search warrant. A trial court's ruling on a motion to suppress evidence, 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 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. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001), *cert. denied* 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754. The district court correctly overruled the motion to suppress. This assignment of error is without merit.

Ineffective Assistance of Counsel

Ildefonso asserts that he received ineffective assistance of counsel in three ways: (1) His trial counsel failed to preserve the issues raised in his motion to suppress; (2) his trial counsel failed to challenge the affidavit by filing a motion based on *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); and (3) his trial counsel failed to object to hearsay statements when McCowen testified as to the statements given to police by Devore-Alexander and Reh.

[12] The duty rests on the defendant, after his or her motion to suppress has been denied, to object to the admission of the evidence at trial and to state the specific grounds of the objection if not apparent from the context in which the objection was made. *State v. Bray*, 243 Neb. 886, 503 N.W.2d 221 (1993). The record shows that trial counsel adequately preserved all issues related to the motion to suppress by renewing his objection when the evidence was offered at trial. Therefore, the first claim of ineffective assistance of counsel is without merit.

Ildefonso next argues that trial counsel was ineffective when he failed to challenge the search warrant's validity under *Franks* because McCowen omitted important facts from the affidavit, including information concerning Taylor's relationship with an earlier suspect in the case. Also, McCowen did not include in the affidavit the fact that he picked up the ammunition from the motel desk clerk, rather than obtaining it directly from Taylor.

[13] To state a claim of ineffectiveness 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, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. See *State v. Dunster, ante* p. 329, 631 N.W.2d 879 (2001). The record shows that Ildefonso's counsel did not request a *Franks* hearing, but that does not necessarily demonstrate deficient performance by counsel.

In *Franks*, the Court held that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of

> the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56.

[14] In *State v. Williams*, 214 Neb. 923, 336 N.W.2d 605 (1983), this court noted that under *Franks*, a challenger must attack the veracity of only the affiant and not of any other informant in order to be entitled to a hearing. The challenger must also make a " 'substantial preliminary showing,' including allegations of 'deliberate falsehood or of reckless disregard for the truth,' supported by an offer of proof." *Williams*, 214 Neb. at 926, 336 N.W.2d at 607. No hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. *Id.*

Ildefonso offers no evidence to suggest that any statement in the affidavit is a deliberate falsehood or shows reckless disregard for the truth. Although the affidavit did not contain any mention of an alleged relationship between Taylor and one of the individuals who had been arrested in connection with the murder, the finding of probable cause was not related to any evidence of such a relationship. The district court did not consider any false statement because none was made in the affidavit.

The second statement which Ildefonso alleges to be false concerns the method by which McCowen obtained the ammunition. This information was not deliberately false or made with reckless disregard for the truth, nor was it necessary to find probable cause.

Ildefonso has not demonstrated that trial counsel was ineffective by failing to request a *Franks* hearing. This assignment of error has no merit.

Ildefonso also argues that trial counsel was ineffective in failing to object to McCowen's hearsay testimony concerning statements made by Devore-Alexander and Reh. Ildefonso claims that McCowen's testimony rehabilitated weak testimony given by these witnesses concerning the events on the night of the murder. The State admits that the testimony was "conceptually hearsay," but it argues that the testimony was cumulative, that the testimony of Devore-Alexander and Reh was "consistent and

compelling," and that the failure to object did not prejudice Ildefonso. See brief for appellee at 23-24.

McCowen's testimony, in which he repeated statements made by Devore-Alexander and Reh, was hearsay. It consisted of statements made by one other than the declarant while testifying at trial, and the testimony was offered to prove the truth of the matter asserted. See Neb. Rev. Stat. § 27-801(3) (Reissue 1995). As hearsay, the testimony should have been objected to, and the objection would have been sustained if there were no exceptions to hearsay which applied. Neither party has suggested any exception to the hearsay rule which might apply in this case.

[15] However, McCowen's testimony reiterated statements made by Devore-Alexander and Reh, witnesses who heard the gunshot and saw the body of Hume in the street. There is no claim that McCowen testified to any facts which were in conflict with the testimony of the two witnesses, and his testimony was cumulative to their testimony. Even if Ildefonso's counsel should have objected to the testimony as hearsay, "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." See *State v. Quintana*, 261 Neb. 38, 63, 621 N.W.2d 121, 140 (2001). McCowen's testimony was cumulative.

Ildefonso also suggests that McCowen's testimony was harmful because it rehabilitated the testimony of Devore-Alexander and Reh, who were not credible. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

Two witnesses testified that they heard a gunshot and that they saw Hume's body lying in the street. Devore-Alexander testified that Ildefonso returned to the car with a gun in his hand. Prior to the shooting, Ildefonso told Devore-Alexander that "the only thing that would make him feel better is if he shot somebody." No evidence was offered at trial to refute the State's evidence of

guilt. The hearsay testimony was cumulative. The evidence of guilt, including Ildefonso's confession to Taylor, was more than sufficient to support the convictions. This assignment of error has no merit.

SENTENCING

[16] Although neither party raises sentencing as an issue, we note that the district court sentenced Ildefonso to life imprisonment without parole on the first degree murder charge and to a consecutive sentence of 40 to 45 years' imprisonment on the use of a firearm charge. The sentencing order provided that Ildefonso would be given credit for time served (318 days) against the sentence imposed on the first degree murder charge. We find plain error in the sentencing.

> Upon being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for time served against the consecutive sentence.

State v. Mantich, 249 Neb. 311, 329, 543 N.W.2d 181, 194 (1996).

[17] A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled. *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993). Ildefonso is entitled to receive credit for time served, but the credit should be applied against the use of a firearm charge rather than against the first degree murder charge. Ildefonso's sentences are therefore vacated, and the cause is remanded to the district court with directions to resentence Ildefonso, giving him credit for time served against the conviction for use of a firearm to commit a felony.

CONCLUSION

The affidavit in support of the search warrant provided probable cause to issue the warrant, and the district court properly overruled the motion to suppress. Ildefonso did not receive ineffective assistance of trial counsel due to counsel's failure to request a hearing in accordance with *Franks v. Delaware*, 438

U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), because no false statements were made in the affidavit. As to whether trial counsel provided ineffective assistance by failing to object to hearsay testimony, we find that any error that occurred was harmless because the testimony was cumulative and the evidence of guilt was more than sufficient to sustain the convictions. Thus, Ildefonso's convictions are affirmed.

The sentencing order incorrectly granted Ildefonso credit for time served against the life sentence. We therefore find that Ildefonso's sentences should be vacated. The cause is remanded for resentencing, and the district court is directed to apply credit for time served to the conviction for use of a firearm to commit a felony.

AFFIRMED IN PART, AND IN PART SENTENCES VACATED AND CAUSE REMANDED FOR RESENTENCING.

LOUIS HUNT, APPELLEE, V.
LLOYD TRACKWELL, JR., APPELLANT.

635 N.W.2d 106

Filed October 19, 2001. No. S-00-172.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that 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. **Statutes.** Statutory interpretation presents a question of law.
3. **Appeal and Error.** When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
5. **Jurisdiction: Waiver.** While the lack of subject-matter jurisdiction cannot be waived nor the existence of subject-matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties.
6. **Jurisdiction: Service of Process: Parties.** For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process.
7. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.

8. **Motions for Continuance: Jurisdiction.** A motion for a continuance constitutes a general appearance that confers personal jurisdiction over the moving party.
9. **Jurisdiction: Pleadings: Parties.** A party that files an answer generally denying the allegations of a petition invokes the court's power on an issue other than personal jurisdiction and confers on the court personal jurisdiction.
10. **Jurisdiction: Words and Phrases.** Subject-matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
11. **Judgments: Jurisdiction.** A ruling made in the absence of subject-matter jurisdiction is a nullity.
12. **Courts: Jurisdiction.** Under Neb. Rev. Stat. § 24-517(4) (Supp. 1997), a county court has authority to certify the proceedings to district court when the amount in controversy exceeds its jurisdictional limit.
13. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
14. **Courts: Jurisdiction: Service of Process.** Service of process in a county court is effective in district court after the county court has certified the proceedings to district court under Neb. Rev. Stat. § 25-2706 (Reissue 1995) if the county court had previously obtained personal jurisdiction in the case.

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

Mary C. Wickenkamp for appellant.

James A. Cada and Edward F. Hoffman, of Cada & Associates, for appellee.

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

CONNOLLY, J.

Under Neb. Rev. Stat. § 25-2706 (Reissue 1995), a county court shall certify a proceeding to the district court when the pleadings or discovery indicates the amount in controversy may exceed $15,000. Although the petition of the appellee, Louis Hunt, claimed damages in the amount of $27,000, the county court failed to certify the case to the district court and entered judgment within its jurisdictional limit of $15,000. The appellant, Lloyd Trackwell, Jr., appealed to the district court. The district court determined that the county court erred in failing to certify the proceedings to the district court and reversed, and remanded for certification. After remand and certification by the

county court to the district court, a jury returned a verdict of $27,368. Trackwell appeals.

In deciding this appeal, we address the following issues:

(1) Whether Trackwell subjected himself to the personal jurisdiction of the county court by invoking the power of the court.

(2) Whether the county court had subject-matter jurisdiction to act in this case even though Hunt's petition indicated an amount in controversy over $15,000.

(3) Whether the district court had personal jurisdiction over Trackwell even though no service of summons was issued by that court.

We determine that Trackwell subjected himself to the personal jurisdiction of the county court, that the county court had jurisdiction to certify the proceedings to district court, and that the district court was not required to reissue service of summons after certification. We affirm.

BACKGROUND

Hunt initially filed this replevin action in county court on June 8, 1998, to recover tools that Hunt alleged Trackwell had converted to Trackwell's own use. The petition claimed that the value of the property sought was $27,368. The summons, issued by the county court on June 9, required service to be completed by June 22. The summons was not served until June 25.

At the hearing the next day, Trackwell, without counsel, claimed that Hunt's counsel had a conflict of interest in the case and should be disqualified. The court instructed Trackwell to file a proper motion and continued the temporary replevin order until a permanent hearing was held. The court noted that there was a jurisdictional question, but Trackwell responded only that he did not believe the value of the tools to be $27,000.

Before the permanent hearing in county court, Trackwell filed the following motions: (1) a motion for a continuance, (2) a motion for an order recusing the judge from presiding in the case because of past contact he allegedly had with her, and (3) a motion for an order requiring Hunt's counsel to withdraw. In addition, Trackwell filed an answer generally denying the allegations in Hunt's petition.

A hearing was held on Trackwell's various motions. After Hunt appeared with new counsel, the court sustained Trackwell's motion to disqualify counsel. Although the judge could not remember any past contact with Trackwell, she recused herself from the case. Accordingly, Trackwell's motion for a continuance was not disposed of at that time. Trackwell then filed another motion for continuance, which was denied after a new judge was assigned to the case. After filing an answer, Trackwell continued to proceed pro se. The county court found that Hunt had been damaged in the amount of $25,000 but entered a judgment against Trackwell for only $15,000, the limit of the court's jurisdiction. See Neb. Rev. Stat. § 24-517 (Supp. 1997).

Trackwell appealed to the district court, assigning, among other errors, that the county court lacked jurisdiction. Because the pleadings indicated that the amount in controversy exceeded $15,000, the district court held that the county court erred by failing to certify the proceedings to district court under § 25-2706. The district court reversed, and remanded the case to county court with instructions to certify the proceedings to district court. The county court filed the certificate of transcript with the district court on March 19, 1999.

After the transcript was filed, Trackwell filed a special appearance in district court, challenging the court's jurisdiction because a service of summons had not been effected. The court overruled the special appearance under § 25-2706. The case was tried to a jury, which returned a verdict in favor of Hunt in the amount of $27,368. Trackwell filed a motion for a new trial, which was overruled. Trackwell timely appeals.

ASSIGNMENTS OF ERROR

Trackwell assigns that the district court erred in finding that (1) it had personal jurisdiction over him because no service of process was effected in the district court after the case was certified to the district court and (2) it had personal jurisdiction over him because (a) the county court lacked subject-matter jurisdiction and (b) service of process was defective in that court.

STANDARD OF REVIEW

[1] A jurisdictional question that 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. *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

[2,3] Statutory interpretation presents a question of law. *Hatcher v. Bellevue Vol. Fire Dept., ante* p. 23, 628 N.W.2d 685 (2001). When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001).

ANALYSIS

Trackwell argues two jurisdictional points. First, he argues that all actions taken by the county court were void ab initio due to its lack of subject-matter jurisdiction, and therefore, the county court could not have acquired personal jurisdiction. He also contends that the county court could not have obtained personal jurisdiction because service of process was defective in that court. Second, he argues that because the county court did not have personal jurisdiction, it could not have conferred personal jurisdiction upon the district court. He argues that the district court was therefore required to issue a summons for service of process upon him after the certification before it could acquire personal jurisdiction.

Personal Jurisdiction in County Court

[4,5] Trackwell first contends that because the county court did not have subject-matter jurisdiction over the amount in controversy, it could not have acquired personal jurisdiction over him. But the two are not synonymous. See *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997) (concluding that district court had personal jurisdiction but not subject-matter jurisdiction). Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Id*. While the lack of subject-matter jurisdiction cannot be waived nor the existence of subject-matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction

may be waived and such jurisdiction conferred by the conduct of the parties. *Id.*

There is no merit to Trackwell's contention that the county court could not have acquired personal jurisdiction over him if it lacked jurisdiction over the subject matter. But Trackwell also contends that the county court failed to obtain personal jurisdiction because service of process was defective in that court.

[6,7] For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996).

[8,9] While Trackwell was proceeding pro se, he filed a motion for an order to recuse the county court judge and to require that Hunt's attorney withdraw over a conflict of interest. Moreover, he filed two motions for a continuance in the county court, and we have specifically held that a motion for a continuance constitutes a general appearance that confers jurisdiction over the moving party. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). Most importantly, he filed an answer generally denying the allegations, invoking the court's power and making a general appearance. See *Concordia Teachers College v. Neb. Dept. of Labor, supra* (concluding that defendants' amended answer invoking court's power on issue other than personal jurisdiction conferred on court personal jurisdiction). Trackwell's answer and various requests for relief invoking the court's power subjected him to the personal jurisdiction of the county court.

Subject-Matter Jurisdiction in County Court

Trackwell also contends that all actions taken by the county court were void ab initio due to its lack of subject-matter jurisdiction because Hunt's petition indicated that the amount in controversy exceeded $15,000.

[10,11] Subject-matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the

general subject matter involved. *Falotico v. Grant Cty. Bd. of Equal., ante* p. 292, 631 N.W.2d 492 (2001). A ruling made in the absence of subject-matter jurisdiction is a nullity. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998).

Although the statute has since been amended, at the time that this action was filed, § 24-517(4) gave county courts concurrent jurisdiction with district courts in all civil actions when "the amount in controversy does not exceed fifteen thousand dollars. When the pleadings or discovery proceedings in a civil action indicate an amount in controversy may exceed fifteen thousand dollars, the county court shall certify the proceedings to the district court as provided in section 25-2706."

Under this section, the county court lacked subject-matter jurisdiction to determine Trackwell's case because the petition indicated an amount in controversy of $27,368, and § 24-517(4) required the county court to certify the proceedings to district court. This conclusion is supported by the Legislature's 2001 amendments to § 24-517. See 2001 Neb. Laws, L.B. 269.

[12] Section 24-517(5)(a) now requires the county court, "*upon the request of any party*," to certify civil proceedings to district court when the pleadings or discovery indicates an amount in controversy over $45,000. (Emphasis supplied.) 2001 Neb. Laws, L.B. 269. The certification of a civil proceeding, in which the amount in controversy exceeds the statutory limit, is now mandatory only upon the request of a party. By implication, at the time of this action, the certification was mandatory even without a party's request. But § 24-517(4) authorized the county court to certify the proceedings to district court when the amount in controversy exceeded its jurisdictional limit. Further, a county court may be required to certify the proceedings even after the parties have had discovery in a case. Consequently, while the county court was without authority to determine the case, it was not without authority to act. Therefore, on appeal, the district court correctly reversed the judgment and remanded the case with instructions to certify the case to district court.

Trackwell, however, argues that the action did not effectively begin until it was filed in the district court because only that court had jurisdiction to hear and determine the case. He

contends, therefore, that the district court was required to issue a new summons for service of process before the court could acquire personal jurisdiction over him. We analyze that argument in the context of § 25-2706.

Personal Jurisdiction in District Court

[13] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001).

At the time this action was filed, the applicable version of § 25-2706 provided:

> The county court shall certify proceedings to the district court of the county in which an action is pending . . . when . . . there is an amount in controversy in excess of fifteen thousand dollars . . . . *The action shall then be tried and determined by the district court as if the proceedings were originally brought in such district court* . . . .

(Emphasis supplied.)

[14] By its plain terms, § 25-2706 required no additional action by the parties or the district court to confer personal jurisdiction on the district court once the county court had certified the proceedings. We conclude that service of process or a defendant's voluntary appearance in a county court is effective in district court after the county court has certified the proceedings under this section. While service of process might be required in district court if the county court had never obtained personal jurisdiction, that is not the case here.

CONCLUSION

The district court did not err in overruling Trackwell's special appearance and in finding that it had personal jurisdiction over him because § 25-2706 does not require a district court to issue a new summons for service of process when an action has been certified to it from the county court under this section.

Affirmed.

Hendry, C.J., not participating.

LYLE WILCOX AND JEAN WILCOX, APPELLANTS, V. CITY OF MCCOOK, NEBRASKA, A MUNICIPAL CORPORATION, AND SOUTHWEST NEBRASKA YOUTH SERVICES, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEES.

634 N.W.2d 486

Filed October 19, 2001. No. S-00-481.

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. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
3. **Pleadings.** The issues in a given case will be limited to those which are pled.
4. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
5. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Order vacated, and appeal dismissed.

J. Bryant Brooks, of Brooks Law Offices, P.C., for appellants.

G. Peter Burger, of Burger & Bennett, P.C., for appellee City of McCook.

John A. Gale, of McCarthy, Gale, Moore, Bacon & Hall, for appellee Southwest Nebraska Youth Services, Inc.

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

HENDRY, C.J.

INTRODUCTION

Lyle Wilcox and Jean Wilcox appeal from the district court's decision dismissing their petition in error. In their petition, the Wilcoxes requested that the district court reverse the McCook

City Council's decision of May 17, 1999, approving a special exception application.

FACTUAL BACKGROUND

In 1999, Southwest Nebraska Youth Services, Inc. (Southwest), submitted an application for a special use exception. This application concerned a building located in McCook, Nebraska, within an area zoned residential medium density. Southwest intended to use the building as a multiple-family dwelling, medical-health facility, and school for state wards and other youths. The McCook zoning ordinances list multiple-family dwellings, medical-health facilities, and schools as special exceptions in residential medium density zones.

Previously, in 1998, the McCook City Council denied a separate special use exception application by Southwest concerning the same building. The 1998 application proposed to use the building as an "intermediate school . . . multiple family dwelling" and provide "governmental services" for state wards and other youths, including services for domestic and sexual abuse victims. The city council denied the 1998 application by a vote of two in favor, two against, and one abstaining.

Southwest's second application was submitted to the city council in 1999. The city sent out notices to all adjoining landowners concerning Southwest's 1999 special exception application. Some of the landowners initiated a petition drive against Southwest's application. The record indicates they collected approximately 108 signatures against Southwest's proposal. On May 17, 1999, after public notice and public hearings, the city council met and considered Southwest's second application. The council voted three in favor, one against, and one abstaining. Immediately after the vote, a question was raised as to whether a simple majority was sufficient to pass the application pursuant to Neb. Rev. Stat. § 19-905 (Reissue 1997). Notwithstanding this concern, the mayor announced the application had passed.

On June 3, 1999, the city council published notice in the McCook Daily Gazette newspaper that the next council meeting would be held on June 7, 1999. Listed on the agenda for the meeting was a motion by a council member to reconsider "the special

exception request for Southwest Nebraska Youth Services, Inc." This council member had voted "no" on Southwest's application at the May 17 meeting. Also included on the agenda for the June 7 meeting was a proposal that the city council consider "additional restrictions" on Southwest's use of the property.

At the June 7, 1999, meeting, the city council reconsidered Southwest's application. After including some additional restrictions concerning hours of operation and other related matters, the city council approved the application with four votes in favor of the proposal and one against.

On June 10, 1999, 3 days after the special exception request had been reconsidered and approved, the Wilcoxes filed a petition in error under Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2000). The Wilcoxes are adjoining landowners to the proposed youth center.

In their petition, the Wilcoxes asked the district court to reverse the city council's May 17, 1999, decision. The petition alleged four grounds in support of the requested relief. First, the Wilcoxes asserted that the 1999 application was barred by the previous 1998 application under a theory of res judicata. Second, they contended that Southwest's proposed use did not comply with the permitted special exception uses listed in the McCook zoning ordinances. Third, they argued that the application failed to receive a three-fourths majority vote at the May 17 meeting as required by § 19-905. Finally, the Wilcoxes argued that they were not provided due process by the city council. The petition did not ask for any relief from the city council's decision of June 7.

The appellees, Southwest and the City of McCook, filed answers in which the city asserted the issues raised by the Wilcoxes were "rendered moot by the vote in favor of the application by three-fourths (3/4ths) of the City Council on June 7, 1999." No amendments to the Wilcoxes' petition were requested or made.

The court rendered its decision on the Wilcoxes' petition in error on April 3, 2000. The court made various findings of fact, determined the matter in the appellees' favor, and dismissed the petition.

The Wilcoxes appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court

and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The Wilcoxes assert the district court erred in (1) failing to find that Southwest's 1999 application for a special exception was barred by res judicata, (2) failing to find that the Wilcoxes' right to due process was violated, and (3) failing to address whether the intended use of the property by Southwest was a permitted special exception.

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. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000).

ANALYSIS

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. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

[2] The appellees argue that the Wilcoxes' appeal from the city council's decision on May 17, 1999, is moot. "A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive." *Hron*, 259 Neb. at 263, 609 N.W.2d at 383. See, also, *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001).

[3] The appellees contend that because of the subsequent actions taken by the city council on June 7, 1999, the issues presented by the May 17 decision are no longer alive. See *Hron, supra*. The record shows that the Wilcoxes' petition in error only challenges the May 17 decision by the city council. "[T]he

issues in a given case will be limited to those which are pled." *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 73, 615 N.W.2d 460, 468 (2000). Accord *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). The record further shows that on June 7, the May 17 decision by the city council was reconsidered and the city council approved Southwest's application, with some additional restrictions.

[4] Accordingly, any determination regarding the May 17, 1999, decision would be purely advisory. "In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory." *US Ecology v. State*, 258 Neb. 10, 18, 601 N.W.2d 775, 780 (1999) (citing *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999)). We therefore determine that the Wilcoxes' appeal is moot.

[5] We recognize that the court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Hron v. Donlan, supra*. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

While the questions presented in this case are of a public nature, we find that application of the public interest exception would not be appropriate. The issues presented in this appeal do not inherently evade appellate review. See *Putnam*, 256 Neb. at 274, 589 N.W.2d at 844 ("[i]t is generally inappropriate for an appellate court to review a moot case that does not evade review as a result of a transitory setting"). Thus, we decline to apply the public interest exception to reach the merits of this case.

CONCLUSION

The Wilcoxes' petition in error did not raise any issue involving an actual case or controversy necessary for the district court

to exercise judicial power. Accordingly, the decision of the district court is vacated, and the appeal is dismissed as moot.

ORDER VACATED, AND APPEAL DISMISSED.

HOME PRIDE FOODS, INC., A NEBRASKA CORPORATION, APPELLEE, v. CHRISTOPHER S. JOHNSON ET AL., APPELLANTS.

634 N.W.2d 774

Filed October 19, 2001. No. S-00-514.

1. **Trade Secrets: Words and Phrases.** The definition of a trade secret is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
3. **Trade Secrets: Actions: Damages.** In an action for damages, whether information sought to be protected rises to the level of a trade secret under the Trade Secrets Act is a question of fact.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
5. **Motions to Dismiss: Waiver: Appeal and Error.** A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal.
6. **Trade Secrets: Words and Phrases.** A customer list can be included in the definition of a trade secret under Neb. Rev. Stat. § 87-502 (Reissue 1999).
7. **Trade Secrets: Restrictive Covenants.** Where time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market.
8. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
9. ____: ____. A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
10. **Damages: Evidence.** Where a plaintiff presents evidence of only gross profits and fails to provide evidence of expenses and overhead costs from which net profits can be calculated, the plaintiff has failed to present sufficient evidence of lost profits.
11. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
12. **Damages: Injunction.** It is impermissible double recovery for a court to award damages for future use and, at the same time, issue a permanent injunction barring such use.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellants.

Clay M. Rogers and Patrick E. Griffin, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, for appellee.

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

CONNOLLY, J.

The appellee, Home Pride Foods, Inc. (Home Pride), sued the appellants, Christopher S. Johnson, Jason J. Johnson, and Consumer's Choice Foods, Inc. (Consumer's Choice), for a permanent injunction and damages under Nebraska's Trade Secrets Act, Neb. Rev. Stat. § 87-501 et seq. (Reissue 1999). After a bench trial, the district court determined that the appellants had used a customer list misappropriated from Home Pride. The court determined the list was a trade secret, issued a permanent injunction, and awarded damages.

This appeal presents the questions, Is a customer list a trade secret, and if so, was the list used by the appellants? Because we decide these issues in Home Pride's favor, we inquire whether Home Pride proved damages. We determine that the district court erred in calculating damages by awarding an amount based on a 25-percent net profit when there is no evidence in the record to support that finding. We also conclude that the court erred in awarding damages for future use of the list when a permanent injunction was also entered. We reverse the district court's award of damages and remand the cause for further proceedings.

BACKGROUND

FACTS

Home Pride and Consumer's Choice are competing home food service companies. The companies sell and deliver food products and appliances to their customers.

The parties stipulated that the appellants inappropriately came into possession of the customer list owned by Home Pride.

The appellants stipulated that they paid $800 for the list and knew the list was stolen when they purchased it. The parties further stipulated that under a search warrant for the Consumer's Choice premises related to the purchase of stolen goods, police found copies of the list at the Consumer's Choice premises. The list contains information about the customers such as their names, addresses, telephone numbers, amount of food ordered, and number of reorders of food.

Bryce Johnson, no relation to Christopher Johnson and Jason Johnson, is the president of Home Pride. Before starting Home Pride, he and Christopher Johnson and Jason Johnson were employed by Nebraska Prime Meats (Nebraska Prime). In 1996, Bryce Johnson purchased the customer database of Nebraska Prime and its service contracts.

After the list was purchased, an employee of Nebraska Prime loaded the list into Home Pride's computers. Bryce Johnson testified that there were three different passwords on each computer and that the paper files were also protected. Bryce Johnson, his secretary, and his sales manager were the only people who had access to the customer list. In addition, Home Pride's sales representatives were subject to covenants not to compete and not to divulge trade secrets, including customer lists.

The customer list is a valuable asset of a food service company. Bryce Johnson described the list as "priceless" and testified that if a customer list got into the hands of a competitor, the results could result in significant losses.

Testifying about damages, Bryce Johnson stated the average customer at Home Pride reorders food 4½ times and that the national average is four to eight reorders. According to Bryce Johnson, Home Pride's gross margin of profit was 60 percent and between 30 and 50 percent on reorders. He stated the average value of reorders is between $1,200 and $1,500. After discovery proceedings, he compared customer files at Consumer's Choice against Home Pride's customer list and found that many of the names matched up. By cross-referencing the list, he determined the receipts from Consumer's Choice of the names that matched was $33,605. He assumed the average number of reorders from these customers would be four reorders each.

Using a gross profit margin of 60 percent, he calculated that Home Pride had lost approximately $80,000 in profits because of the theft of the customer list.

Kenneth E. McLaughlin, the previous owner of Nebraska Prime, corroborated Bryce Johnson's testimony. He testified that the customer list contained names of both active and inactive customers. McLaughlin explained that a food service business could be harmed if others knew the customers and the prices, because the company could then be undercut. According to McLaughlin, without the customer list, no business can exist.

McLaughlin testified that when he owned Nebraska Prime, it made every attempt to keep its customer list secret. Nebraska Prime kept the list password protected, and the list was never sold to anyone other than Home Pride. He testified that employees were given lists of people to call but that these employees did not have the master list. He also stated that the Nebraska Prime employee who loaded the list did not have the authority to have the list other than to install it in Home Pride's computers.

McLaughlin testified that between 50 percent and 60 percent of customers would reorder food. According to McLaughlin, most customers would stay with the service for 3 years because they had a service agreement or had bought a freezer through Nebraska Prime which entitled them to a discount on food. He stated that this would lead to between five and six reorders because a customer would have to place that many reorders in order to benefit from the discounts during the period that the appliance was financed.

Home Pride also called two expert witnesses whose testimony generally agreed with Bryce Johnson's testimony about Home Pride's gross profits and the value of the list. Both testified that Home Pride lost $80,000 in gross profits.

Shannon Tews, an acquaintance of Christopher Johnson, corroborated that the appellants misappropriated the use of the list. Tews testified that Christopher Johnson told her he had bought disks copied from Nebraska Prime. She also stated that Christopher Johnson told her that he and his fiance, Kimberly Stigge, the sales manager of Consumer's Choice, were going to contact people within 1 to 2 months so as not to raise eyebrows.

The appellants called Michael Schmidt, an employee of Consumer's Choice. Schmidt was previously employed by Nebraska Prime, where he was in charge of operations. He testified that Nebraska Prime had between 300 and 400 active customers and that there were between 2,000 and 3,000 names on the list. He stated that the list at Nebraska Prime was printed and not password protected. According to him, 40 to 50 percent of Nebraska Prime's business was derived from day-care providers, contrary to Bryce Johnson's claim that Home Pride did not solicit day-care centers. He stated that the average reorder rate is one or two and that the net profit on reorders at Consumer's Choice is 10 percent.

On cross-examination, Schmidt admitted that in April 1999, Consumer's Choice had purchased a home food service business owned by him and had retained him as a consultant. As part of that transaction, he receives between 10 and 20 percent of the sales price from people that he hires and trains for Consumer's Choice. He also conceded that the customer list is an asset of the business.

Stigge testified that the customer list had not been installed on the Consumer's Choice computers and was not used by the appellants. According to Stigge, Christopher Johnson and Jason Johnson did not make sales calls for Consumer's Choice.

Stigge testified there were 40 matches, but 15 of those were acquired by Consumer's Choice before the list was stolen in September 1996. She could not find a file for 1 of the remaining 25 matches. She stated that the rest of the matches were acquired through normal marketing, including day-care provider lists.

Stigge, who had previously been employed by Nebraska Prime as a telemarketer, stated that day-care lists were used at Nebraska Prime, along with other marketing lists. According to her, day-care lists generated the most appointments.

Trial Court's Findings

After the conclusion of Home Pride's case, the appellants moved for a directed verdict, which was overruled. The court entered a detailed order finding in favor of Home Pride. The court did not specifically state that it found the customer list to be a trade secret. The court did, however, note McLaughlin's

testimony about the value of the customer list. The court also noted the conflicting testimony about whether the list was used and the value placed on the list.

The court then found that Home Pride had established the presence of 40 names from the stolen list on the Consumer's Choice customer database. The court stated that "[a]t this point, it would seem that the business from those 40 names should, in the absence of other evidence, be attributed to the stolen list." The court then found that Home Pride suffered no damage from those customers of Consumer's Choice acquired before the list was stolen. The court separately addressed the remaining names on the list and found that each customer had been acquired through the use of the stolen list with the exception of three names.

Concerning damages, the court noted that the renewal rate from Nebraska Prime's list was "quite low." The court also noted that most of the customers who were acquired by Consumer's Choice had already purchased a freezer. The court found that this limited the loss to Home Pride since most of the profit lost from those customers would be through reorders or purchases of items other than freezers. The court determined that lost revenues were not the proper measure of damages and that gross profit margins were not reflective of actual damages. The court then determined that there were customers who demonstrated that they were active customers and found those customers represented lost profits, valued at the time of theft at $13,000, or $1,000 per contract. The court calculated the $13,000 based on "25% net profit."

In addition, the court found that the customer list had value because it represented future sales opportunities and provided "real leads in this area." The court found the value of those leads to be $10,000 and stated that "[t]o the extent that this value may represent neither an enrichment to Defendants' or a dollar loss to Plaintiff, it shall be considered a royalty under §87-504." The court awarded Home Pride $23,000 and entered a permanent injunction prohibiting the appellants from continuing to misappropriate the customer list.

ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred in (1) finding that the customer list was a trade secret, (2) finding

that the customer list was used by the appellants, (3) allowing Home Pride a double recovery by entering an order that included damages for both actual damages and unjust enrichment, (4) entering an order for damages without competent evidence to support the award, (5) awarding $10,000 as a reasonable royalty, (6) failing to sustain their motion for a directed verdict, (7) failing to issue specific findings of fact and conclusions of law, and (8) failing to grant their motion for a new trial.

STANDARD OF REVIEW

We first address the appropriate standard of review. Before the enactment of the Uniform Trade Secrets Act in 1988, this court indicated that an action for damages because of the unlawful use of a trade secret was an action at law, subject to a clearly erroneous standard of review. *Henkle & Joyce Hardware Co. v. Maco, Inc.*, 195 Neb. 565, 239 N.W.2d 772 (1976). In a later case, we held that an action for both an injunction and damages for misappropriation of a trade secret was in equity and subject to a de novo standard of review. *Garner Tool & Die v. Laux*, 204 Neb. 717, 285 N.W.2d 219 (1979). See, also, *Selection Research, Inc. v. Murman*, 230 Neb. 786, 433 N.W.2d 526 (1989) (stating that trade secret action seeking injunction and filed before Trade Secrets Act went into effect was action in equity).

We have not addressed what the appropriate standard of review is in an action brought under Nebraska's Trade Secrets Act for money damages. Courts in other jurisdictions that have adopted the Uniform Trade Secrets Act have treated an action for damages under the act as an action at law. See, e.g., *Elm City Cheese Co. v. Federico*, 251 Conn. 59, 752 A.2d 1037 (1999) (citing cases applying clearly erroneous standard of review); *Basic American, Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999); *Weins v. Sporleder*, 569 N.W.2d 16 (S.D. 1997). Thus, courts have held that the definition of a trade secret is a matter of law under the act. But, the question of whether information sought to be protected by the act rises to the level of a trade secret is one of fact for the trial court that is subject to a clearly erroneous standard of review. *Id.*; *Bernier v. Merrill Air Engineers*, 770 A.2d 97 (Me. 2001).

[1-4] We hold that the definition of a trade secret is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *In re Guardianship & Conservatorship of Donley, ante* p. 282, 631 N.W.2d 839 (2001). Whether information sought to be protected rises to the level of a trade secret under the act is a question of fact. In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000); *Blue Creek Farm v. Aurora Co-op Elev. Co.*, 259 Neb. 1032, 614 N.W.2d 310 (2000).

ANALYSIS

Motion to Dismiss

[5] The appellants contend that the district court erred in failing to grant their motion for a directed verdict. The appellants made a motion for a directed verdict at the end of Home Pride's case, which was overruled. We interpret this motion to be the same as a motion to dismiss. After the motion was overruled, the appellants presented evidence and did not renew their motion at the end of their case. A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal. *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995), *overruled in part on other grounds, Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). We determine that the appellants' argument on this issue has been waived.

Determination That Customer List Was Trade Secret

The appellants argue that the court erred in determining that the customer list was a trade secret. Section 87-502(4), of the Trade Secrets Act, defines a trade secret as

> information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable

by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[6] This court has never addressed the question whether a customer list can be included in the definition of a trade secret. Other jurisdictions hold that a customer list can constitute protected information under the Uniform Trade Secrets Act. See, e.g, *Brown v. Ruallam Enterprises, Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001); *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wash. 2d 427, 971 P.2d 936 (1999) (en banc); *Fred's Stores of Miss. v. M & H Drugs*, 725 So. 2d 902 (Miss. 1998); *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 66 Cal. Rptr. 2d 731 (1997). We agree and hold that a customer list can be included in the definition of a trade secret under § 87-502. The question is whether the customer list rises to the level of a trade secret in this case.

[7] The appellants argue that the customer list could be ascertained by proper means through the use of day-care lists and other marketing lists and that therefore, the customer list was not a trade secret. Courts are reluctant to protect customer lists to the extent that they embody information that is readily ascertainable through public sources. *Morlife, Inc. v. Perry, supra*. But where time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market. See *id*. Such lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers. *Id*.

The record contains evidence that the customer list contained information not available from publicly available lists. For example, Bryce Johnson testified that the list provided information on customers who had previously placed orders with Home Pride or Nebraska Prime, and the amounts of those orders. With such information, a competitor could undercut Home Pride's pricing. Moreover, if the information was readily available, why did the appellants pay $800 for a stolen list? We determine that the court was not clearly wrong in finding that the list could not be ascertained through proper means.

The appellants also argue that the list was not password protected or kept secret. The record, however, contains evidence that the customer list had independent economic value and was kept secret. Finally, the appellants do not deny that the list was misappropriated. There was evidence in the record to support the court's finding of fact that the customer list was a trade secret. Thus, the finding of the court was not clearly erroneous.

Determination That Customer List Was Used by Appellants

The appellants next argue that the court erred in finding that the customer list was used by them. The appellants argue that Home Pride failed to present any evidence that the list was actually used.

The record contains evidence that previous customers of Home Pride or Nebraska Prime were contacted by Consumer's Choice and that some of these people received discounts on their orders. The record also contains evidence that some of these previous customers did not initiate the contact with Consumer's Choice. Finally, Home Pride's evidence refuted the contention by Consumer's Choice that many of the customers' names were obtained from day-care providers. Thus, there was circumstantial evidence that Consumer's Choice used the customer list, and it was reasonable for the court to infer from this evidence that the list had been used. See, generally, *Morlife, Inc. v. Perry, supra*. We determine that the court was not clearly wrong in finding that the customer list was used by Consumer's Choice.

Damages for Lost Profits and Unjust Enrichment

The appellants first argue that the court awarded damages for both lost profits and unjust enrichment. The appellants argue that such an award allows a double recovery for the same damages.

Section 87-504 provides:

> [A] complainant shall be entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation

may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Courts are divided on whether a plaintiff may recover damages for both his or her lost profits and damages for unjust enrichment based on the defendant's gain. See Annot., 11 A.L.R. 4th 12 (1982 & Supp. 2001). A majority of courts hold that damages are to be calculated by either the plaintiff's lost profits or the defendant's gain, whichever is greater, but not a combination of the two. See, *id.*; *Saforo & Associates, Inc. v. Porocel*, 337 Ark. 553, 991 S.W.2d 117 (1999). Other courts allow for a combination of lost profits and unjust enrichment damages under certain circumstances that are not present in this case. See Annot., 11 A.L.R. 4th, *supra*.

We do not decide whether a plaintiff may recover both his or her lost profits and the defendant's gained profits because the court awarded damages based only on lost profits. The court did not base an award on the profit gained by the appellants. The court awarded $10,000 representing the value of leads for future sales opportunities gained by Consumer's Choice because of their misappropriation of the list. This figure did not represent the appellants' unjust enrichment and was characterized by the court as a reasonable royalty. Thus, the court did not award a double recovery for both the lost profits of Home Pride and the gain in profits of Consumer's Choice.

Evidence of Lost Profits

The appellants next argue that Home Pride failed to provide sufficient proof of lost profits. In particular, the appellants argue that Home Pride failed to present evidence to support its claim for lost profits and that the evidence of lost profits was based only on gross profit without taking expenses into consideration.

[8,9] While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). We have held that a claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness. *World Radio Labs. v. Coopers & Lybrand*,

251 Neb. 261, 557 N.W.2d 1 (1996). In *World Radio Labs.*, a witness provided an opinion regarding lost profits, but no reliable financial data was provided to support the claim. We held under those circumstances that it was error for the district court to submit the claim for lost profits to the jury.

[10] Further, courts in other jurisdictions hold that the proper method of calculating damages for lost profits is on the basis of lost net profits and not gross profits. See, *Brown v. Ruallam Enterprises, Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001); *Fred's Stores of Miss. v. M & H Drugs*, 725 So. 2d 902 (Miss. 1998). Thus, where a plaintiff presents evidence of only gross profits and fails to provide evidence of expenses and overhead costs from which net profits can be calculated, the plaintiff has failed to present sufficient evidence of lost profits. See *Fred's Stores of Miss. v. M & H Drugs, supra* (reversing damage award based on gross profits).

[11] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

Home Pride presented evidence of only lost gross profits or losses based on Home Pride's gross profit margin. No evidence was provided regarding Home Pride's expenses or overhead costs. There is no evidence in the record to support a damage award for lost profits. The court, however, based its award on an assumption of a 25-percent net profit. Because no evidence was provided that would allow a calculation of net profit to be made, we determine that the court's award of lost profits was clearly erroneous and must be reversed.

Although we determine that there was insufficient evidence for the court's award of damages for Home Pride's lost profits, we note that evidence was presented regarding the net profit of Consumer's Choice. The net profit realized by Consumer's Choice is recoverable as unjust enrichment as a result of the misappropriation. The record contains testimony from Schmidt

that Consumer's Choice earned a 10-percent net profit on reorders of food. Accordingly, we remand for a determination of damages based on the unjust enrichment to Consumer's Choice.

Award of Royalty

The appellants argue that the court's award of $10,000 as a reasonable royalty is not allowed under the Trade Secrets Act. The court awarded an additional $10,000 for the value of future sales generated by the misappropriation of the list. The court also permanently enjoined the appellants from further use of the list.

[12] Courts in other jurisdictions have held that it is impermissible double recovery for a court to award damages for future use and, at the same time, issue a permanent injunction barring such use. See, *Sonoco Products Co. v. Johnson*, 23 P.3d 1287 (Colo. App. 2001) (citing cases); *Robert L. Cloud & Associates v. Mikesell*, 69 Cal. App. 4th 1141, 82 Cal. Rptr. 2d 143 (1999).

The court's award for the value of future sales is inconsistent with the issuance of a permanent injunction. Home Pride requested, and was given, a permanent injunction. The court's award of $10,000 for future sales was an impermissible double recovery and is reversed.

Remaining Assignments of Error

The appellants also assign that the court erred in failing to issue specific findings of fact and conclusions of law and in failing to sustain a motion for a new trial. We have reviewed these assignments of error and determine they are without merit.

CONCLUSION

We determine that a customer list can be a trade secret under the Trade Secrets Act. We further determine that the court was not clearly wrong in determining that the customer list was a trade secret under the facts of the case and that it was used by the appellants. We determine, however, that the court erred in awarding damages for lost profits when no evidence of Home Pride's net profits was provided. We further determine that the court erred in awarding $10,000 in damages for future use of the customer list when a permanent injunction had also been issued.

We reverse the award of damages. Because there is evidence of the net profit earned by Consumer's Choice, we remand for a recalculation of damages.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

V.C., APPELLANT, V. THOMAS K. CASADY, CHIEF OF POLICE, CITY OF LINCOLN, NEBRASKA, POLICE DEPARTMENT, AND DON LEUENBERGER, DIRECTOR, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

634 N.W.2d 798

Filed October 26, 2001. No. S-99-1435.

1. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.
2. **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.
3. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
4. **Trial: Evidence: Appeal and Error.** An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence.
5. **Equity: Statutes.** Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity.
6. **Equity: Jurisdiction.** Jurisdiction of a court of equity refers to two distinct concepts: (1) the power of a court to render a valid decree and (2) the propriety of granting the relief sought.
7. **Courts: Arrests: Records.** Courts which recognize an inherent power to expunge arrest records have tempered this power by requiring that it be exercised sparingly and only in extraordinary circumstances.
8. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.
9. **Constitutional Law: Due Process.** An injury to reputation alone is not enough to create a liberty interest, protected by the Due Process Clause of the U.S. Constitution, apart from some more tangible interests such as employment.
10. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled.

11. **Equity: Records: Appeal and Error.** The reservation of possible judicial review of police records in cases of overriding equitable considerations, based on the violation of established legal rights, is to provide a remedy in the rare case where extraordinary circumstances so warrant.
12. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
13. **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.
14. **Rules of Evidence: Proof.** For evidence to be relevant under Neb. Rev. Stat. § 27-401 (Reissue 1995), all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

John E. Beltzer, of DeCamp Legal Services, P.C., for appellant.

Dana W. Roper, Lincoln City Attorney, and Connor L. Reuter for appellee Thomas K. Casady.

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

GERRARD, J.

NATURE OF CASE

V.C., the appellant, sued Thomas K. Casady, chief of the Lincoln Police Department (LPD), and Don Leuenberger, director of the Nebraska Department of Health and Human Services (DHHS), seeking an order directing Casady and Leuenberger to expunge any record of an LPD investigation into an allegation that the appellant had sexually molested a child, C.C., who was then 9 years old. The district court determined that it had jurisdiction to issue such an order, but that the appellant was not entitled to relief. The appellant filed this appeal.

FACTUAL BACKGROUND

POLICE INVESTIGATION

On May 23, 1996, a police officer with the LPD generated an incident report based on information provided to him by C.C.'s mother and by a Lincoln attorney. The police officer was first called by the attorney, who was representing the mother in a

custody dispute with C.C.'s father. The attorney reported that the mother thought that C.C. might have been sexually abused by the appellant, a friend of the father's. The police officer later received a telephone call from the mother and proceeded to investigate.

As part of his investigation, the police officer interviewed C.C. at C.C.'s school. The police officer also spoke to the counselor at C.C.'s school and reviewed a deposition of the father that had been in the possession of the mother's attorney. The police officer then dictated a supplemental investigation report. The police officer concluded that there was no evidence of a sexual assault. Since there was no evidence of a crime, no charges were filed.

Briefly summarized, the police officer's supplementary investigation report states that while there was no evidence that the appellant had abused C.C., the police officer did find the appellant's relationship with the child to be peculiar and inappropriate and expressed these concerns to C.C. and the father. The report recounts the mother's explanation of the situation to the police officer as follows: The mother had been employed in the appellant's office, and the appellant became acquainted with C.C. when the mother brought C.C. to work. The appellant became C.C.'s godfather and became extremely involved in C.C.'s life. The mother became concerned and began restricting the appellant's contact with C.C. The mother then left the appellant's employment. According to the police officer's recitation of the mother's statements, the appellant then befriended the father and provided the father with substantial financial support in exchange for being permitted to spend time with C.C.

LPD Recordkeeping Procedures

Casady testified regarding the LPD's retention and use of police reports. Generally, Casady drew a distinction between incident reports and investigation reports.

Incident reports are maintained as both a hard copy of a written report and as an electronic record containing some of the information on the officer's written report. Incident reports contain the name of the victim, but not the name of any suspects. The incident report in this case, contained in exhibit 3, identifies only C.C. as the victim and the LPD officer who prepared the report.

The electronic incident report records are accessible to the LPD's police officers and civilian employees who have been determined to need access to those records in the course of their duties. Police incident reports are public records, available to the general public upon request. In addition, the FBI is provided with and maintains records of code numbers, the nature of the event, and the date of each incident report for the purpose of compiling national crime statistics, but the FBI does not have access to the report and is not given any identifying information.

A supplementary investigation report is a narrative report about any case or information that an officer cares to prepare. Such a report names all the persons involved in the case, including suspects. These reports are electronic records and are not regularly kept as hard copies. They may be accessed by the LPD's police officers and civilian employees who need to access them. Case investigation reports and additional case investigation reports are maintained as hard copies, and not as electronic records. They include names and details of the investigation.

Investigation reports are not available to the general public, including victims, without a subpoena or a court order. Governmental officials or agencies charged with criminal investigatory responsibilities may be provided with copies of such reports upon request. Such officials or agencies include federal law enforcement agencies, courts, probation officers, probation departments in Nebraska, and DHHS in child abuse and neglect investigations. Military agencies charged by law with criminal investigative responsibility, such as the Naval Investigative Service, might also access investigation reports. Federal civil service personnel, however, would not be able to get copies of investigation reports.

The LPD has extensive rules and regulations about the distribution of information that are rigorously enforced. Reports are kept in a secure area and, when discarded, are securely recycled and destroyed.

Casady also testified at length regarding the utility of such records to the LPD. Casady stated that the reports document the LPD's investigation in the event that questions arise about whether an investigation has been handled properly; for instance, Casady noted that police investigations sometimes result in litigation.

Casady also stated that the reports preserve a record of the investigation in case allegations are made in the future, either by C.C. or against the appellant. Casady also testified that the reports would provide documentation if C.C. was ever convicted of a crime and his childhood history was a relevant issue in sentencing.

Casady stated that if anyone ever wanted testimony from the investigating police officer or anyone else at the LPD regarding the investigation, the police reports would provide the only record. Casady also testified that the reports help him to provide oversight to ensure competent investigations, noting that there is occasionally a need to investigate the death of a child regarding whom there have been previous reports or referrals. Casady testified that in his opinion, there is a valid place in police reports for clearly noted opinions.

Casady admitted that if there was some way of guaranteeing that nothing would ever come up in the future that would involve this case, then the police reports would have no continuing utility.

PROCEDURAL BACKGROUND

The appellant filed an "Amended Petition in Equity" against Casady, alleging that the LPD reports on file were untrue and injurious to his reputation. The appellant sought to require Casady to deliver to him all of the LPD documents and records in the case. The appellant also asked the district court to order Casady to purge the LPD records and to identify all the persons who had been informed of the records. The appellant's petition also named Leuenberger and the Lancaster County Attorney as parties and sought to compel those parties to purge their records as well.

The district court subsequently sustained a demurrer by the Lancaster County Attorney and dismissed him from the case. The district court overruled demurrers filed by Casady and Leuenberger, concluding that the district court had the power to act in equity even in the absence of legislative authority. The court ruled, however, that trial was to be limited to the records themselves, concluding that since the relevant issue was the harm that could be done by the records, any attempt to attack the veracity of the records was irrelevant.

At trial, the appellant made several offers of proof regarding evidence that was intended to undermine the credibility of the

facts and conclusions stated in the police reports. A lawyer, who defended the appellant with respect to charges made by the mother in a separate civil proceeding, would have testified that the mother's attorney told this lawyer that if the appellant stopped helping the father in his custody proceeding, another civil action brought by the mother against the appellant would "go away." This testimony was excluded as irrelevant.

A licensed clinical psychologist would have testified that he had met with and assessed the appellant to determine if there was evidence of pedophilic tendencies. The psychologist would have testified that he reviewed the police report and concluded that there was no evidence that the appellant had pedophilic tendencies. Casady's relevance objection was sustained.

C.C.'s father would have testified about his contact with the LPD investigating officer and the events of the investigation. The appellant would have testified about his relationship with C.C. and why the appellant took the interest in C.C. that he did. Relevance objections were sustained to this proffered testimony. Attempts to attack the accuracy of statements in the reports were also made during the investigating officer's testimony, but Casady's objection was sustained, and the testimony was stricken. In addition, the district court excluded the deposition of an employee of the appellant and the deposition of the mother, which the appellant offered to further attack the substance of the police reports.

The appellant was permitted to testify at trial regarding the potential harm to him of the continued existence of the reports. The appellant recalled that he was required, on application to another state's bar, to have police records sent to the other state's bar association. The appellant also testified that he has on several occasions obtained security clearances: twice when working as an electrical engineer in the missile industry, again as a civilian employee of the Navy, and also when performing a foreign patent application for the Army. The appellant testified that police records were obtained by the FBI in making those checks. The appellant also testified that he had recently obtained an application to the Big Brother program that required him to sign a release authorizing the program to obtain police records. The appellant testified, "I'm always afraid that that matter will

be resurrected and used against me, although I think that it wasn't meritorious at all."

During trial, at the close of the plaintiff's evidence, the district court entered what it referred to as a directed verdict in favor of Casady and Leuenberger and dismissed the case. The district court found that the evidence failed to establish that the continued existence of the reports carried a potential harm to the appellant. The undisputed evidence, according to the district court, was that the reports were released only through legal process and that the appellant had proved only the legitimate need to maintain such records. V.C. appeals.

ASSIGNMENTS OF ERROR

The appellant assigns that it was error for the trial court to (1) find that the LPD and DHHS have a legitimate need to retain the reports sought to be expunged; (2) fail to find harm or potential harm to the appellant's basic legal interests; and (3) exclude evidence relevant and material to a determination of the competence, reliability, and accuracy of the investigation that provides the basis for the generation of the records.

Casady has also filed a "Suggestion of Mootness" with this court. See *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999). Casady argues that because of this proceeding and others, and due in part to the appellant's own actions, the content of the police reports has already been made a part of the public record. We have considered Casady's argument that this fact renders the instant appeal moot, and we find the argument to be without merit.

STANDARD OF REVIEW

[1] On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Klundt v. Karr*, 261 Neb. 577, 624 N.W.2d 30 (2001); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[2-4] 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. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001); *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Genetti, supra*. An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence. *Nickell, supra.*

ANALYSIS

We first address that portion of the district court's judgment that dismissed the appellant's claim against Leuenberger. While the appellant alleged that copies of the police reports at issue had been provided to DHHS and were maintained in DHHS' records, there was no evidence at trial to substantiate the allegation that DHHS had maintained copies of any of the reports that the appellant sought to have expunged.

[5] Moreover, to the extent that the appellant's petition addresses information maintained in the Abused or Neglected Child Registry, there is a statutory remedy available that allows for the expunction of such information, but there is no indication in the record that the appellant followed the statutory procedure. See, generally, *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity. See *Genetti, supra*.

Given the failure of the record to establish that the appellant pursued an available statutory remedy, or to establish even that DHHS maintained copies of the reports that the appellant sought to have expunged, we conclude that the district court did not err in dismissing the appellant's claims against Leuenberger. However, the statutes providing for expunction of criminal history record information, as maintained by the LPD, do not include investigative information such as the reports at issue in this case. See Neb. Rev. Stat. §§ 29-3506 (Reissue 1995) and 29-3523 (Cum. Supp. 2000). There is, therefore, no statutory procedure

that applies to the police reports that the record reflects are maintained by the LPD, and we proceed to consider the appellant's assignments of error as they relate to his claims against Casady.

Denial of Relief

We turn first to the issue whether the district court erred when it dismissed the appellant's cause of action and denied the relief he requested. The appellant's first two assignments of error are essentially addressed to the appellant's claim that he proved his entitlement to the relief requested. Underlying the issue, however, are the more fundamental questions whether, and under what circumstances, the equitable remedy of expunction is within the jurisdiction of the district court.

[6] Juridically, jurisdiction of a court of equity refers to two distinct concepts: (1) the power of a court to render a valid decree and (2) the propriety of granting the relief sought. *Doe v. Comdr., Wheaton Police Dep't*, 273 Md. 262, 329 A.2d 35 (1974). Assuming, arguendo, that expunction is available as an equitable remedy, the first question is under what circumstances the power of a court to expunge may be invoked.

Most of the reported cases that address the propriety of expunction as an equitable remedy have done so in the context of arrest records, rather than police reports. In cases upholding the theory of " 'inherent equitable power to expunge,' " the expunction of such records is a process of weighing the interests of society and of the individuals involved. *In re Interest of P.L.F.*, 218 Neb. 68, 71, 352 N.W.2d 183, 185 (1984).

[7] Courts which recognize an inherent power to expunge arrest records have tempered this power by requiring that it be exercised sparingly and only in extraordinary circumstances. *Toth v. Albuquerque Police Dept.*, 123 N.M. 637, 944 P.2d 285 (N.M. App. 1997). See, e.g., *Camfield v. City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001); *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977); *In Interest of E.C.*, 130 Wis. 2d 376, 387 N.W.2d 72 (1986); *Bradford v. Mahan*, 219 Kan. 450, 548 P.2d 1223 (1976); *Journey v. State*, 850 P.2d 663 (Alaska App. 1993), *aff'd* 895 P.2d 955 (Alaska 1995); *State ex rel. Peach v. Tillman*, 615 S.W.2d 514 (Mo. App. 1981); *People v. Michael L.*, 80 Misc. 2d 292, 362 N.Y.S.2d 989 (1975). Notably, no court has

questioned the legitimacy or importance of the government's interest in obtaining and retaining records dealing with individuals who pass through our criminal justice system, none has viewed inherent judicial authority to expunge as a power to be used routinely, and none has suggested that the government's interest in maintaining accurate criminal histories can be outweighed in any but exceptional circumstances. See *Journey, supra*.

The logic upon which this requirement is based is that while expunction may be available as an equitable remedy, that remedy may only be properly invoked where the court is afforded with authority to act, by the need to remedy the invasion of legally protected rights. See, *In Interest of E.C., supra*; *Bradford, supra*. While the judicial remedy of expunction may be inherent, and not dependent upon express statutory provision, it exists to vindicate substantial rights provided by statute as well as by organic law. See *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

Where constitutional questions are involved, the litigant has the right to raise them in a court of equity and such court has the right to consider them. *Doe, supra*. In cases to which a statutory scheme does not extend, however, the court's inherent power is limited to instances where the petitioner's constitutional rights may be seriously infringed by retention of his or her records. *In re R. L. F.*, 256 N.W.2d 803 (Minn. 1977).

For instance, a number of courts have ordered expunction of local police records as an appropriate remedy in the wake of police action in violation of constitutional rights. *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 374 N.E.2d 272 (1978). Federal courts have ordered expunction of arrest records where the arrests were made in violation of the constitutional rights of the individuals arrested. See, e.g., *Menard, supra* (individual arrested and held without probable cause); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973) (mass arrests, without probable cause, of thousands of individuals protesting American military involvement in Southeast Asia); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (arrests used to intimidate minority voters in violation of Voting Rights Act).

Assuming, then, that expunction is an available remedy for a court of equity, the issue facing this court is whether the appellant's evidence, taken as true as required by our standard of

appellate review, establishes the extraordinary circumstances necessary for expunction to be ordered. Because the appellant's evidence, taken as true, fails to establish the invasion of a legally protected right, we conclude that the appellant did not prove the extraordinary circumstances that would be necessary to support an order expunging the police investigative reports at issue.

[8] The appellant's brief argues that the retention by the LPD of the police reports presents violations of (1) his right to liberty as protected by the Due Process Clause and (2) his right to privacy. We first note that these claims were not clearly articulated by the appellant in his pleadings or at trial. Generally, an issue not presented to the trial court may not be raised on appeal. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996). However, it appears that the district court, evidently being of a generous disposition, nonetheless evaluated the appellant's pleadings and evidence to determine if the appellant's rights to privacy or due process had been violated. Therefore, we consider each argument in turn.

[9,10] The appellant argues that the LPD's retention of the police reports deprives him of liberty without due process of law, in violation of the Due Process Clause of the U.S. Constitution. However, the only injury identified in the appellant's petition is harm to his reputation. It is well established that an injury to reputation alone is not enough to create a liberty interest, protected by the Due Process Clause, apart from some more tangible interests such as employment. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). See, *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). Although the appellant expands upon his due process argument on appeal, the appellant's operative petition clearly does not allege a violation of a liberty interest protected by the Due Process Clause. The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000). Given the appellant's failure to plead, and the failure of the evidence presented at trial to substantiate, the deprivation of any protected liberty interest, we find the appellant's alleged due process claims to be without merit.

The appellant did not specifically plead a violation of his right to privacy either, but the district court, in overruling Casady's and Leuenberger's demurrers, concluded that the appellant's petition alleged facts that would support a finding that the appellant's right to privacy had been violated. The evidence presented at trial, however, failed to show such a violation.

The appellant's argument is premised on the possibility that the police investigative reports will be disseminated and cause him harm. In the first place, we note that the uncontradicted evidence presented at trial indicates that the police reports are not public records and are disseminated only to other law enforcement agencies or when subject to legal process.

Moreover, in *Paul, supra*, the U.S. Supreme Court rejected a claim that a plaintiff's right to privacy had been violated by the dissemination of the fact that he had been arrested for shoplifting. The Court recognized that " 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power." 424 U.S. at 712-13. However, the Court concluded that the plaintiff's claim

> [was] based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

424 U.S. at 713. See, also, *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202 (3d Cir. 1991) (information contained in police report not protected by constitutional right of privacy); *J. P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (interest asserted in nondisclosure of juvenile court records not protected by constitutional right to privacy); *Roth v. Reagen*, 422 N.W.2d 464 (Iowa 1988) (entry in child abuse registry not violation of constitutionally protected privacy interest); *Loder v. Municipal Court*, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976) (limited retention and dissemination of arrest records does not violate right of privacy).

In the instant case, the evidence does not indicate, and the appellant does not argue, that the police investigative reports at issue were generated in violation of the appellant's constitutional rights. While the appellant sought to impeach the information in

the reports, he does not claim, and the evidence would not support concluding, that the investigation was undertaken in bad faith or that the reports were the result of actionable police misconduct. Compare, *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977); *United States v. Linn*, 513 F.2d 925 (10th Cir. 1975); *Toth v. Albuquerque Police Dept.*, 123 N.M. 637, 944 P.2d 285 (N.M. App. 1997); *State ex rel. Peach v. Tillman*, 615 S.W.2d 514 (Mo. App. 1981) (cases holding expunction of arrest record not appropriate where arrest was lawful).

While the appellant claims that the information contained in the police investigative reports is embarrassing to him, those reports do not contain confidential information and explicitly exonerate the appellant of any illegal conduct. The appellant's argument essentially appears to be that he is entitled to have the reports expunged because some of the conclusions are wrong and because the appellant believes the investigating officer did not conduct a complete investigation. This claim, however, does not support a finding that a legal right of the appellant has been invaded. Accepting the appellant's argument would require the judiciary to become the arbiter of what is and is not good police work, and to edit police reports to remove conclusions over which there is disagreement. This is simply not an appropriate judicial function.

Police reports summarize the facts surrounding an event and constitute a necessary log of police activity. See *State v. L.K.*, 359 N.W.2d 305 (Minn. App. 1984). The hallmark of our system of government calls for the preservation of accurate official records rather than suppression of information. *Spock v. District of Columbia*, 283 A.2d 14 (D.C. App. 1971). If a record of involvement with criminal process is expunged, the traces literally vanish and no indication is left behind that information has been removed. *Com. v. Roberts*, 39 Mass. App. 355, 656 N.E.2d 1260 (1995). Therefore, it is possible that the judicial editing of history could produce a greater harm than that sought to be corrected by the expunction of certain information from a police report. See *Camfield v. City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001).

[11] Given the uncontradicted testimony of Casady regarding the utility of these police reports to the LPD, the commands of a

government of laws require that this court confine its acts within the scope of judicial power recognizing the coequal powers of the other branches of government. See *Mulkey v. Purdy*, 234 So. 2d 108 (Fla. 1970). The reservation of possible judicial review of police records in cases of overriding equitable considerations, based on the violation of established legal rights, is to provide a remedy in the rare case where extraordinary circumstances so warrant. See *id*. Because the appellant's evidence in this case, taken as true, failed to establish such circumstances, we conclude that the district court did not err in dismissing the appellant's cause of action. The appellant's first two assignments of error are without merit.

Evidentiary Issue

[12] The appellant also argues that the district court abused its discretion in excluding the evidence the appellant proffered that he claims would have attacked the conclusions in the police reports. We first note that the appellant's brief appears to argue that the exclusion of this evidence violated his right to due process of law. However, the record does not indicate that this due process argument was presented to the trial court; therefore, we do not consider it. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). We do consider the appellant's argument that this evidence was erroneously excluded on the basis of relevance.

[13,14] 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. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). For evidence to be relevant under § 27-401, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence. *Snyder, supra*.

We conclude that the trial court erred in excluding the appellant's proffered evidence to the extent that it was relevant to the truth of the conclusions set forth in the police reports. As noted

above, expunction of police records is a process of weighing the interests of society and of the individual involved. Whether the facts set forth in a police report are true or false will directly bear on the interests of the individual involved, as the harm done to the individual's legally protected interest may vary depending upon the veracity of the information that is disseminated. See *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 663 N.E.2d 1376 (1995). Furthermore, the utility of a police record to law enforcement may depend on the reliability of the information contained in the report. See *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 374 N.E.2d 272 (1978). Thus, while we cannot countenance the use of the courts as a forum for questioning the competence of an investigation, evidence bearing on the reliability of a police report is certainly relevant to the analysis necessary to determine if expunction is appropriate.

However, we conclude that this error does not require reversal, as it does not affect the issue that the district court and this court have determined to be dispositive. The investigative reports conclude that the appellant did not commit any crime, and even if the other opinions expressed by the investigating officer are incorrect or subject to dispute, there is no evidence that maintaining the reports in police records would invade the appellant's rights to privacy or due process of law. Even if the appellant's evidence had been accepted by the district court and had successfully undermined the conclusions set forth in the police reports, the appellant's petition would still fail to plead, and his evidence would still fail to establish, the invasion of a legally protected right. Absent such proof, the appellant is not entitled to the remedy of expunction.

CONCLUSION

Assuming, without deciding, that expunction of police records is an available remedy under extraordinary circumstances when an individual's legally protected rights have been invaded, the appellant's evidence, taken as true, failed to establish such circumstances. The district court did not err in dismissing the appellant's petition at the close of his evidence, and we therefore affirm the judgment of the district court.

AFFIRMED.

DIDIER PRESLE, APPELLANT, V. LYNNE ANN PRESLE, APPELLEE, AND STATE OF NEBRASKA, INTERVENOR-APPELLEE.

634 N.W.2d 785

Filed October 26, 2001. No. S-00-502.

1. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
2. **Records.** Once a praecipe for bill of exceptions has been filed, preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to prepare the original bill of exceptions.
3. **Rules of the Supreme Court: Records.** If a court reporter is unable to prepare and certify a bill of exceptions, or if a bill of exceptions cannot be prepared and certified under provisions contained elsewhere in court rules, the bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Order vacated, and cause remanded with directions.

Daniel W. Ryberg for appellant.

Anthony R. Medina for intervenor-appellee.

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

WRIGHT, J.

NATURE OF CASE

This is an appeal from an order of the Douglas County District Court which found that, as a matter of public policy, it could not vacate or set aside any provision of a 1982 decree of dissolution, including a finding of paternity. The district court granted summary judgment to the State as intervenor.

FACTS

Didier Presle and Lynne Ann Presle were married on May 15, 1980. One child was born during the marriage on January 27, 1982. On May 26, Didier filed a petition for dissolution of marriage in Douglas County District Court. In the petition, Didier disclaimed paternity of and responsibility for the child.

In the decree of dissolution, entered on December 14, 1982, the trial court found that although the petition alleged Didier was not the father of the child and Didier had disclaimed paternity, there was no competent and sufficient evidence before the court to support these allegations. The trial court found that the child was the issue of the marriage and that Didier should be required to contribute to her support. Lynne was awarded custody, and Didier was ordered to pay $200 per month in support until the child's emancipation. During subsequent years, Lynne assigned her child support rights to the State on several occasions and received State benefits for the child.

In an application to modify signed on December 12, 1998, 16 years after the decree of dissolution was entered, Didier requested a modification of the child support order, asserting that a material change of circumstances had occurred. He alleged that he was not aware he had been ordered to pay child support because he did not reside in Nebraska at the time the decree was entered. Didier further alleged that genetic testing conducted in 1998 had determined that he could not be the natural father of the child.

The State filed a petition seeking leave to intervene on April 6, 1999, alleging that it had been assigned the child support payments and that Didier owed the State $39,200 as of March 29. The State was subsequently granted leave to intervene.

On May 7, 1999, Didier filed a "Petition to Vacate and Set Aside or Alternatively Amended Application to Modify" asserting that the provisions of Neb. Rev. Stat. § 42-368 (Reissue 1998) which preclude modification of amounts "accrued prior to [the] date of service" of a motion to modify are arbitrary and capricious; are in violation of the separation of powers clause of the state Constitution; deny him access to the courts for an adequate remedy, in violation of article I, § 13, of the state Constitution; and deny him due process under the state Constitution and the U.S. Constitution. Didier argued that the adverse parties were estopped from asserting any obligations upon him, and he invoked laches. In the alternative, he sought to amend his application to modify by asking that child support be abated as of the date of the decree, the date of the application to modify, or "such other retroactive date that the law allows."

In its response, the State affirmatively alleged that since entry of the decree of dissolution in 1982, Lynne had received aid to dependent children benefits, and that she had assigned her rights to child support to the State. The State also asserted that any effort to revisit the issue of paternity was precluded by res judicata.

After Didier and the State each filed motions for summary judgment, the district court entered an order overruling Didier's motion and sustaining the State's motion. The district court held that it would be contrary to public policy for the court to find that the child was not the issue of the marriage and that Didier remained the child's legal father and had a continuing obligation of support. The district court ordered that all aspects of the original decree of dissolution remain in full force and effect. Didier filed this appeal.

ASSIGNMENTS OF ERROR

Didier set forth five assignments of error: (1) The district court erred in determining that public policy prevented it from vacating and setting aside the original provisions of the December 1982 decree of dissolution; (2) the court erred in failing to consider the issues of estoppel and laches; (3) the court erred in determining that the State, as assignee, had not waived or was not estopped from asserting any rights it may have had; (4) the court erred in granting standing to the State and in sustaining its motion for summary judgment; and (5) the court erred in failing to address the constitutionality of Neb. Rev. Stat. § 42-377 (Reissue 1998).

ANALYSIS

We must first address the appellate record in this case. The transcript, which has been supplemented twice, contains the original petition seeking dissolution of the marriage and the decree of dissolution as well as the application to modify, the petition to vacate, the motions for summary judgment, and the district court's order from which Didier appeals. The bill of exceptions contains seven exhibits, but no testimony nor any indication that the exhibits were offered or received into evidence at the summary judgment hearing. In a motion for an order nunc pro tunc, which was filed after Didier filed his notice of appeal, Didier asserted that no court reporter was available for the summary judgment hearing but that the exhibits were preserved for the record.

[1] Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), "[t]he official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived." See, also, Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 2000).

[2,3] The record in the case at bar includes a praecipe for bill of exceptions. This court has stated that "[o]nce a praecipe for bill of exceptions has been filed, preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to prepare the original bill of exceptions." *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 979, 581 N.W.2d 405, 407 (1998). Court rule 5B(3)c provides that

> [i]f the reporter is unable to prepare and certify a bill of exceptions, or if a bill of exceptions cannot be prepared and certified under provisions contained elsewhere in [court] rules, the bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

The record here does not establish that the trial judge took any steps to ensure that a bill of exceptions was prepared and certified.

At oral argument before this court, the State suggested that the summary judgment hearing was held in chambers and that no court reporter was present. This court will not permit such conduct. Whether a trial court judgment is appealed or not, a record is necessary, and the trial judge in the case at bar should have ensured that a court reporter was available for the hearing.

On June 12, 2000, Didier filed a motion for an order nunc pro tunc requesting an order from the district court reflecting which exhibits were received and showing that no objection was made to the exhibits offered by Didier. For purposes of this opinion, we treat the motion as a notice and request that the trial judge direct and supervise the preparation of a bill of exceptions to be certified by the judge and delivered to the clerk of the district court. The trial docket reflects that the district court overruled this motion. Under these circumstances, we conclude that the orderly administration of justice is best served by vacating the order of the district

court and remanding the cause for a new evidentiary hearing. See *Sindelar v. Hanel Oil, Inc., supra* (Caporale, J., concurring).

CONCLUSION

The order granting summary judgment to the State is vacated, and the cause is remanded for a new evidentiary hearing.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

ARMEDA MALONE, APPELLANT, V. AMERICAN BUSINESS INFORMATION, A CORPORATION, APPELLEE.

634 N.W.2d 788

Filed October 26, 2001. No. S-00-571.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. ___: ___. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
5. **Termination of Employment: Public Policy.** The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Michael P. Dowd, of Dowd & Dowd, for appellant.

Patrick M. Flood and Andrew J. Wilson, of Hotz, Weaver, Flood & Breitkreutz, for appellee.

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

STEPHAN, J.

This is an appeal from an order of the district court for Douglas County dismissing an action for wrongful discharge filed by Armeda Malone against American Business Information (ABI), her former employer. The sole issue presented is whether Malone stated a cause of action by alleging that her employment was terminated after she asserted a claim cognizable under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998). The district court resolved this issue against Malone. We find no error and therefore affirm.

BACKGROUND

In her petition, Malone alleged she was employed by ABI as a national account manager under an employment agreement which included a sales/wage commission plan. Malone further alleged she was entitled to commissions in the amount of $94,877.81 under the plan which ABI failed and refused to pay within 30 days from the date due. Malone alleged she made both verbal and written claims to ABI for her unpaid wages and that due to the assertion of such claims, her employment was terminated. Malone specifically alleged that her demand for payment of wages to which she was lawfully entitled under the Nebraska Wage Payment and Collection Act resulted in the termination of her employment in violation of public policy. She prayed for damages in the form of mental pain and suffering and present and future lost wages.

ABI filed a general demurrer asserting that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, reasoning that Malone was an at-will employee and that the facts she alleged did not fall within a public policy exception to the at-will employment doctrine. Although given an opportunity to amend, Malone elected to stand on her petition, and the district court entered an order of dismissal. Malone then perfected this timely appeal which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Malone assigns, restated and summarized, that the district court erred in failing to find that her petition stated a cause of

action for wrongful termination pursuant to the public policy exception to the at-will employment doctrine.

STANDARD OF REVIEW

[1] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001); *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[2,3] In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000); *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

ANALYSIS

[4] Although Malone alleged that she was employed by ABI pursuant to an "employment agreement" which included a sales/wage commission plan, there is no allegation that the agreement contemplated employment for a specific duration. Malone concedes in her brief that she was an at-will employee. The clear and oft-cited rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000). Malone contends that she has nevertheless stated a cause of action because she alleged facts falling within the public policy exception to the at-will employment rule.

We first recognized, without adopting, the public policy exception to the at-will employment doctrine in *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), *disapproved*

on other grounds, Johnston v. Panhandle Co-op Assn., 225 Neb. 732, 408 N.W.2d 261 (1987). In *Mau*, we noted that other jurisdictions had adopted a rule that allows an at-will employee to claim damages for wrongful discharge "when the motivation for the firing contravenes public policy." 207 Neb. at 316, 299 N.W.2d at 151.

[5] We first applied the public policy exception in *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). The issue presented in that case was whether an at-will employee had stated a cause of action for wrongful discharge by alleging that his employment was terminated because he refused to submit to a polygraph examination. Although we recognized the general rule that in the absence of contractual or statutory restrictions, an employer could discharge an at-will employee for any reason without incurring liability, we determined that an exception to the rule was created by Neb. Rev. Stat. § 81-1932 (Reissue 1999), which provides in part that " '[n]o employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination . . . .' " *Ambroz*, 226 Neb. at 900-01, 416 N.W.2d at 512. The statute further provides that any person who violates its provisions is guilty of a Class II misdemeanor. We held that these statutory provisions constituted a "pronouncement of public policy on the issue of wrongful discharge" in language which clearly and unambiguously prohibited the employer's use of a polygraph to deny employment. *Id.* at 903, 416 N.W.2d at 513. We concluded by defining the circumstances in which the public policy exception would be recognized, stating:

> This is a case involving a discharge in violation of a clear, statutorily mandated public policy. We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated. This case falls within that rule.

Id. at 905, 416 N.W.2d at 515.

We next considered the public policy exception in *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988), wherein

an employee claimed that he was wrongfully discharged for reporting his suspicions that his employer was violating state odometer fraud laws. In addressing the employee's claim, we cited our recognition of the public policy exception in *Mau* and our holding in *Ambroz*. We distinguished the case from *Ambroz* in that there was no statute which prohibited an employer from discharging an employee who reported suspected criminal activity. We further noted that the case was distinguishable from those in other jurisdictions where an employee was discharged for refusing to directly engage in criminal conduct. Notwithstanding those distinctions, however, we recognized that the Legislature had made it unlawful to engage in odometer fraud and had made such conduct a Class IV felony under Neb. Rev. Stat. § 60-2301 et seq. (Reissue 1984 & Cum. Supp. 1986) (now found at Neb. Rev. Stat. § 60-132 et seq. (Reissue 1998)). In view of this legislative action, we noted that we were not being asked to declare new public policy, but, rather, were presented with the issue of

> whether, by virtue of the enactment of §§ 60-2301 et seq., there exists such a clear declaration by the Legislature of important public policy as to warrant a judicial determination that the policy is to be enforced by recognizing a cause of action for wrongful discharge under appropriate facts.

Schriner, 228 Neb. at 91, 421 N.W.2d at 759. In addressing this issue, we reasoned that there is no public policy more basic than the enforcement of a state's criminal code and concluded that the enactment of the criminal statute was a clear declaration of public policy against odometer fraud. Finding, however, that an action for wrongful discharge could lie only when the employee acts in good faith in reporting a violation of the criminal code, we declined to apply the exception and affirmed summary judgment for the employer because there was no evidence that the employee had reasonable cause to believe that the employer had acted unlawfully or that he had acted in good faith in so reporting.

The most recent Nebraska case to address the public policy exception is *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997). In that case, an at-will employee alleged that he was wrongfully discharged for refusing an order to drive a truck that had defective brakes. Based upon *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510

(1987), and *Schriner, supra*, the Court of Appeals concluded that "the law in Nebraska is that an at-will employee has a cause of action for wrongful discharge against his or her former employer if the employee was discharged in violation of a contractual right or a statutory restriction or when the motivation for the discharge contravenes public policy." *Simonsen*, 5 Neb. App. at 269, 558 N.W.2d 829. The Court of Appeals determined that by making the operation of a motor vehicle with defective brakes a misdemeanor under Nebraska law, the Legislature had declared that such conduct was contrary to public policy. The Court of Appeals concluded that discharging an employee for refusal to commit a criminal act would contravene public policy and give rise to a wrongful discharge action under the public policy exception.

The Nebraska Wage Payment and Collection Act, codified at §§ 48-1228 to 48-1232, obligates an employer to "pay all wages due its employees on regular days designated by the employer or agreed upon by the employer and employee." § 48-1230. The act places certain restrictions upon the employer's right to deduct, withhold, or divert a portion of an employee's wages, and specifies when unpaid wages are due following an employee's separation from the payroll. *Id*. The act also permits an employee to bring suit on a claim for wages which are not paid in a timely fashion and, if successful in prosecuting such a claim, to recover attorney fees. § 48-1231. In such an action, an amount equal to the unpaid wages, or an amount equal to two times the unpaid wages in the event of willful nonpayment, may be recovered and placed in a fund distributed to the common schools of this state. § 48-1232.

Unlike the Licensing of Truth and Deception Examiner's Act which formed the basis of our decision in *Ambroz*, the Wage Payment and Collection Act does not contain a specific provision restricting an employer's right to discharge an at-will employee. Nor does the act impose any criminal sanctions, thus distinguishing it from the basis for the public policy exception recognized in *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988), and *Simonsen, supra*. Thus, none of these cases provide direct support for Malone's contention that the Wage Payment and Collection Act forms the basis for recognition of a public policy exception to the doctrine of employment at will under the facts alleged.

Due to variations in statutory language, cases from other jurisdictions provide little guidance. In *Tullis v. Merrill*, 584 N.W.2d 236 (Iowa 1998), the Iowa Supreme Court held that an at-will employee who was terminated after seeking reimbursement of amounts withheld from his paycheck could bring an action for wrongful discharge based upon a provision of Iowa's wage payment collection act which prohibited an employer from discharging an employee because of the employee's assertion of a claim under the act. As noted, the Nebraska act contains no such provision. In *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29 (1998), the court held that an employee who had been discharged during a dispute with his employer regarding payroll deductions could state a claim for retaliatory discharge, reasoning that the State of California had a fundamental public policy favoring prompt payment of wages based in part upon a statute which made an employer's willful nonpayment of wages a misdemeanor offense. Nebraska's act contains no such provision. Although the Illinois Wage Payment and Collection Act does contain a similar provision, see 820 Ill. Comp. Stat. Ann. 115/14(c) (Lexis 1999), the court in *McGrath v. CCC Information Services, Inc.*, 314 Ill. App. 3d 431, 731 N.E.2d 384, 246 Ill. Dec. 856 (2000), reached the opposite result. Reasoning that "[to] constitute a clearly mandated public policy exception that would justify application of the tort of retaliatory discharge, the matter at issue must strike at the heart of a citizen's social rights, duties, and responsibilities," the court concluded that "the effect of plaintiff's dispute and subsequent termination on the citizenry collectively is incidental at best" and that "[m]erely citing a constitutional or statutory provision in a complaint will not give rise to a retaliatory discharge cause of action." *Id*. at 440, 731 N.E.2d at 391, 246 Ill. Dec. at 863.

As did the district court, we conclude as a matter of law that the Nebraska Wage Payment and Collection Act does not represent a "very clear mandate of public policy" which would warrant recognition of an exception to the employment-at-will doctrine based on the facts alleged by Malone. See *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). The act is primarily remedial in nature, providing specific procedures for the enforcement of substantive rights to compensation for work

performed which arise not from the statute but from the employment relationship itself. The act specifically contemplates payment of wages which become due both during the employment relationship and after it has been terminated. See § 48-1230. As noted above, the act contains no criminal penalties nor any specific provision restricting the employer's common-law right to discharge an at-will employee. Thus, while the act provides Malone with a remedy to collect any compensation which ABI may owe her, it does not "declare . . . an important public policy with such clarity as to provide a basis for a civil action for wrongful discharge." See *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 89, 421 N.W.2d 755, 757 (1988).

CONCLUSION

For the reasons discussed, we conclude that Malone's petition does not allege facts sufficient to constitute a cause of action. The district court therefore did not err in sustaining ABI's demurrer or in ultimately dismissing the action.

AFFIRMED.

ROGER THORNTON, APPELLANT, V. GRAND ISLAND CONTRACT CARRIERS AND AETNA CASUALTY AND SURETY COMPANY, APPELLEES.

634 N.W.2d 794

Filed October 26, 2001. No. S-00-887.

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. **Statutes.** Interpretation of a statute presents a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Stipulations.** The general rule is that parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael P. Dowd, of Dowd & Dowd, for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Roger Thornton, filed a petition alleging that appellees, Grand Island Contract Carriers and Aetna Casualty and Surety Company, refused to pay medical expenses and attorney fees arising from work-related injuries. Aetna Casualty is now known as The Travelers Property and Casualty and will be referred to herein as "Travelers." The issue in the Nebraska Workers' Compensation Court was whether a medical bill incurred by Thornton was required to be paid by appellees. A single judge of the compensation court ordered a dismissal. This order was reviewed and affirmed by a three-judge review panel. We granted Thornton's petition to bypass under our power to regulate the caseloads of this court and the Nebraska Court of Appeals.

BACKGROUND

On August 24, 1988, Thornton sustained personal injuries as a result of an accident arising out of the course of his employment with Grand Island Contract Carriers. Thornton filed a petition on September 20, 1991, to present a claim for workers' compensation benefits. In this petition, Thornton alleged that "the Statute of Limitations is tolled as a result of [appellees'] paying compensation benefits and medical expenses as a result of this accident and injuries to date of filing this Petition." Appellees generally denied Thornton's petition. In its award, the single judge for the compensation court noted that "[appellees] have paid all medical bills incurred to date arising from said accident" and that appellees had already been paying Thornton temporary total and permanent partial disability benefits for which appellees were entitled to credit. The original award was totally silent as to future medical expenses.

The present appeal arises out of a petition filed on June 4, 1999, by Thornton alleging that appellees refused to pay medical

expenses and attorney fees arising from work-related injuries of the original August 24, 1988, accident. Appellees filed a motion for summary judgment, attaching a stipulation of the parties to indicate there was no genuine issue of material fact. The stipulation states that Thornton was awarded various benefits including future medical benefits in a 1992 award which was affirmed on June 21, 1993; that Travelers last made a disability payment to Thornton on September 1, 1994, and a medical payment to Thornton or on Thornton's behalf on June 19, 1995; and that Thornton now makes a claim for medical services arising more than 2 years following the date of Travelers' last payment of indemnity and/or medical payments.

Neb. Rev. Stat. § 48-137 (Reissue 1998) states in pertinent part:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

The single judge granted appellees' motion for summary judgment and ordered a dismissal, citing *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997), as controlling the matter. In *Snipes*, we held that claims for medical expenses filed more than 2 years after the last payment of compensation were barred by § 48-137 in the absence of evidence of a material increase in the claimant's disability, which would permit the claimant to seek an increase in benefits pursuant to Neb. Rev. Stat. § 48-141 (Reissue 1993) or where the injury is latent and progressive and is not discovered within 2 years of the accident. See *Snipes v. Sperry Vickers, supra*.

The three-judge panel affirmed, citing *Snipes* as controlling, and one judge wrote a concurrence and attached a three-judge opinion in a case which has since become *Foote v. O'Neill Packing, ante* p. 467, 632 N.W.2d 313 (2001), as deciding the exact same issues as those presented in this case.

Thornton's petition to bypass the Court of Appeals was granted.

ASSIGNMENTS OF ERROR

Thornton assigns that the trial court erred (1) in determining that Thornton's claim for payment of medical benefits was barred by §§ 48-137 and 48-141 (Reissue 1988); (2) in determining that the general statute of limitations, § 48-137, applied in this case in which a petition had previously been filed and adjudicated and an award had previously been entered by the compensation court; (3) in determining that requiring the employer to pay for medical care amounted to a modification of the previous award directing payment for such care and was therefore subject to the provisions of § 48-141; and (4) as a matter of fact and law in applying the case *Snipes v. Sperry Vickers, supra*, as controlling on this matter.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a compensation court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001).

[2,3] Interpretation of a statute presents a question of law. *Fontenelle Equip. v. Pattlen Enters., ante* p. 129, 629 N.W.2d 534 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001).

ANALYSIS

In the recent case of *Foote v. O'Neill Packing, supra*, we were called upon to resolve two questions: (1) whether the compensation court has the authority to order payment of future medical expenses incurred more than 2 years after the date of the last payment unless there was a change in condition of the employee sufficient to satisfy the requirements of § 48-141 and (2) whether

§ 48-137 bars a claim made more than 2 years after the accident or last payment of compensation in a situation where compensation was paid pursuant to an award of the compensation court. As to the compensation court's authority, we concluded in *Foote* that Neb. Rev. Stat. § 48-120 (Reissue 1998) clearly manifests the legislative intent to make medical benefits available to a disabled worker without regard to any time limitation measured from the last date of payment when an award is entered as long as further medical treatment is reasonably necessary to relieve the worker from the effects of the work-related injury or occupational disease.

As to § 48-137, we stated:

> We determine that Foote's claim for payment of medical expenses is not barred by § 48-137 and that the 1996 compensation court award authorized the payment of reasonable and necessary medical expenses resulting from said injuries, even where those expenses were incurred after the award was entered and more than 2 years from the time of the making of the last payment.

Foote, ante at 480, 632 N.W.2d at 324.

In both *Foote v. O'Neill Packing, ante* p. 467, 632 N.W.2d 313 (2001), and in Thornton's case, the injured worker was attempting to obtain payment of medical expenses more than 2 years after the last compensation payment was made.

However, as in *Foote*, the compensation payments made in this case were made pursuant to an award entered by the compensation court after a petition had been filed. In *Foote*, we held that the 2-year limitation of § 48-137 is contingent upon the failure of one of the parties to file a petition. Instead, once a party has filed a petition and an award of compensation has been entered, that award is final and not subject to readjustment, unless there is an increase or decrease in incapacity or the condition of a dependant has changed. See *Foote v. O'Neill Packing, supra*, citing Neb. Rev. Stat. §§ 48-140 and 48-141 (Reissue 1998). In other words, an injured worker may be entitled to future medical expenses under § 48-120, but the injured worker must prove such entitlement and obtain an award with respect to the future medical expenses. The employer can then, if warranted, appeal that final award. If, on the other hand, future medical expenses are not part

of the final award, that judgment is final and any future claims for medical expenses relating to the same accident are absolutely barred unless the requirements of § 48-141 are met. *Foote v. O'Neill Packing, supra*.

In *Foote*, we determined that the plaintiff's claim was not barred by § 48-140. In *Foote*, however, our decision was based on the fact that the Workers' Compensation Court's original award had provided that future medical benefits would be paid and that § 48-120 authorized such an award. In the instant case, no such award was made; the order stated only that "[appellees] have paid all medical bills incurred to date arising from said accident." Thus, unlike in *Foote*, the award in the instant case is essentially silent on the issue of future medical expenses.

Thornton's claim in the instant case is admittedly based on the same accident that was the subject of the 1992 award, and the parties agree that the requirements of § 48-141 (Reissue 1988) have not been satisfied. Consequently, the compensation court erred in applying the 2-year limitation of § 48-137 in the instant case because absent satisfaction of § 48-141, a claim for additional benefits relating to the same accident is barred regardless of whether or not it is brought within 2 years of the making of the last compensation payment. As the 1992 award contains no language that can be reasonably construed to provide future medical benefits, Thornton's current claim is an attempt to secure additional benefits relating to the same accident, and is barred by § 48-140 (Reissue 1988).

[4] One additional matter we address is the fact that although the award of December 22, 1992, did not award future medical expenses, the stipulation entered into between the parties after the judgment states that Thornton was awarded various benefits, including future medical benefits. The stipulation is of no effect, as the general rule is that the parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded. See *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993).

Therefore, we conclude that since the December 22, 1992, award did not provide for future medical benefits, Thornton cannot recover for medical expenses relating to the same accident that is the subject of the 1992 award.

CONCLUSION

The compensation court erred in concluding that § 48-137 applied to the instant case; instead, Thornton's petition was properly dismissed because his claim was barred by § 48-140. However, a proper result will not be reversed merely because it was reached for the wrong reasons. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). Since the compensation court reached the right result, albeit for the wrong reasons, the order of the review panel affirming the judgment of the compensation court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

THE CINCINNATI INSURANCE COMPANY, APPELLEE, V. BECKER WAREHOUSE, INC., AND BECKER TRANSPORTATION, INC., APPELLANTS.

635 N.W.2d 112

Filed November 2, 2001. No. S-00-767.

1. **Contracts: Appeal and Error.** 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.
2. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
3. **Declaratory Judgments.** A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain.
4. **Insurance: Contracts.** Whether the language in an insurance policy is ambiguous presents a question of law.
5. ____: ____. A court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
6. **Insurance: Contracts: Intent: Appeal and Error.** Appellate review of an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
8. **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.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Eugene P. Welch and Francie C. Riedmann, of Gross & Welch, P.C., for appellants.

Robert T. Grimit and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

GERRARD, J.

NATURE OF CASE

Becker Warehouse, Inc., and Becker Transportation, Inc. (collectively Becker), own a warehouse where food products owned by various entities are stored. While constructing an addition to Becker's warehouse, Stoetzel & Son, Inc., applied a sealant called Kure-N-Seal to the concrete floor. The owners of the food products filed lawsuits against Becker alleging that xylene fumes from the Kure-N-Seal contaminated their food products. Becker sought indemnity and defense from its insurer, the appellee, The Cincinnati Insurance Company (Cincinnati). Cincinnati filed a petition for declaratory judgment in the district court, seeking a declaration that Becker's insurance policy does not provide coverage for the alleged contamination and that Cincinnati has no obligation to defend Becker. Both parties filed motions for summary judgment; the district court sustained Cincinnati's motion and overruled Becker's. Because Cincinnati's insurance policy is not ambiguous and excludes coverage for Becker's claim, we affirm the district court's judgment in favor of Cincinnati.

FACTUAL BACKGROUND

In 1997, Becker and Stoetzel & Son entered into a contract under which Stoetzel & Son was to build an addition to Becker's warehouse in Hastings, Nebraska. Becker used the warehouse to store food products and ingredients owned by various entities, including Swift-Eckrich, Inc., doing business as Armour Swift Eckrich (Armour); Newly Weds Foods, Inc.; and J.M. Swank Company, a division of ConAgra, Inc. (Swank). While constructing the warehouse addition, Stoetzel & Son applied a concrete sealant called Kure-N-Seal.

Kure-N-Seal's material safety data sheet indicates that it contains xylene, poses an immediate and chronic health hazard, and

should be used with proper respiratory protection when applied in poorly ventilated areas. The federal Clean Air Act, 42 U.S.C. § 7412(b) (1994), lists xylene as a hazardous air pollutant. The Kure-N-Seal label and advertisement state that "[i]f Kure-N-Seal is applied in or near areas containing foodstuffs, they should be removed before application and until Kure-N-Seal has fully dried and all solvent vapors have dissipated." The label and advertisement also state:

> Heating Ventilation Air Conditioning (HVAC) units may draw [Kure-N-Seal] solvent vapors into occupied building interiors. Solvent vapors can be irritating to people unaccustomed to the odor; do not apply Kure-N-Seal in or around buildings occupied by nonconstruction personnel without consulting building management. Use only with adequate ventilation and with a minimum of 6 air changes per hour.

According to Becker, Stoetzel & Son failed to properly ventilate the warehouse while applying the Kure-N-Seal. Scott Stoetzel, an employee who applied the Kure-N-Seal, testified in a deposition that he wore a respirator during application of the Kure-N-Seal because he applied it in an enclosed building that needed ventilation.

Scott Stoetzel testified that Kure-N-Seal might have been safely applied without a mask, but he "wouldn't want to try it." Scott Stoetzel and another Stoetzel & Son employee opened doors, installed fans, and hung plastic sheeting to ventilate the area treated with Kure-N-Seal and to prevent the fumes from spreading. Several days after the Kure-N-Seal application, both Scott Stoetzel and Brian Becker, the warehouse company's owner and chief executive officer, noticed an odor of the Kure-N-Seal in the warehouse area where food products were stored. Subsequently, Scott Stoetzel and Brian Becker attempted to better ventilate the warehouse until the odor dissipated.

Armour and Swank filed lawsuits against Becker, alleging that xylene fumes from the Kure-N-Seal damaged their food products stored in Becker's warehouse at the time of the Kure-N-Seal application. Subsequently, Becker filed insurance claims with Cincinnati, seeking indemnity and defense against Armour and Swank's allegations. Cincinnati denied Becker's claims and refused to defend Becker in the pending lawsuits.

Cincinnati filed a petition for declaratory judgment in district court, seeking a declaration that its policy does not cover matters arising out of Stoetzel & Son's use of Kure-N-Seal in the Becker warehouse and that it has no obligation to defend actions filed by others against Becker. Becker filed a counter/cross-claim, alleging that Cincinnati has a duty to indemnify Becker's damages from the use of Kure-N-Seal and to provide a defense to the pending litigation against Becker. Becker also alleged that Kure-N-Seal is not a pollutant within the meaning of the insurance policy issued by Cincinnati.

The commercial general liability (CGL) insurance policy issued to Becker by Cincinnati excludes from coverage, in pertinent part:

> **f. Pollutant**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> **(a)** At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.
>
> . . . .
>
> **(d)** At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> **(i)** If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor . . . .
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment.
>
> . . . .
>
> **j. Damage to Property**
>
> "Property damage" to:

. . . .

(4) Personal property in the care, custody or control of an insured.

The building and personal property coverage form of the commercial property coverage part of the insurance policy issued to Becker by Cincinnati states, in pertinent part:

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the following types of property for which a Limit of Insurance is shown in the Declarations:

. . . .

b. Your Business Personal Property and Personal Property of Others in your care, custody and control located in or on the building described in the Declarations

. . . .

The causes of loss—special form as shown in the declarations and referred to above provides the following relevant exclusion for the commercial property coverage part:

B. EXCLUSIONS

. . . .

2. We will not pay for loss or damage caused by or resulting from any of the following:

. . . .

1. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if loss or damage by the "specified causes of loss" results, we will pay for the resulting damage caused by the "specified causes of loss."

The policy defines "Specified Causes of Loss" as "Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire

extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage."

Becker and Cincinnati both moved for summary judgment in the district court. The district court found that the insurance policy in question contained an absolute pollution exclusion which, as a matter of law, was not ambiguous and should be construed under its plain meaning. The district court also found that the xylene fumes emitted in Becker's warehouse constituted a pollutant within the meaning of the policy, creating damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants. Further, the court determined that damage to Swank's and Armour's property in the care, custody, and control of Becker was excluded from coverage by the pollution exclusion in the policy. Therefore, the district court concluded that Becker's damages were excluded from coverage under the insurance policy and that Cincinnati had no duty to defend. The district court sustained Cincinnati's motion for summary judgment and denied Becker's motion for summary judgment. Becker appealed, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

Becker assigns, restated, that the district court erred in (1) finding that the pollution exclusion contained in the insurance policy issued by Cincinnati is not ambiguous; (2) finding that the pollution exclusion applied to the claims filed against Becker and not just to environmental claims; (3) finding that xylene was a pollutant within the language of the policy; (4) finding that the chemicals contained in the floor sealant were "discharged, dispersed, migrated or released"; (5) finding that the conflicting provisions regarding the "care, custody and control" provision in the policy were not ambiguous; (6) finding that the claims against Becker are excluded by the "care, custody and control" provision contained in the policy; and (7) sustaining Cincinnati's motion for summary judgment and overruling Becker's motion for summary judgment. Additionally, Becker argues that the district court did not have

subject matter jurisdiction over Cincinnati's petition for declaratory judgment.

STANDARD OF REVIEW

[1] 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. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

ANALYSIS

SUBJECT MATTER JURISDICTION

[2,3] First, we must determine if the district court had subject matter jurisdiction over Cincinnati's declaratory judgment action. The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). Becker argues that because Swank's and Armour's lawsuits against Becker have not yet established that their products were contaminated by the xylene used in Becker's warehouse, the district court did not have jurisdiction over the declaratory judgment action filed by Cincinnati. A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain. *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998).

Becker, citing *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981), asserts that an insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. In *Novak*, the insured sought defense from his insurance company for assault and battery allegations brought against him. The insurance policy in *Novak* excluded coverage for bodily injury that the insured either expected or intended, such as intentional torts like assault and battery. Bodily injury, however, was clearly covered by the policy in *Novak*, and the pending case against the insured would have determined whether or not the injury was intentional. Thus, this court found that until the facts were resolved, we could not determine the insurance company's obligation to pay and could not, therefore, grant a declaratory judgment on that question. *Id.*

[4] Here, however, the duty to defend is bound up in whether or not Cincinnati's policy covers Becker's potential damages. In *Novak, supra*, the insured's damages were covered if his acts were not intentional. But here, Becker is arguing only that Cincinnati's policy is ambiguous. Whether the language in an insurance policy is ambiguous presents a question of law. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). *Novak, supra*, turned on facts; this case turns on law. If Cincinnati's policy does not provide coverage for Becker's damages in the Kure-N-Seal incident, there is no duty for Cincinnati to provide a defense for Becker in the pending lawsuits. Therefore, the district court had subject matter jurisdiction over the declaratory judgment, and we proceed to consider the substantive issues in this appeal.

POLLUTION EXCLUSION

Becker alleges that the pollution exclusion contained in Cincinnati's policy is ambiguous. In support of this claim, Becker argues that (1) the pollution exclusion applies to only traditional environmental pollution claims and (2) applying the pollution exclusion to the claims against Becker violates Becker's reasonable expectations as an insured. The question of the ambiguity of this type of pollution exclusion is an issue of first impression in Nebraska. State and federal courts are split on whether an insurance policy's absolute pollution exclusion bars coverage for all injuries caused by pollutants or whether it applies only to injuries caused by traditional environmental pollution. A majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants. See, *Nat'l Elect. Mfrs. v. Gulf Underwriters Ins.*, 162 F.3d 821 (4th Cir. 1998) (applying D.C. law); *Technical Coating v. U.S. Fidelity & Guaranty*, 157 F.3d 843 (11th Cir. 1998) (applying Florida law); *Certain Underwriters at Lloyd's v. C.A. Turner Const.*, 112 F.3d 184 (5th Cir. 1997) (applying Texas law); *American States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law); *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996); *City of Salina, Kan. v. Maryland Cas. Co.*, 856 F.

Supp. 1467 (D. Kan. 1994); *Madison Const. v. Harleysville Mut. Ins.*, 557 Pa. 595, 735 A.2d 100 (1999); *Deni Associates v. State Farm Ins.*, 711 So. 2d 1135 (Fla. 1998); *Truitt Oil &c. v. Ranger Ins. Co.*, 231 Ga. App. 89, 498 S.E.2d 572 (1998); *City of Bremerton v. Harbor Ins. Co.*, 92 Wash. App. 17, 963 P.2d 194 (1998); *Terramatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997).

Becker, however, argues that the pollution exclusion is ambiguous and should be applied to only environmental pollution claims. In support of his argument, Becker refers us to authority in a number of other jurisdictions. Representative of the cases upon which Becker relies is *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997), wherein the Illinois Supreme Court found that a similar pollution exclusion excluded coverage for only traditional environmental damages. The *Koloms* court based its reasoning on the evolution and purpose of the pollution exclusion rather than on a plain reading of the exclusion. The court in *Koloms* acknowledged that

> [a] close examination of this [pollution exclusion] language reveals that the exclusion (i) identifies the types of injury-producing materials which constitute a pollutant . . . (ii) sets forth the physical or elemental states in which the materials may be said to exist . . . and (iii) specifies the various means by which the materials can be disseminated . . . . To that extent, therefore, the exclusion is indeed "quite specific," and those courts wishing to focus exclusively on the bare language of the exclusion will have no difficulty in concluding that it is also unambiguous.

177 Ill. 2d at 487, 687 N.E.2d at 79, 227 Ill. Dec. at 156. Despite the plain meaning of the policy language, the court held:

> Our review of the history of the pollution exclusion amply demonstrates that the predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the "enormous expense and exposure resulting from the 'explosion' of *environmental* litigation." . . . We would be remiss, therefore, if we were to simply look at the bare words of the exclusion, ignore its *raison d' être*, and apply it to situations which do not remotely resemble traditional environmental contamination. The pollution

> exclusion has been, and should continue to be, the appropriate means of avoiding " 'the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*.' " . . . We think it improper to extend the exclusion beyond that arena.

(Emphasis in original.) *Id.* at 492-93, 687 N.E.2d at 81, 227 Ill. Dec. at 158.

[5,6] We, however, find it unnecessary and inappropriate to look beyond the "bare words of the exclusion" as the court in *Koloms* did. The pollution exclusion in Cincinnati's CGL policy reads, in pertinent part:

> **f. Pollutant**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> **(a)** At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment.

Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). Appellate review of an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

[7] We conclude that as a matter of law, Cincinnati's pollution exclusion, though quite broad, is unambiguous. The language of the policy does not specifically limit excluded claims to

traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage. The definition of "pollutant" in Cincinnati's CGL policy includes substances that are "harmful or toxic to persons, property or the environment." By including "the environment" as a separate entity that could suffer harm from a pollutant, the pollution exclusion does not limit its scope of application to environmental pollution. An occurrence such as the release of xylene fumes in Becker's warehouse clearly falls under Cincinnati's broad exclusion—to find otherwise would read meaning into the policy that is not plainly there. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Austin v. State Farm Mut. Auto. Ins. Co., supra*; *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999).

Other courts, as cited above, have found pollution exclusions to be unambiguous as a matter of law. The 11th Circuit, applying Florida law, held that "absolute pollution exclusions contained in the policies issued by [the insurer] unambiguously excluded coverage for bodily injuries sustained by breathing vapors emitted from [the insured's] roofing products, regardless of whether [the insured] used the products properly or negligently." *Technical Coating v. U.S. Fidelity & Guaranty*, 157 F.3d 843, 846 (11th Cir. 1998). The court in *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207, 209 (E.D. Pa. 1996), stated:

> The best manifestation of the intent of the parties is the clear and unambiguous language of the policy. . . . Plaintiffs have not identified any ambiguity in the language . . . and none is apparent to the Court. . . . Accordingly, the Court declines to look to, or speculate on, the intent of the parties in an attempt to avoid the plain meaning of policy language.

(Citations omitted.) In *Brown, supra*, as in the instant case, there were no specific instances of ambiguous language identified by the insurance claimant, but instead a mere allegation of ambiguity, which is not enough to sustain a conclusion of ambiguity under Nebraska's insurance policy interpretation laws. The broad nature of the pollution exclusion may cause a commercial client to question the value of portions of its commercial general

liability policy, but, as an appellate court reviewing terms of an insurance contract, we cannot say that the language of the pollution exclusion is ambiguous in any way. The language in the instant pollution exclusion is clear and susceptible of only one possible interpretation.

[8] Becker argues that the absolute pollution exclusion violates its reasonable expectations as an insured. Under Nebraska law, however, the reasonable expectations of an insured are not assessed unless the language of the insurance policy is found to be ambiguous. 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. *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). As stated above, the terms of Cincinnati's insurance policy are clear; therefore, the policy is not subject to further interpretation or construction beyond its plain and ordinary meaning. Becker's reasonable expectations are not taken into consideration in light of an unambiguous policy to which it has agreed. Cincinnati's pollution exclusion, though quite broad, is not ambiguous.

Xylene as Pollutant

The district court found that xylene qualified as a pollutant within the definition of the Cincinnati insurance policy issued to Becker. Becker argues that based on an identical definition of "pollutant" used by an insurance policy in *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *overruled on other grounds, Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000), the xylene in Kure-N-Seal does not constitute a "pollutant" under the Cincinnati policy. In that case, Tufco Flooring East, a floor resurfacing company, sought indemnification and defense from West American Insurance for its alleged contamination of chicken products of Perdue Farms, Inc., with styrene, a resurfacing chemical. The court found that under West American's insurance policy, styrene was not a "pollutant" under the pollution exclusion clause, because

> Tufco did not bring the *vapors* or *fumes* which invaded the chicken to the Perdue plant. Rather, Tufco brought an

> unadulterated, pure raw material, styrene monomer resin . . . . When this raw material was brought onto the site, it was neither an "irritant or contaminant." It was a raw material used by Tufco in its normal business activity of resurfacing floors. Yet, to be a "pollutant" under the exclusion, a substance brought onto the site must be precisely that, an "irritant or contaminant."

(Emphasis in original.) *Id.* at 322, 409 S.E.2d at 698.

Becker claims that because Stoetzel & Son brought xylene into the warehouse as pure, unadulterated material to be used in the business activity of resurfacing floors, xylene is not a "pollutant" within the definition of the Cincinnati policy or the holding in *Tufco Flooring East, supra*. Becker also points out that while the food products stored in its warehouse may have been damaged, they were not "polluted," i.e., made toxic from the xylene fumes. Brief for appellant at 31.

We conclude, however, that xylene is indeed a pollutant under the meaning of the Cincinnati insurance policy. The policy defines a pollutant as "any solid, liquid, gaseous or thermal irritant or contaminant," including but not limited to "substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment." The federal Clean Air Act, § 7412(b), lists xylene as a hazardous air pollutant. Merely because the substance is in a different form in the instant case—fumes instead of liquid—does not render xylene a nonpollutant. See, e.g., *American States Ins. Co. v. Technical Surfacing*, 50 F. Supp. 2d 888 (D. Minn. 1999).

Cincinnati urges that in addition to being defined as a pollutant under the federal Clean Air Act, xylene qualifies as a pollutant under the insurance policy because it contaminated the food products in the warehouse. As noted earlier, the Kure-N-Seal label clearly warns that food products should be removed from the area where the sealant is applied until the vapors dissipate. The label also states that the solvent vapors can be "irritating" to those not accustomed to them, which places xylene squarely within the insurance policy's definition of "pollutant" as a "contaminant or irritant." We, therefore, conclude as a matter of law that xylene is a pollutant within the definition of Cincinnati's policy.

DISCHARGE, DISPERSAL, MIGRATION, OR RELEASE

The district court found that the Kure-N-Seal fumes were "discharged, dispersed, migrated or released" in Becker's warehouse, therefore excluding from Cincinnati's insurance policy coverage the alleged damage they caused. Becker argues that within the broader argument regarding the pollution exclusion's ambiguity, the "discharged, dispersed, migrated or released" language further indicates that the pollution exclusion applies to only environmental pollution. *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997), and *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), both found that language similar to the language in Cincinnati's policy indicates that a discharge into the environment is necessary for the pollution exclusion to be applicable.

> The operative policy terms of the pollution exclusion clause imply that there must be a discharge into the environment before coverage can be properly denied. . . . While they are not defined in the policy, the terms "discharge" and "release" are terms of art in environmental law and include "escape" by definition and "dispersal" by concept.

Tufco Flooring East, 104 N.C. App. at 324, 409 S.E.2d at 699. Becker also cites the Sixth Circuit's holding that "the total pollution exclusion clause at bar does not shield the insurer from liability for injuries caused by toxic substances that are still confined within the general area of their intended use." *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1184 (6th Cir. 1999).

Cincinnati also cites the above quotation from *Kellman, supra*, emphasizing the words "confined within the general area of their intended use" to distinguish the issue in the instant case from *Kellman*. Cincinnati argues that, unlike *Kellman*, 197 F.3d at 1185, "where the injured third party was in the immediate vicinity of the harmful product" and was "harmed . . . within a few feet of the area of [the product's] intended use," the Kure-N-Seal fumes in Becker's warehouse were not confined within the general area of their intended use and, allegedly, harmed products outside the immediate vicinity of use. As noted earlier, Stoetzel & Son applied Kure-N-Seal to the floor of the addition

to Becker's warehouse, not to the immediate area or vicinity where the food products were stored. The treated area was separated from the food storage area with layers of heavy plastic sheeting. Cincinnati claims, and we agree, that the only logical explanation for the alleged damage is that the Kure-N-Seal fumes "discharged, dispersed, released or escaped" from the warehouse addition into the original part of the warehouse where food products were stored.

Care, Custody, and Control

Finally, Becker assigns that the district court erred in finding (1) that the "care, custody and control" exclusion in Cincinnati's policy is unambiguous and (2) that claims against Becker are excluded by the "care, custody and control" exclusion.

Cincinnati's policy contains two coverage segments, the CGL coverage form and the commercial property coverage part. While the CGL coverage form excludes property in the "care, custody and control" of the insured from coverage, the commercial property coverage part, with its building and personal property coverage form, covers property in the "care, custody and control" of the insured. This is not ambiguous, but instead applies to separate aspects of Becker's insurance coverage—the CGL covers liability, and the commercial property coverage refers to Becker's buildings and personal property.

The "care, custody and control" exclusion in the CGL coverage form clearly excludes Becker's damages from coverage. The "care, custody, and control" provision in the commercial property coverage part provides coverage, but subject to the causes of loss—special form. The causes of loss form specifically excludes coverage for "discharge, dispersal, seepage, migration, release or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the 'specified causes of loss.' " None of the specified causes of loss, which refer primarily to weather- or nature-related damage, apply to Becker's situation.

Because we have determined that the alleged xylene contamination constitutes pollution, the pollution exclusion in the commercial property coverage part precludes coverage under the "care, custody and control" provision.

CONCLUSION

Having considered each of Becker's assignments of error, and finding them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
CRAIG J. HAMIK, APPELLEE.

635 N.W.2d 123

Filed November 2, 2001. No. S-00-787.

1. **Statutes: Appeal and Error.** 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.
2. **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.
3. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
4. **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.
5. **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.
6. **Statutes: Legislature: Intent.** Under principles of statutory construction, 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.
7. **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.
8. **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.
9. **Sentences.** 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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Sentence vacated, and cause remanded for resentencing.

Andrew J. McMullen, Buffalo County Attorney, Melodie Turner Bellamy, and Melanie Young for appellant.

Clarence E. Mock and Michael J. Tasset, of Johnson and Mock, for appellee.

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

STEPHAN, J.

Following a jury trial in the district court for Buffalo County, Craig J. Hamik was convicted of first degree sexual assault, a Class II felony, and sentenced to 5 years' probation to be served consecutively to a sentence of incarceration imposed in another case. Pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 1995), the State has appealed on grounds that the sentence is excessively lenient, both factually and as a matter of law. We moved the case to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). The issues presented for our review are whether the district court was prohibited by Neb. Rev. Stat. § 28-105(4) (Reissue 1995) from placing Hamik on probation and, if not, whether the sentence imposed was excessively lenient.

BACKGROUND

Hamik was charged with first degree sexual assault in violation of Neb. Rev. Stat. § 28-319(1) (Reissue 1995). At trial, a female under the age of 16 testified that Hamik, who had been her neighbor, touched and digitally penetrated her on multiple occasions while she was present in his home for the purpose of playing with his children. Hamik testified in his own defense and denied that he ever touched the girl. The jury returned a verdict of guilty, upon which the district court entered a judgment of conviction on May 9, 2000.

In June 1999, prior to the trial of this case, Hamik was charged with two counts of sexual assault of a child in violation

of Neb. Rev. Stat. § 28-320.01 (Reissue 1995), a Class IV felony. He initially entered pleas of not guilty to both counts. At a hearing on July 17, 2000, Hamik entered a guilty plea to one of these counts as part of a plea agreement. In return for the plea, the State agreed to dismiss the other pending count and to recommend that any sentence imposed for the Class IV felony be concurrent with the sentence to be imposed in this case. The district court accepted the plea and entered a judgment of conviction on the Class IV felony. With the agreement of the parties, the district court then conducted a sentencing hearing and imposed sentences in both cases. Because it is central to the issues presented in this appeal, we quote verbatim the reasoning of the district judge from the record of the sentencing hearing:

> Mr. Hamik, the duty of the Court at this time is to impose a sentence as to each of these particular matters. And frankly the status of this particular case does create a great deal of problems for the Court as well as it has for the State, yourself, and the victims. There is nothing that this Court can do that is going to make everything perfect for everybody in this case. There's certainly no way no matter how much we wish we could that we can bring closure of this incident, that we can bring peace of mind, that we can return the victims and their families to normalcy. That is not possible. The effect of what has occurred will bother those persons and those families for a great number of years to come the same as it will be a destructive influence and bothersome to your own family and the people within it.
>
> Mr. Mock has pointed out that the Legislature envisioned offenses that had a great latitude in punishment because the nature and the type of the offenses that are involved have a great latitude in the degree of violence and the degree of harm that is occasioned. Whenever the Legislature basically says that the Court has a period of 1 to 50 years to play with in sentencing an individual, the suggestion is that some cases are right for one-year sentence and some cases are for 50 and many cases are for in between. And it's the discretion of the Court to try to find the right place to put each individual case.

One of the things that we do not do in sentencing in this country is to sentence an individual on a peremptory basis. That is, a sentence that is going to stop you from committing a crime in the future. That is certainly antagonistic to our system of justice that thinks that people ought to commit the crimes before they're punished for them.

Mr. Mock also pointed out that there was quite a bit of information contained in the presentence report that he hoped that the Court would not pay attention to. It's sad because I pay attention to that information, especially the information that relates to activities by other people in your family which seem to be at best harassing and irritating toward the victim and her family. I pay attention to it not because it in any way affects you because you're not doing those things. It doesn't — I don't pay attention to it because you should receive [a] more harsher penalty because of what has occurred. I pay attention to it because I think better of the people in this community than they may have in this particular way.

I also note, Mr. Hamik, that there is a difference in your case than some of the other cases that we see. First of all, I'm not so sure that these are necessarily better moments, but they are different.

My opinion from the evidence that we've heard and what we've seen in this case is that you are a predator and you prey upon the trust of young girls, and that this is something that has happened in the past and you've either put them in a position of tolerating the advances because they're having fun driving the car or you put them in a position where they have a great deal of trust and affection and you take advantage of their inability to know how to properly express themselves. None of that is forgiven because you are the adult, they are the children. Our laws in this state are designed to protect the children and to put an affirmative obligation on each and every one of us to protect the children of the community. And when we violate that obligation, we violate that trust, this is where we end up.

You are not out actively soliciting and trying to ensnare these people. You sort of wait until they're almost prover-

bally [sic] dropped in your lap. As I said, it may not make it better but there is a difference in the type of person that is actively soliciting and trying to find the victims. Yours is the type of situation that should well be put in check. If there's any validity whatsoever to our Sex Offender Registration Act because the community will know — anyone who doesn't know you will know that they may not wish to trust you with the well being of their children.

Ms. Young has suggested that the Court sentence you to what would be effectively a period of ten years of incarceration. I will tell you that if I sentenced [you] to ten years of incarceration, you would be out free from your commitments within five years. You will have spent that five years accomplishing little if anything through the auspices of the State of Nebraska Department of Corrections. Partially because their program is difficult to get into, it's questionably effective. More importantly as you stand at this point, I don't see an attitude on your part that suggests that you think it's necessary to make changes in yourself in your life. I will suggest to you from what I have seen in the court I have sat through the trial and what I have read, that you do need to reevaluate yourself, you do need to reevaluate your personality, you do need to reevaluate your relationship to other people and you do need to bring your life under control. And no matter how many people love you in your family, the fact that they will not say that to you does not mean that it doesn't need to be done.

Mr. Hamik, the offenses that occurred on the scale of sexual assault offenses and I say this with a great deal of reluctance because it doesn't sound real good is not as great as other people who are in this court. The pain, the hurt, the long-term psychological damage, that has been occasioned may well be just as great to the victims and their families as any forcible rape could ever be.

My read of this particular situation is absent the opportunity, the likelihood of your reoffending is not great.

The best way for the Court to control your opportunity is two-fold.

One, there has to be some serious period of incarceration that tells you and other persons that this type of behavior is not acceptable.

Second of all, we need to be able to maintain control over your behaviors and try to get you to reevaluate your position in yourself in the future. The best way I can do that is by not complying with the request for concurrent sentence.

Mr. Hamik, in case CR 99-76 which is the conviction for the Class IV felony, the Court in this matter is going to assess the costs of the prosecution against you, and I'm going to sentence you to a period of incarceration and commitment to the State of Nebraska Department of Corrections for not less than 20 months nor more than 5 years.

Mr. Hamik, that is the maximum sentence that I can impose on that particular offense. I will advise you that you will be parole eligible in approximately ten months. That does not mean that you will receive parole. It means that if you earn the good time and the other time credits that are available, that you will be considered for parole if the Department of Parole believes that you are an appropriate person to be released back on to the streets at that time.

In case CR 99-7[5] which is the conviction for the Class II felony, Mr. Hamik, this is obviously the most serious of the events. It's going to be strange because I'm going to give you the lesser of the sentences in this particular case. The lesser as it affects us today. The greater the potential of sentence for tomorrow. I'm going to place you on a concurrent probation — I'm sorry, a consecutive sentence of probation consecutive to the prior order that has been entered by the Court. This sentence of probationary status will commence upon your release on parole or upon institutional discharge from the State of Nebraska Department of Corrections. I'm going to place you under probationary supervision for a period of five years which is the maximum possible time that I can place you on a probationary supervision as allowed by statutes.

I will require that you comply with the standard and traditional terms and conditions of probation that will be

placed on your probation order. Those will include such things as reporting to the probation officer when required, maintaining suitable employment or career situation, doing the — abiding by all of the terms and conditions of probation including not being involved in any and I stress the word "any law violations in the future." A violation of the probation will lead to you being brought back to be resentenced under the 1-to-50 year program.

As additional conditions of that probation, I am going to require that you have no direct or indirect contact with the alleged victim in this particular case. That means you are to neither see, talk to, or have other persons communicate with that victim or her immediate family.

I will also require that you pay the court costs that are involved in this.

I'm going to require that you participate in and complete an appropriate psychological evaluation, and I'm also going to require that as a result of that evaluation that you participate in any counseling that it is determined necessary and appropriate by the probation officer after conferring with counsel. Pursuant to any term or condition of future counseling, you may petition the Court for review and clarification.

Mr. Hamik, the purpose of this is to motivate you and convince you you've got to change and understand that the penitentiary is where you're headed in the future for long periods of time unless your attitude and your behaviors change. It is also designed to give you an opportunity to make those changes and afford the maximum amount of protection that we can to the victim. I hope you use this as an opportunity and not as an escape, an — an opportunity — there's a future for yourself, there's a future for your family, and I hope and pray there's a future for the victim and her family.

ASSIGNMENTS OF ERROR

The State argues, restated, (1) that Hamik was ineligible for probation under § 28-105(4) and (2) that in any event, a sentence of probation was excessively lenient in this case.

STANDARD OF REVIEW

[1,2] 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. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). 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. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

ANALYSIS

Eligibility for Probation

All crimes in Nebraska are statutory in nature. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). Sentences imposed upon persons convicted of a crime are also statutory. *Id*. Thus, in order to resolve the question of whether Hamik was eligible to be sentenced to probation on his Class II felony conviction, it is necessary to examine those Nebraska statutes pertaining to criminal penalties and eligibility for probation. The starting point for our analysis is § 28-105, which provides in pertinent part:

> (1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into eight classes which are distinguished from one another by the following penalties which are authorized upon conviction:
>
> Class I felony . . . Death
> Class IA felony . . . Life imprisonment
> Class IB felony . . . Maximum-life imprisonment
> Minimum-twenty years imprisonment
> Class IC felony . . . Maximum-fifty years imprisonment
> Mandatory minimum-five years imprisonment
> Class ID felony . . . Maximum-fifty years imprisonment
> Mandatory minimum-three years imprisonment
> Class II felony . . . Maximum-fifty years imprisonment
> Minimum-one year imprisonment

Class III felony . . .	Maximum-twenty years imprisonment, or twenty-five thousand dollars fine, or both Minimum-one year imprisonment
Class IV felony . . .	Maximum-five years imprisonment, or ten thousand dollars fine, or both Minimum-none

. . . .

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

Also pertinent to our analysis is Neb. Rev. Stat. § 29-2260(2) (Reissue 1995), which provides in part:

> Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the 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[.]

[3-5] The State contends that § 28-105(1) imposes a mandatory minimum term of incarceration for persons convicted of a Class II felony and that Hamik is therefore ineligible for probation under § 28-105(4). This presents an issue of statutory interpretation, which we must resolve in accordance with long-established principles. A fundamental principle of statutory construction requires that penal statutes be strictly construed. *State v. Hochstein and Anderson, ante* p. 311, 632 N.W.2d 273 (2001); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). 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. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). 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. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

[6] Under principles of statutory construction, 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. *State v. Hochstein and Anderson, supra*; *State v. Seberger*, 257 Neb. 747, 601 N.W.2d 229 (1999).

As is readily apparent from the plain language of § 28-105(1), the Legislature utilized different language in specifying the lower limit of a term of incarceration for specific felony classifications. For Class IC and Class ID felonies, the statute prescribes a "[m]andatory minimum" term. For other classifications, including Class IB, Class II, and Class III felonies, the statute prescribes a "[m]inimum" term of incarceration. Section 28-105(4) provides that a person convicted of a felony for which a "mandatory minimum" sentence is prescribed shall not be eligible for probation. However, neither this nor any other statute states that a person such as Hamik who is convicted of a felony for which a "minimum" sentence is prescribed is ineligible for parole. Equating a "minimum" sentence with a "mandatory minimum" sentence, as the State urges, would require that we regard the Legislature's use of the word "mandatory" to be superfluous, contrary to our established principles of statutory construction.

The State argues that the statutory structure for classifying penalties for felonies is incongruous if we do not read the term "minimum" as "mandatory minimum," because then, persons convicted of relatively less serious offenses would require a mandatory minimum sentence without the option of probation, while those convicted of more serious offenses could be sentenced to probation without any incarceration. If any such incongruity exists, it is wholly within the province of the Legislature

to resolve as a matter of policy. Accordingly, we conclude that the State's first assignment of error is without merit.

Claim of Excessive Leniency

[7,8] Alternatively, the State argues that even if a sentence of probation could lawfully be imposed for a Class II felony, its imposition on the facts of this case resulted in an excessively lenient sentence. Pursuant to § 29-2320, the State may appeal a sentence imposed following a finding or plea of guilty "if such [county] attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient." Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). 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. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). 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. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison, supra*.

Having concluded that probation was a legally permissible sentence in this case, we turn to the question of whether the sentence was excessively lenient under the facts reflected in the record. Neb. Rev. Stat. § 29-2322 (Reissue 1995) provides that where the State challenges a sentence as excessively lenient, the appellate court should consider:

> (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.

In *State v. Harrison, supra*, we recognized that where the sentence alleged to be excessively lenient is one of probation, it is also necessary for the trial court and the reviewing appellate court to consider the provisions of § 29-2260, which states in relevant 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.

In *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), a case concerning the prosecution for motor vehicle homicide involving a driver impaired by alcohol, we determined that there was competent evidence received at the sentencing hearing which supported the sentence of probation. This evidence included a statement by the defendant expressing deep remorse for her conduct and a promise to maintain sobriety in the future; letters from members of the community attesting to the defendant's sincere attempts to rehabilitate herself; and, of particular importance to the sentencing judge, a letter from relatives of the two victims expressing their opinion that the defendant's remorse and efforts at rehabilitation were genuine. We noted that this evidence established that the defendant was unlikely to commit another crime, that she was likely to respond affirmatively to probationary treatment, and that imprisonment would entail excessive hardship to her children.

In this case, the district court reasoned that consecutive sentences of 20 months' to 5 years' imprisonment on the Class IV felony and 5 years' probation on the Class II felony would result in Hamik's being subject to the State's supervision for a longer period than under the concurrent sentences of incarceration proposed by the State, thus providing Hamik with a better opportunity to alter his attitude and behaviors. While this rationale seems reasonable on its face, it does not square with the record. Hamik did not offer evidence or personally address the court at the sentencing hearing. Unlike the defendant in *Harrison*, he did not acknowledge his criminal conduct or express any remorse. Indeed, during the sentencing hearing, the district court specifically noted that it could not discern in Hamik's attitude any appreciation of a need to make changes in his life. Although the court characterized Hamik as a "predator" who "prey[s] upon

the trust of young girls," it concluded that "absent the opportunity, the likelihood of your reoffending is not great." This conclusion is not supported by the presentence investigation report (PSI) which describes several instances of aggressive and violent conduct on the part of Hamik. For example, the PSI indicates that in October 1999, Hamik instituted an altercation with another individual while both were in a post office, and then said to the individual, "You better watch your kids, I'm going to get them, they're mine."

In reviewing the record, we find none of the grounds favoring probation which are enumerated in § 29-2260(3). Regarding § 29-2260(3)(a) and (b), the crime clearly caused serious psychological harm to the victim. The victim's counselor diagnosed her as suffering from significant trauma from the abuse and stated that she would be "at high risk for needing additional psychological services periodically throughout her lifetime." There is no claim or evidence to suggest that Hamik did not contemplate that his conduct would cause such harm. With respect to § 29-2260(c) through (f), there is no evidence that Hamik acted "under strong provocation" or under circumstances tending to excuse or justify his conduct; or that the victim, who because of her age was incapable of consent, "induced or facilitated commission of the crime." With respect to § 29-2260(f), the PSI reflects that the victim's parents incurred unreimbursed expenses for her counseling and medical services. The PSI reflects that Hamik was convicted of third degree assault in 1986, as well as the conviction on one count of first degree sexual assault on a child for which he was sentenced contemporaneously with the sentence here under review. As noted above, the record does not support a conclusion that the "crime was the result of circumstances unlikely to recur"; that Hamik's "character and attitudes" make him unlikely to reoffend; or that he is likely to "respond affirmatively to probationary treatment." See § 29-2260(h), (i), and (j). Finally, the record does not support a finding that imprisonment would constitute "excessive hardship" to Hamik's dependents within the meaning of § 29-2260(k).

[9] As we stated in *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), 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. *Id.*; *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993). However, there must be some reasonable factual basis for imposing a particular sentence. Here, while we believe that the trial court was attempting in good faith to fashion a sentence which would both punish Hamik and afford him an opportunity to rehabilitate himself, the record simply does not reflect statutory or other grounds for the imposition of probation. Accordingly, we determine that the sentence constituted an abuse of discretion.

CONCLUSION

For the reasons stated, we conclude that a sentence of probation in this case was legally permissible but excessively lenient. Accordingly, pursuant to Neb. Rev. Stat. § 29-2323(1)(a) (Reissue 1995), we vacate the sentence of probation and remand the cause to the district court with directions to impose a greater sentence.

SENTENCE VACATED, AND CAUSE
REMANDED FOR RESENTENCING.

IN RE ADOPTION OF BABY GIRL H.
K.D.G. AND T.S.G., APPELLEES, V. LUKE ARMOUR, APPELLANT.

635 N.W.2d 256

Filed November 2, 2001. No. S-00-1104.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court.
2. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
3. **Constitutional Law: Parent and Child.** State intervention in a parent-child relationship is subject to constitutional oversight.
4. **Constitutional Law: Parent and Child: Due Process.** An established familial relationship is a liberty interest entitled to substantial due process protection, but the mere existence of a biological link does not merit equivalent constitutional protection.

5. **Constitutional Law: Parent and Child: Adoption: Notice.** When a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before a child may be adopted.
6. **Due Process.** Substantive due process concerns the content of the statute specifying when a right can be lost or impaired.
7. **Constitutional Law: Due Process.** The 14th Amendment forbids the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.
8. **Statutes: Due Process.** The 30-day filing requirement of Neb. Rev. Stat. § 43-104.05 (Reissue 1998) does not facially violate substantive due process.
9. **Equal Protection.** Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest.
10. **Equal Protection: Adoption: Statutes.** The adoption statutes do not facially violate equal protection.
11. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
12. **Constitutional Law: Parent and Child: Notice: Statutes.** Neb. Rev. Stat. § 43-104.13 (Reissue 1998) is facially constitutional.
13. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties.

Appeal from the County Court for Gosper County: CARLTON E. CLARK, Judge. Affirmed.

Michael J. Synek for appellant.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellees.

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

CONNOLLY, J.

Neb. Rev. Stat. § 43-104.05 (Reissue 1998) requires a putative father to file a petition for adjudication of paternity in county court within 30 days of filing a notice of intent to claim paternity in order to preserve his rights to notice of adoption proceedings. See *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000). Appellant, Luke Armour, the putative father of Baby Girl H., filed a petition for adjudication of paternity in the

district court, which was the wrong court. The district court dismissed the petition for lack of jurisdiction. In the present adoption proceedings, the county court determined that because Armour filed in the wrong court, he had not complied with the provisions of § 43-104.05. As a result, the court determined Armour was not entitled to further notice in adoption proceedings involving the child.

On appeal, Armour argues that the application of the adoption statutes to his case violate his rights to due process and equal protection and that the statutes are facially unconstitutional. We determine that the statutes at issue are constitutional and did not deprive Armour of his constitutional rights as applied. We affirm.

BACKGROUND

On August 3, 1998, Armour received a letter by registered mail from a counselor at Lutheran Family Services. The letter stated that L.H., a person with whom Armour had been sexually active, had given birth to a child on July 22, 1998, and was planning to relinquish the child for adoption. The letter advised that Armour had been identified as a possible biological father and informed Armour that he could: "a. Deny paternity; b. Waive any paternal rights [Armour] may have; c. Join in the relinquishment and consent to adoption; or d. File a notice of intent to claim paternity and obtain custody of the child." The letter advised Armour that if he wished to establish his rights as the biological father, he must file a notice with the biological father registry maintained at the Nebraska Department of Health and Human Services within 5 days of receipt of the letter. The letter further advised Armour that if he wished to pursue custody of the child, he should seek counsel from an attorney immediately. At the time Armour received the letter, he was an unemancipated minor and was living with his parents.

Armour filled out a form entitled "Notice of Intent to Claim Paternity and Obtain Custody," in which he stated his intention to obtain custody of the child. He further acknowledged his liability for contribution to support the child and pay for pregnancy-related expenses of the mother. The form was faxed to the appropriate department on August 4, 1998. A portion of the notice stated:

> I understand that if a petition is not filed in the county court in the county of residence of said child for an adjudication of my claim of paternity and right to custody within thirty (30) days after the filing of this notice, my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

Armour hired legal counsel, and on August 21, 1998, a petition for determination of paternity and custody was filed in district court. The petition named L.H. as a party and stated that it was filed according to § 43-104.05. K.D.G. and T.S.G. sought to intervene as the prospective adoptive parents. On September 22, L.H. filed a demurrer on the basis that the district court lacked subject-matter jurisdiction, and Armour later filed a motion for visitation pending final hearing.

Without ruling on the petition in intervention or motion for visitation, the district court entered an order dismissing the petition for lack of jurisdiction. We dismissed Armour's appeal, holding that the procedure for adjudicating paternity under § 43-104.05 falls within the exclusive jurisdiction of the county court, or in certain circumstances, the separate juvenile court. *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000). On June 23, 2000, the district court dismissed the petition pursuant to the mandate.

On July 17, 2000, K.D.G. and T.S.G. filed a petition for adoption in the county court. The petition asserted that Armour had been given proper notice of his rights and that he had failed to file a petition for an adjudication of paternity within 30 days of filing notice of intent to claim paternity with the Department of Health and Human Services as required by § 43-104.05. The record shows that Armour was served with a copy of the petition.

K.D.G. and T.S.G. also filed a motion seeking a determination that Armour's consent to the adoption was not required and that he was not entitled to further notice in the proceedings. Armour appeared without counsel and requested a continuance because the attorney he had planned to hire had a conflict of interest. The county court ruled in favor of K.D.G. and T.S.G., but later granted Armour's motion for a rehearing.

At the hearing, Armour testified that L.H. informed him of her pregnancy when she called him in June or July 1998, shortly

before she gave birth. Armour contended that because he was a minor, he received insufficient notice of his rights from Lutheran Family Services. Armour also argued that any action to preclude him from receiving notice of, and participating in, the adoption proceedings would deprive him of procedural and substantive due process under the U.S. and Nebraska Constitutions. Armour then argued that the statutory scheme at issue was unconstitutional.

On September 19, 2000, the county court determined that Armour did not properly file a petition for adjudication of paternity in accordance with § 43-104.05 and was not entitled to any further notice in the adoption proceedings. On September 21, K.D.G. and T.S.G. adopted the child. Armour appeals.

ASSIGNMENTS OF ERROR

Armour assigns, rephrased, that the county court erred in (1) determining that he was not entitled to further notice in the adoption proceedings; (2) determining that he did not have any rights that were required to be recognized in the adoption proceedings; (3) depriving him of his constitutional rights, particularly substantive and procedural due process under the U.S. and Nebraska Constitutions; (4) rendering an adoption decree contrary to statutory provisions; and (5) failing to dismiss the adoption petition for failure of proof and lack of jurisdiction. Armour further assigns that Neb. Rev. Stat. §§ 43-101 to 43-116 (Reissue 1998), especially §§ 43-104.05, 43-104.13, and 43-104.22, violate the U.S. and Nebraska Constitutions on their faces.

STANDARD OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

[2] Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

ANALYSIS

Constitutionality of Adoption Statutes as Applied

Armour contends that the application of the adoption statutes to his case denied him due process. Armour argues that because he filed a notice of intent to claim paternity within 5 days under § 43-104.02, applying § 43-104.05 deprives him of his constitutionally protected interest of parenting his child.

At the time Armour filed his petition for adjudication of paternity in district court, § 43-104.05 provided in part:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court.

Section 43-104.22 provided:

> The court shall determine that the biological father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:
>
> . . . .
>
> (7) The father failed to timely file a petition to adjudicate his claim of paternity and right to custody as contemplated in section 43-104.05[.]

[3-5] This court has not addressed whether § 43-104.22 can violate due process as applied. The U.S. Supreme Court has long recognized that state intervention in a parent-child relationship is subject to constitutional oversight. See, e.g, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 2d 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 2d 1042 (1923). The Court has held that an established familial relationship is a liberty interest entitled to substantial due process protection. *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). But the Court has made clear

that "the mere existence of a biological link does not merit equivalent constitutional protection." 463 U.S. at 261. The Court explained that the protection given to the familial relationship stems from the emotional attachments that derive from the intimacy of daily association. Thus, when a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before a child may be adopted. As the Court explained:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

463 U.S. at 262.

In *Lehr*, the putative father of a child born out of wedlock never supported the child and failed to enter his name in his state's "putative father registry," 463 U.S. at 251, which would have entitled him to notice of any adoption proceedings. When the child was over 2 years old, the biological mother and her husband filed a petition for adoption and an order of adoption was entered. The biological father sought to vacate the adoption, arguing that the requirement that he file notice with the putative father registry in order to be given notice of the adoption violated his constitutional rights. The U.S. Supreme Court held that the putative father failed to grasp any opportunity interest he had in raising his child. In reaching this conclusion, the Court stated that it was concerned only with whether the state had adequately protected the putative father's opportunity to form a relationship with his child. The Court held that the putative father registry protected that right and further stated that the possibility that the father failed to use the registry because of his ignorance of the law could not be a sufficient reason for criticizing the law itself.

In Nebraska, a putative father is required under § 43-104.02 to file a notice of intent to claim paternity within 5 days of either the child's birth or receiving notice from an agency or attorney of the birth. Under § 43-104.04, if the putative father fails to file such a notice, his consent or relinquishment are not required. Citing to *Lehr*, we held in *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996), that §§ 43-104.02 and 43-104.04 did not violate due process as applied.

In *Friehe*, the putative father, after learning of the child's birth, infrequently visited the child at the hospital. The father agreed to place the child in temporary foster care and did not file a notice of intent to claim paternity within the 5-day time period required by § 43-104.05. The putative father argued that §§ 43-104.02 and 43-104.04 unconstitutionally violated his rights to due process and equal protection. We noted that the liberty interest at stake did not involve the termination of established custodial rights. Instead, the interest involved was a putative father's opportunity to potentially form a familial bond with his child. We then specifically noted the reasoning of the U.S. Supreme Court in *Lehr* as follows: " 'The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.' " 249 Neb. at 836, 545 N.W.2d at 748, quoting *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). We held that the putative father had it within his own power to assert his rights and obtain an opportunity to be heard by filing a notice of intent to claim paternity. Because it was his own failure to act upon the notice given to him of the child's birth, we determined that his due process claim was without merit.

Armour did not have an established familial relationship with the child guaranteeing him due process protection. Armour never saw the child and did not assist in paying for the child's birth or in supporting the child. Armour did, however, timely file a notice of intent to claim paternity pursuant to § 43-104.02, in which he acknowledged his obligation to pay support. Armour later failed to timely file a petition for adjudication of paternity under § 43-104.05 because his attorney filed the first petition in the wrong court. A motion for visitation was also filed in the wrong court. The question is whether Armour has sufficiently

grasped his opportunity interest in a relationship with his child requiring further notice of adoption proceedings and an opportunity to be heard under the Due Process Clauses of the U.S. and Nebraska Constitutions.

In accordance with *Lehr*, when Armour failed to file a petition for adjudication of paternity under § 43-104.05, Armour and his attorney were presumed to know the law. Indeed, Armour's notice of intent to claim paternity, filed under § 43-104.02, stated that he understood that he must file a petition for adjudication of paternity in the county court within 30 days. That the error of filing in the wrong court was made by Armour's attorney does not change the analysis. As *Lehr* makes clear, the issue is whether the state has adequately protected the putative father's opportunity interest. The failure to properly follow § 43-104.05 because of ignorance of the law can not be a sufficient reason for criticizing the law itself. As we indicated in *Friehe*, Armour is presumptively capable of asserting and protecting his own rights. Further, after our decision in *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000), Armour failed to make any further attempts to comply with § 43-104.05. As a result, Armour failed to ever file a petition for adjudication of paternity in county court. We determine that it was not impossible for Armour to properly comply with § 43-104.05 and that he was not denied any reasonable opportunity to do so. The statutes at issue adequately protected Armour's opportunity to form a relationship with his child. We determine that Armour did not sufficiently grasp his opportunity interest and that the application of §§ 43-104.05 and 43-104.22 to Armour's case did not deprive him of due process.

Facial Constitutionality of § 43-104.05

Armour next contends that the adoption statutes facially violate the U.S. and Nebraska Constitutions. Armour argues that the 30-day filing requirement of § 43-104.05 arbitrarily acts to terminate parental rights in violation of his right to substantive due process.

[6,7] Substantive due process relates to the content of the statute specifying when a right can be lost or impaired. See *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199 (Utah 1984). The U.S. Supreme Court has stated that the 14th Amendment

forbids the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. See *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

Applying the reasoning of *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), the Utah Supreme Court has held that an adoption statute that required a notice of paternity to be filed in order to preserve parental rights did not facially violate substantive due process. *Wells, supra*. The court in *Wells* reasoned that parental rights are not absolute and that the state has a compelling interest in speedily identifying those persons who will assume a parental role over illegitimate newborn children. The court further noted that for the statute to serve its purpose for the welfare of the child, a determination that a child can be adopted must be final and immediate. *Id.*

[8] We hold that the 30-day filing requirement of § 43-104.05 does not facially violate substantive due process. The 30-day requirement does not arbitrarily act to terminate a putative father's parental rights. Rather, the requirement provides the father with a period of time in which to assert his rights. If the father fails to do so, the statute then serves the compelling state interest of immediately placing the child with people who will assume a parental role for the child.

[9] Armour next contends that the adoption statutes—in particular § 43-104.05—facially violate equal protection because the statutes treat biological mothers and fathers differently. Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest. *Lehr, supra*.

We have stated that the 5-day filing requirement of § 43-104.02, although treating mothers and fathers differently, enables a speedy determination of the rights of the father so as to make it possible for the state to achieve a legitimate end, which is the placement of children as soon after birth as possible. *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). See, also, *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d

740 (1996) (interpreting *In re Application of S.R.S. and M.B.S.* as upholding the facial constitutionality of adoption statutes).

[10] The immediate secure adoption of children is an important state interest. We determine that the adoption statutes serve an important state interest and that any disparity of treatment in those statutes are substantially related to that interest. Accordingly, we determine that the adoption statutes do not facially violate equal protection.

NOTICE

Armour next contends that § 43-104.13 is facially unconstitutional because it fails to require that notice be given to a putative father that he must file a petition for adjudication of paternity within 30 days. Armour claims that this failure violates principles of procedural due process.

Section 43-104.08 provides:

> Whenever a child is claimed to be born out of wedlock and the biological mother contacts an adoption agency or attorney to relinquish her rights to the child . . . the agency or attorney contacted shall attempt to establish the identity of the biological father and further attempt to inform the biological father of his right to execute a relinquishment and consent to adoption, or a denial of paternity and waiver of rights . . . .

Section 43-104.12 requires that an agency or attorney shall notify by registered mail, return receipt requested, any person who has been identified as the biological father or possible biological father by the child's mother. Section 43-104.13 provides a list of information and rights of which a possible biological father must be notified.

[11] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

[12] Although § 43-104.13 does not require that a putative father be given notice that he must file a petition for adjudication within 30 days of filing his notice of intent to claim paternity,

§ 43-104.13 does advise the father to seek legal counsel immediately if he desires to seek custody of his child. Further, § 43-104.05 provides notice that a petition for adjudication must be filed within 30 days of the date the notice of intent to claim paternity was filed. If § 43-104.05 is followed, the father is afforded full notice of the adoption proceedings and an opportunity to be heard. It was not the content of the adoption statutes that deprived Armour of notice in the adoption proceedings. Instead, Armour's own failure to properly follow statutory procedure deprived him of notice in the adoption proceedings. We determine that § 43-104.13 is facially constitutional.

Armour next contends that the requirements of the notice statute, § 43-104.13, were not met. The letter Armour received from Lutheran Family Services was sent by registered mail with a return receipt requested. The letter informed Armour of his rights as set forth in § 43-104.13. Having reviewed the letter, we determine that it was sent in compliance with the notice statutes.

Armour next contends that the notice requirements of § 43-104.13 deprived him of due process and equal protection because Armour was a minor when he received notice of the child's birth. The stated purpose of § 43-104.13 is to provide notice to allow compliance with § 43-104.02. That section requires a putative father to file a notice of intent to claim paternity in order to preserve his rights. Armour received notice of the birth and acted on that notice by filing a notice of intent to claim paternity pursuant to § 43-104.02. Therefore, Armour was not deprived of any benefit intended by the statute. Nothing in the notice statutes requires notice to be served on the parents of a minor. Armour does not cite to any precedent for his argument that § 43-104.02 as applied to him violated his rights to due process or equal protection, nor can we find any precedent to support his argument. We conclude that this assignment of error is without merit.

Remaining Assignments of Error

Armour assigns that the county court erred in entering a decree of adoption based on what he contends were errors made by the court in the final adoption hearing and decree. K.D.G. and T.S.G. argue that Armour lacks standing to raise these issues.

[13] In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000); *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). The issues regarding the final adoption hearing and decree arose out of proceedings that Armour was not a party to and was not required to be given notice of. Armour is attempting to assert the legal interests of third parties. Because Armour lacks standing, we do not address his remaining assignments of error.

CONCLUSION

We determine that the adoption statutes at issue are not unconstitutional, either facially or as applied to Armour. We further conclude that the county court did not err in determining that Armour was not entitled to further notice in the adoption proceedings for Baby Girl H. We do not address Armour's remaining assignments of error due to Armour's lack of standing to assert the errors. Accordingly, we affirm.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EDWIN KULA, ALSO KNOWN AS ED KULA, APPELLANT.

635 N.W.2d 252

Filed November 2, 2001. No. S-01-044.

1. **Trial: Costs: Appeal and Error.** In determining what costs are actually, apparently, or probably necessary, the trial court is given discretion in determining those costs, and such determination will be reversed or modified only for an abuse of discretion.
2. **Sentences: Appeal and Error.** An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences.
3. **Costs.** Generally, the only costs which can be taxed are those authorized by statute.
4. **Costs: Parties.** A trial court may award or tax costs and apportion the same between parties on the same or adverse sides as in its discretion it may deem right and equitable.
5. **Convictions: Appeal and Error.** A conviction reversed on appeal is nullified, and the slate is wiped clean.

6. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
7. **Sentences.** 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.
8. ___. In considering a sentence, a 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 observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Merrick County: MICHAEL OWENS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, and Adam Sipple for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

MCCORMACK, J.

NATURE OF CASE

On October 26, 2000, Edwin Kula pled no contest to a charge of manslaughter, a Class III felony, in the district court for Merrick County. His plea arose out of the April 15, 1994, death of Jerry Carlson. This is the fourth time Kula has appeared before this court regarding this incident. He was originally convicted of first degree murder and use of a weapon to commit a felony, which this court overturned in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997) (*Kula I*). Kula was then convicted of second degree murder and use of a weapon to commit a felony. This conviction was overturned by this court in *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000) (*Kula II*). On December 5, 2000, Kula pled no contest to the charge of manslaughter, was sentenced by the trial court to a minimum and a maximum term of 20 years in prison, and was ordered to

pay court costs of $4,592.39. Kula appeals his sentence and the order assessing the costs of prosecution to him.

BACKGROUND

The facts of this case are set out in detail in *Kula I.*

On October 26, 2000, pursuant to a plea agreement, Kula appeared in the district court for Merrick County, entering a plea of no contest to the reduced charge of manslaughter and giving a statement which served as the factual basis for the plea. The charge of use of a weapon to commit a felony was dismissed. On December 5, Kula was sentenced to a minimum and maximum sentence of 20 years in prison. He was also ordered to pay costs of $4,592.39. The trial court granted Kula credit for the time he had served since his arrest.

ASSIGNMENTS OF ERROR

Kula, in the appeal of his sentence, assigns that (1) the trial court erred in assessing court costs to him and (2) the trial court erred and abused its discretion in sentencing him to a minimum and maximum sentence of 20 years in the Nebraska Penal and Correctional Complex.

STANDARD OF REVIEW

[1] In determining what costs are actually, apparently, or probably necessary, the trial court is given discretion in determining those costs, and such determination will be reversed or modified only for an abuse of discretion. See *Biester v. State*, 65 Neb. 276, 91 N.W. 416 (1902).

[2] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

ANALYSIS

As to the first assignment of error, Kula argues that there is no rational basis for an assessment of costs of $4,592.39. He argues that no costs should be assessed to him for the first conviction because it was reversed due to prosecutorial misconduct. He also argues that he should not be assessed the costs of the second trial because "[h]e was not convicted as a result of the

second trial and the matter was reversed." Brief for appellant at 5. Kula believes that no costs should be associated with the present proceeding, wherein he entered a no contest plea to a conviction of manslaughter. At the very least, according to Kula, the matter should be remanded to the trial court for a hearing to determine the accurate amount of costs, if any, that should be assessed to him.

[3,4] Costs are purely compensatory and are not punitive. 24 C.J.S. *Criminal Law* § 1738 (1989). Generally, the only costs which can be taxed are those authorized by statute. *State v. Konvalin*, 181 Neb. 554, 149 N.W.2d 755 (1967), *cert. denied* 389 U.S. 872, 88 S. Ct. 157, 19 L. Ed. 2d 152. A trial court may award or tax costs and apportion the same between parties on the same or adverse sides as in its discretion it may deem right and equitable. *State v. Canizales*, 240 Neb. 811, 484 N.W.2d 446 (1992). Determining what costs are actually, apparently, or probably necessary is a matter of discretion. However, the court's decision is subject to review and will be reversed or modified whenever it appears that there has been an abuse of discretionary power. *Biester v. State, supra*.

The *only* evidence in the record as to costs is the statement by the clerk of the district court as follows:

STATE OF NEBRASKA VS. EDWIN KULA a/k/a/ ED KULA
Case No. 1072-E-220,CR95-9
Appellate Court Case No. S-01-0044

	1ST TRIAL
FEES	$1546.32
DEPOSITIONS	288.38
FILING, ETC.	60.00
	2ND TRIAL
FEES	$1334.76
SUPREME COURT FILING, ETC.	177.00
DEPOSITIONS	5979.55
SUPREME COURT BILL OF EXCEPTIONS	371.25
WITNESS AFFIDAVIT FOR 1ST TRIAL	$3631.00

Therefore, the issue is whether the trial court abused its discretion in taxing costs to Kula from the previous trials, the convictions for which were reversed.

At oral argument, neither the attorney for Kula nor the attorney for the State could reconcile the figures in the clerk's statement with the costs assessed by the court, of $4,592.39. Other than the clerk's statement, there is absolutely nothing in the record as to how the court arrived at this figure.

The State relies on Neb. Rev. Stat. § 29-2207 (Reissue 1995), which provides: "In every case of conviction of any person for any felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of the prosecution against the person convicted." The State argues that the first two trials did indeed establish Kula's guilt, despite the fact that his convictions were overturned on appeal. According to the State, court costs are part of the burden the loser must pay. Since Kula lost at trial, the State contends he is liable for the associated costs. See *State ex rel. Douglas v. Gradwohl*, 194 Neb. 745, 235 N.W.2d 854 (1975).

[5] In *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995), we held that generally a conviction reversed on appeal is nullified, and the slate is wiped clean. In *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986), the U.S. Supreme Court held, similar to *State v. Rust, supra*, that when a defendant obtains a reversal of his or her conviction on appeal, the original conviction is nullified, and the slate is wiped clean.

Kula's convictions in the two trials, *Kula I* and *Kula II*, were reversed on appeal, and the costs of those two proceedings cannot be assessed against Kula. We remand this matter to the trial court to determine what, if any, costs are associated with only the instant proceeding (plea of no contest to manslaughter) and to assess such unpaid costs of prosecution found against Kula.

Excessive Sentence

In his second assignment of error, Kula argues that the trial court abused its discretion in sentencing him to prison for the statutory maximum, which is a minimum and maximum of 20 years. He cites several Nebraska cases where defendants were convicted of manslaughter and received lesser sentences and argues that those cases form the basis for an abuse of discretion

argument. Kula notes that this court may reduce a sentence imposed on a defendant when in its opinion the sentence is excessive, and it is the duty of this court to render such a sentence as in its opinion may be warranted by the evidence. See *State v. Sturm*, 189 Neb. 299, 202 N.W.2d 381 (1972).

[6-8] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). Additionally:

> 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.

State v. Urbano, 256 Neb. 194, 216, 589 N.W.2d 144, 159 (1999). In considering a sentence, a 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 observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995).

We conclude, after reviewing the record, that the trial court did not abuse its discretion in the sentence imposed, and therefore, this assignment of error is without merit.

CONCLUSION

As to the assigned error in the assessment of court costs, we cannot determine on this record how the trial court arrived at the costs. We reverse and vacate the judgment of the trial court as to costs, and remand the cause on this issue with directions that Kula cannot be assessed any costs in *Kula I* or *Kula II*.

On the assigned error of excessive sentence, we determine that this assignment is without merit for the reason that the trial

court did not abuse its discretion in sentencing Kula to a minimum and a maximum term of 20 years in prison on the charge of manslaughter.

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

SAMMIE JONES, DOING BUSINESS AS JONES DRYWALL, APPELLEE, V. SUMMIT LIMITED PARTNERSHIP FIVE, A SOUTH DAKOTA LIMITED PARTNERSHIP, AND THE SUMMIT GROUP, INC., A SOUTH DAKOTA CORPORATION, APPELLANTS.

635 N.W.2d 267

Filed November 9, 2001. No. S-00-630.

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. ____: ____. Under Neb. Rev. Stat. § 25-2614(a)(1) (Reissue 1995) of the Uniform Arbitration Act, an evident miscalculation of figures occurs when there is a mathematical error in the arbitration award that is both obvious and unambiguous.
3. **Arbitration and Award: Proof.** The burden of alleging and proving an arbitration award's invalidity rests upon the party seeking to set aside the decision.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Timothy R. Engler and Karen A. Haase, of Harding, Schultz & Downs, for appellants.

Stuart Tiede, of Woods, Fuller, Schultz & Smith, P.C., and Jane F. Langan and Britt J. Ehlers, of Rembolt, Ludtke & Berger, L.L.P., for appellee.

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

HENDRY, C.J.

INTRODUCTION

This case arises from a contract dispute between Sammie Jones (Jones) and The Summit Group, Inc., a general contractor

affiliated with Summit Limited Partnership Five (collectively The Summit Group). After the dispute was submitted to arbitration, The Summit Group requested that the district court modify or correct the arbitrator's award pursuant to Neb. Rev. Stat. § 25-2614(a)(1) (Reissue 1995). The district court denied the request and confirmed the award. The Summit Group appealed.

FACTUAL BACKGROUND

Jones, an individual doing business as Jones Drywall, contracted to do painting and drywalling on a hotel owned by The Summit Group in Lincoln, Nebraska. The Summit Group was displeased with Jones' work and his staffing of the job, and eventually terminated its contractual relationship with Jones.

On July 30, 1998, Jones filed a construction lien against the hotel and a construction lien foreclosure petition and praecipe in Lancaster County District Court. The parties thereafter filed a joint stipulation to arbitrate the dispute and agreed to stay the district court proceedings pending the outcome of the arbitration. The district court ordered the stay.

The parties arbitrated their dispute. The record before this court regarding the proceedings before the arbitrator includes only the two-page arbitration award and the one-page order of the arbitrator denying modification. The arbitrator entered his award on February 25, 1999. In the award, the arbitrator awarded Jones $40,195.47, itemized as follows:

Drywall Contract Damages Total	$31,031.59
Painting Contract Damages Total	9,163.88
Total	$40,195.47

The arbitrator also awarded The Summit Group $10,019.40, itemized as follows:

Custom Drywall Systems	$11,453.00
E&K Drywall	21,112.00
Performance Coatings	18,800.00
Payment to Tim Rogers	600.00
Extra staff to clean paint and texture from Fixtures, tubs, etc.	1,092.00
Sub-total	$53,057.00
Less Contract Amounts Not Paid to Jones	<43,037.60>
Total	$10,019.40

In sum, the arbitrator found $40,195.47 in damages to Jones and $10,019.40 in damages to The Summit Group, resulting in an award of $30,176.07 to Jones.

On March 17, 1999, Jones applied to the district court for confirmation of the arbitration award. That same day, The Summit Group filed an application for modification of the award with the arbitrator in accordance with Neb. Rev. Stat. § 25-2610 (Reissue 1995). The arbitrator refused to modify the prior award and denied the application.

The Summit Group then filed a motion in the district court, requesting modification or correction of the arbitrator's award pursuant to § 25-2614(a)(1). The Summit Group asserted that the arbitrator granted Jones a double recovery by awarding Jones $40,195.47 for "Drywall Contract Damages" and "Painting Contract Damages," while deducting $43,037.60 for "Contract Amounts Not Paid to Jones" from The Summit Group's award. The district court denied The Summit Group's motion and confirmed the arbitrator's $30,176.07 award to Jones. The court found there was not an "evident miscalculation of figures" under § 25-2614(a)(1).

The Summit Group appealed to the Nebraska Court of Appeals, which, in *Jones v. Summit Group, Inc.*, 8 Neb. App. lxvii (case No. A-99-1090, Jan. 18, 2000), dismissed the appeal without opinion and remanded to the district court for reasons unrelated to this appeal. Jones thereafter moved for summary judgment in the district court requesting that court to enter a final judgment in the amount of the arbitration award. The district court entered judgment for Jones. The Summit Group appealed.

ASSIGNMENTS OF ERROR

The Summit Group assigns that the district court erred as a matter of fact and law in refusing to alter or amend the arbitrator's award.

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, this 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. See *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

ANALYSIS

Question of Law

The Summit Group asserts that the arbitrator's award contains an "evident miscalculation of figures" under § 25-2614(a)(1), justifying a modification or correction of the arbitrator's award. Under Nebraska's Uniform Arbitration Act, a district court may modify or correct an arbitration award when one of the limited grounds listed in § 25-2614 exists. The Summit Group relies on § 25-2614(a)(1), which states, "[T]he court shall modify or correct the award when: (1) There was an evident miscalculation of figures."

This court has not previously addressed what constitutes an "evident miscalculation of figures" under § 25-2614(a)(1). However, § 25-2614(a)(1) is similar to 9 U.S.C. § 11(a) (1994) of the federal Arbitration Act ("evident material miscalculation of figures") and identical to the Unif. Arbitration Act § 13(a)(1), 7 U.L.A. 409 (1997) ("evident miscalculation of figures"), which has been adopted in other states. Accordingly, we look to federal and state decisions interpreting similar portions of the Uniform Arbitration Act and the federal Arbitration Act for guidance in construing § 25-2614(a)(1). See, e.g., *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999) (in interpreting state statute, court may look to federal court decisions construing similar federal statute); *FirstTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993) (stating that other jurisdictions' opinions were persuasive in case of first impression in Nebraska under Uniform Commercial Code).

Various courts have defined what constitutes an evident miscalculation in the context of reviewing an arbitrator's decision. In the federal courts, the Eighth Circuit has defined an "evident material miscalculation of figures" under 9 U.S.C. § 11(a) of the federal Arbitration Act as a "mathematical mistake." *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 749 (8th Cir. 1986). The Fifth and Sixth Circuits have found that an evident material miscalculation occurs only " ' "[w]here the record that was before the arbitrator demonstrates an unambiguous

and undisputed mistake of fact . . . by the arbitrator in making his award . . . .'' '' *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 821 (5th Cir. 1993), quoting *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210 (5th Cir. 1993). Accord *National Post Office v. U.S. Postal Service*, 751 F.2d 834 (6th Cir. 1985). The Fourth Circuit has defined "evident material miscalculation" as a " 'mathematical error appear[ing] on the face of the award.' " *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998). See, also, *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994) ("clerical error which may be corrected without disturbing the merits of the arbitrators' decision").

State courts similarly define an "evident miscalculation of figures" under the Uniform Arbitration Act in very narrow terms. See, e.g., *Foust v. Aetna Cas. & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989) (only mathematical errors that do not alter award on merits); *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 413, 255 S.E.2d 414, 419 (1979) ("mathematical errors committed by arbitrators which would be patently clear to a reviewing court"). As perhaps best stated in *Severtson v. Williams Const. Co.*, 173 Cal. App. 3d 86, 93, 220 Cal. Rptr. 400, 404 (1985), an evident miscalculation is " 'something which is apparent by an examination of the [document], needing no evidence to make it more clear.' "

The Summit Group relies principally upon *Laurin Tankers America v. Stolt Tankers*, 36 F. Supp. 2d 645 (S.D.N.Y. 1999), in support of its contention that the definition of evident miscalculation of figures should include miscalculations which are not clearly apparent on the face of the award. In *Laurin Tankers America*, the district court modified an arbitrator's award under the federal Arbitration Act. The district court found that the arbitrator, in calculating damages, mistakenly used a sea vessel's total estimated fuel consumption for an entire voyage as the daily estimated rate of fuel consumption, resulting in a much larger deduction to the amount of the petitioner's recoverable damages. The court stated that the error "should have been 'evident' to anyone familiar with the industry," *id.* at 651, and that "in proper circumstances, a reviewing court may look beyond 'the face of the award.' " *Id.* at 652.

The decision in *Laurin Tankers America*, however, differs from this case. In *Laurin Tankers America*, the arbitrators acknowledged their erroneous calculation. Furthermore, the court in *Laurin Tankers America* found that the parties had agreed "on the vessel's rates of fuel consumption to be used in calculating [the petitioner's] damages." 36 F. Supp. 2d at 651. Such agreement among the parties and the arbitrator does not exist in this case. For these reasons, we decline to follow *Laurin Tankers America*.

[2] As noted by the Fourth Circuit in *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998), "[r]eview of an arbitrator's award is severely circumscribed." 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." *Id.* "[S]trong deference [is] due an arbitrative tribunal." *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993). Furthermore, " '[w]hen . . . parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process.' " *Id.* at 821, quoting *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410 (11th Cir. 1990). Based on the foregoing rationale, a carefully circumscribed definition of evident miscalculation of figures is appropriate. Accordingly, we determine that under § 25-2614(a)(1) of the Uniform Arbitration Act, an "evident miscalculation of figures" occurs when there is a mathematical error in the arbitration award that is both obvious and unambiguous.

Question of Fact

The Summit Group contends that the arbitrator's award contains an error on the face of the award that is "obvious, indisputable and clear." Brief for appellants at 24. While a plausible argument can be made that there is some inconsistency in the arbitrator's award, we cannot say that the district court was clearly erroneous in finding that there was no evident miscalculation of figures. In the arbitrator's itemization of damages, it is not clear whether the distinctly labeled "Drywall Contract Damages" and "Painting Contract Damages" are equivalent to "Less Contract Amounts Not Paid to Jones," particularly when

the dollar amount is not identical. As the trial court observed in its order:

> The various elements of damage in [the] arbitrator's award are not at all clear. . . . It is noted that the amount of the deduction ($43,037.60) is not identical to the amount of the damages awarded to [Jones]. While this may be confusing and even suspicious that there may be duplication, that is not sufficient under the law. The duplication must be clear, conclusive, or undisputable, in other words, evident. It is not.

We further note that Jones has disputed any modification of the award from the start. Compare *Cole v. Hiller*, 715 So. 2d 451 (La. App. 1998) (granting modification in case where parties jointly asked arbitrator to review arbitration award).

[3] "[T]he burden of alleging and proving [an arbitration award's] invalidity rests upon the party seeking to set aside the decision." *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 833, 448 N.W.2d 168, 172 (1989). To find an evident miscalculation in the arbitrator's award would require the district court to delve into a legal interpretation of the categories of the arbitrator's award and make assumptions not present on the face of the award. Furthermore, because the record does not contain the evidence presented to the arbitrator, any attempt to modify the figures as determined by the arbitrator would be pure speculation on the part of the district court. This type of analysis is not permissible in reviewing an arbitration award for an evident miscalculation of figures. "[W]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication." *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986). The district court was not clearly erroneous in finding that The Summit Group failed to show an "evident miscalculation of figures" under § 25-2614(a)(1).

CONCLUSION

The district court's confirmation of the award is affirmed.

AFFIRMED.

JOSE MAURICIO RODRIGUEZ, APPELLANT, V. MONFORT, INC., APPELLEE.

635 N.W.2d 439

Filed November 9, 2001. No. S-00-717.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the trial court which conducted the original hearing; the findings of fact of the trial court will not be disturbed on appeal unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Statutes: Appeal and Error.** When construing a statute, an appellate 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.
6. ____: ____. 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.
7. **Statutes.** A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute.
8. **Workers' Compensation: Presumptions.** The plain language of Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2000) requires both the submission of a plan by the vocational rehabilitation counselor and approval of that plan by a Workers' Compensation Court vocational rehabilitation specialist in order for the plan to benefit from the rebuttable presumption of correctness set forth in § 48-162.01(3).
9. ____: ____. Having declined to evaluate an injured worker's loss of earning capacity, a vocational rehabilitation counselor has not provided a loss of earning capacity opinion from which to afford a rebuttable presumption of correctness.

Petition for further review from the Nebraska Court of Appeals, HANNON, CARLSON, and MOORE, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Todd Bennett, of Rehm & Bennett, for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Jose Mauricio Rodriguez, appellant, filed a petition with the Nebraska Workers' Compensation Court seeking workers' compensation benefits for injuries allegedly arising out of and in the course of his employment with Monfort, Inc. Following trial, the workers' compensation trial court entered an award in favor of Rodriguez, granting him, inter alia, vocational rehabilitation benefits as a result of his injuries. Monfort appealed the award to the review panel of the Nebraska Workers' Compensation Court. Monfort claimed that the court-appointed vocational rehabilitation counselor had opined that Rodriguez did not need vocational rehabilitation benefits and that the trial court had failed to afford the "opinions" of the court-appointed vocational rehabilitation counselor a rebuttable presumption of correctness. The review panel, with one judge dissenting, ordered the trial court to consider the applicability of the rebuttable presumption with regard to the vocational rehabilitation counselor's opinion. Rodriguez appealed the review panel's decision to the Nebraska Court of Appeals, which affirmed the review panel's decision. *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 623 N.W.2d 714 (2001). This court granted Rodriguez' petition for further review.

For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to remand the cause to the review panel with directions to affirm the trial court's award.

STATEMENT OF FACTS

The relevant facts are not in dispute. On May 8, 1997, Rodriguez began working for Monfort as a box thrower, stacking 75- to 100-pound boxes of meat. On May 21, while performing his duties as a box thrower, Rodriguez began to experience pain in his left elbow. Rodriguez received medical treatment for this injury. Later, Rodriguez began to complain of pain in both of his shoulders. He received treatment for these injuries.

Because of his injuries, Rodriguez was reassigned to the position of "clod opener," in which position he used a knife to cut incisions in carcasses of meat which were moving on a chain in front of him. A physical therapist, Mike Kalvoda, conducted a jobsite analysis and stated in his report that the position was essentially within Rodriguez' physical restrictions. Rodriguez' treating physician, Dr. Frank Lesiak, concurred with this analysis.

On June 17, 1999, while Rodriguez was being treated for his work-related injuries, the Nebraska Workers' Compensation Court appointed a vocational rehabilitation counselor, Michelle Holtz, to provide Rodriguez with vocational rehabilitation services. In a letter dated June 30, 1999, Holtz informed Rodriguez' and Monfort's attorneys that "vocational rehabilitation services are not appropriate at this time due to the fact that Mr. Rodriguez is currently employed with Monfort in an alternate position that pays an hourly wage comparable to his pre-injury wage rate ($7.30 per hour)." In a letter dated August 13, 1999, Holtz stated that it appeared vocational rehabilitation services were unnecessary for Rodriguez because Kalvoda's jobsite analysis indicated Rodriguez' position as a clod opener was within his restrictions. In a report dated August 24, 1999, Holtz concluded that "vocational rehabilitation services are not warranted at this time due to the fact that Mr. Rodriguez is currently working at Monfort in the alternate position of [clod opener] which was approved by both Dr. Lesiak and Mr. Mike Kalvoda." Holtz further stated that no loss of earning capacity evaluation was appropriate for Rodriguez, because, as distinguished from an injury to the body as a whole for which loss of earning benefits are paid, Rodriguez had sustained an injury solely to a scheduled member. See Neb. Rev. Stat. § 48-121(2) and (3) (Reissue 1998).

On March 2, 1999, Rodriguez filed for workers' compensation benefits against Monfort. On November 10, Rodriguez' claim came on for hearing. During the trial, Rodriguez testified that performing the duties of the position of clod opener caused him shoulder pain and that he did not believe he could continue to perform the job.

In an award filed December 16, 1999, the workers' compensation trial court found that Rodriguez had suffered injuries arising out of and in the course of his employment with Monfort and

that as a result of his injuries, Rodriguez had sustained an 8-percent permanent impairment to his right upper extremity and a 10-percent permanent impairment to his left upper extremity. The court ordered Monfort to pay to Rodriguez medical and indemnity benefits.

With regard to vocational rehabilitation, the court, upon its review of the evidence, found that Rodriguez suffered pain while performing the job of clod opener. In the award, the trial court stated:

> I realize Mr. Kalvoda believes [Rodriguez] can perform the position but it is [Rodriguez] who is performing the position and due to the constant repetitive nature of the duties to make two cuts every 15 seconds, there is a basis for [Rodriguez] to have pain which I believe he has. I find that [Rodriguez] is entitled to rehabilitation services.

In awarding Rodriguez vocational rehabilitation services, the court did not reference or discuss Holtz' findings in her letters or report (hereafter reports).

Monfort applied for review by a Workers' Compensation Court review panel, claiming that the trial court erred in awarding vocational rehabilitation benefits and in not affording a rebuttable presumption to Holtz' "opinions" that vocational rehabilitation services were not warranted. Monfort did not challenge the trial court's findings with regard to Rodriguez' injuries, ratings, and medical and indemnity benefits, and these findings are not at issue in the present appeal.

In its order filed June 2, 2000, the review panel, with one judge dissenting, concluded that pursuant to Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2000) of the Nebraska workers' compensation statutes, the trial court must, at a minimum, state in the award the rationale for rejecting a vocational rehabilitation counselor's "opinion" with regard to vocational rehabilitation services. Section 48-162.01(3) provides, in pertinent part, as follows:

> If entitlement to vocational rehabilitation services is claimed by the employee, the employee and the employer or his or her insurer shall attempt to agree on the choice of a vocational rehabilitation counselor . . . . If they are unable to agree on a vocational rehabilitation counselor, the employee or employer or his or her insurer shall notify

> the compensation court, and the compensation court shall select a counselor from the directory of vocational rehabilitation counselors . . . . The vocational rehabilitation counselor so chosen or selected shall evaluate the employee and, if necessary, develop and implement a vocational rehabilitation plan. *It is a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation*. . . . Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection. *It is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.*

(Emphasis supplied.) We note that since the trial in this case, § 48-162.01(3) has been amended, but such amendments have not affected the relevant portions of the statute for the purpose of this appeal. Based upon the language of § 48-162.01(3), the review panel ordered the trial court to consider the applicability of the rebuttable presumption to be accorded the vocational rehabilitation counselor's "opinion."

Rodriguez appealed the review panel's decision to the Court of Appeals, assigning as errors the review panel's decision (1) "in holding that the vocational rehabilitation counselor's opinion was entitled to a rebuttable presumption of correctness" and (2) "in failing to affirm the trial judge's determination that [Rodriguez] is entitled to vocational rehabilitation."

The Court of Appeals affirmed the review panel's decision, stating: "We conclude that the presumption under the statute applies to her opinions in this case." *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 8, 623 N.W.2d 714, 718 (2001). In affirming the review panel's decision, the Court of Appeals concluded that (1) the vocational rehabilitation counselor's "opinions" were entitled to a rebuttable presumption of correctness pursuant to § 48-162.01(3) and (2) the trial court failed to comply with Workers' Comp. Ct. R. of Proc. 11 (2000) when it rejected the

counselor's "opinions" without an explanation which dealt with the statutory presumption in § 48-162.01(3). Rule 11 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.

The Court of Appeals affirmed the review panel's decision ordering the trial court to reconsider in accordance with the statute and for a decision which complied with rule 11.

Rodriguez petitioned for further review of the Court of Appeals' decision. We granted the petition.

ASSIGNMENTS OF ERROR

On further review, Rodriguez asserts, restated, that the Court of Appeals erred (1) in determining that Holtz' vocational rehabilitation reports were entitled to a rebuttable presumption of correctness and (2) in failing to determine whether there was sufficient competent evidence to support the trial court's award. Because we reverse the Court of Appeals' decision on the basis of the first assigned error, we need not discuss the second assigned error.

STANDARDS OF REVIEW

[1-4] Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001); *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of

fact of the trial court which conducted the original hearing; the findings of fact of the trial court will not be disturbed on appeal unless clearly wrong. *Id.* Statutory interpretation presents a question of law. *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Fay v. Dowding, Dowding, supra*; *Logsdon v. ISCO Co., supra*.

ANALYSIS

[5-7] This appeal presents a question of statutory construction. It is well settled that when construing a statute, we 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. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). 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. *City of Lincoln v. Liquor Control Comm., supra*. A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

We have previously recognized that § 48-162.01 "provides a means of determining a vocational rehabilitation plan for an injured worker, as well as his or her loss of earning power," in order to promote one of the primary purposes of the Nebraska Workers' Compensation Act, that is to restore the injured worker to gainful employment. *Variano v. Dial Corp.*, 256 Neb. 318, 322, 589 N.W.2d 845, 849 (1999). With regard to the procedure for securing vocational rehabilitation services, the statute provides that if an injured employee seeks such services, the employee and the employer or its insurer must try to agree on the appointment of a vocational rehabilitation counselor. § 48-162.01. If they are unable to agree, the Workers' Compensation Court will appoint a vocational rehabilitation counselor. *Id.*

As a means of furthering the goal of returning the injured employee to gainful employment, § 48-162.01 creates two rebuttable presumptions. "A 'rebuttable presumption' is generally defined as '[a] presumption that can be overturned upon the showing of sufficient proof.' " *Variano v. Dial Corp.*, 256 Neb. at 326, 589 N.W.2d at 851 (quoting Black's Law Dictionary 1186 (6th ed. 1990)).

With respect to rebuttable presumptions, § 48-162.01(3) first provides that "[i]t is a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation" (vocational rehabilitation plan presumption of correctness). Second, § 48-162.01(3) states that with regard to a loss of earning capacity evaluation performed by the vocational rehabilitation counselor, "[i]t is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct," *id.* (loss of earning capacity opinion presumption of correctness). The issue presented in the instant appeal is whether any reports issued by Holtz, as Rodriguez' vocational rehabilitation counselor, are entitled to either of the rebuttable presumptions of correctness contained in § 48-162.01(3).

Vocational Rehabilitation Plan Presumption of Correctness.

We first consider whether Holtz developed a vocational rehabilitation "plan" that under § 48-162.01(3) is entitled to a rebuttable presumption of correctness. Pursuant to the plain language of the statute, in order for the vocational rehabilitation plan presumption of correctness to attach, two conjunctive requirements must be met. First, the vocational rehabilitation counselor must develop a vocational rehabilitation "plan," and second, that plan must be submitted and approved by a vocational rehabilitation specialist of the Workers' Compensation Court.

In the instant case, Holtz did not develop a vocational rehabilitation "plan," and hence, there was no "plan" approved by a vocational rehabilitation specialist to which a rebuttable presumption of correctness under § 48-162.01(3) could attach. In her written reports, Holtz states that because Rodriguez had returned to work for Monfort in the new position of a clod

opener, vocational rehabilitation services were not necessary. Notwithstanding the content of Holtz' reports, Monfort argues that Holtz' reports to the effect that no rehabilitation services were necessary are, nevertheless, a "plan" entitled to a rebuttable presumption of correctness under § 48-162.01(3). In effect, Monfort argues that any analysis Holtz made with regard to vocational rehabilitation services is a "plan" entitled to a rebuttable presumption of correctness under the statute.

We decline to accept Monfort's interpretation of § 48-162.01(3). Under the rules of statutory construction, this court is obligated to give a statute its plain and ordinary meaning and must attempt to give effect to all parts of a statute. See, *City of Lincoln v. Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001); *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). The plain meaning of "plan" includes "a detailed and systematic formulation of a . . . program of action." Webster's Third New International Dictionary, Unabridged 1729 (1993). It is undisputed that Holtz declined to formulate a program of action for Rodriguez. Holtz did not develop a plan.

[8] Monfort's interpretation of § 48-162.01(3) would compel this court to ignore the plain meaning of "plan" and the language of the statute. The plain language of the statute requires both the submission of a plan by the vocational rehabilitation counselor and the approval of that plan by a Workers' Compensation Court vocational rehabilitation specialist in order for the plan to benefit from the rebuttable presumption of correctness set forth in § 48-162.01(3). Because Holtz did not develop a plan, Holtz' reports to the effect that Rodriguez did not require vocational rehabilitation services are not entitled to a rebuttable presumption of correctness under § 48-162.01(3). To the extent the Court of Appeals concluded that Holtz' reports stating that Rodriguez did not require vocational rehabilitation were a "plan" entitled to a rebuttable presumption of correctness under § 48-162.01(3), such a conclusion is error as a matter of law.

Loss of Earning Capacity Opinion Presumption of Correctness.

In its opinion affirming the review panel's order, the Court of Appeals relied upon the second rebuttable presumption of

correctness found in § 48-162.01(3), i.e., the loss of earning capacity opinion presumption of correctness. The Court of Appeals misconstrued the loss of earning capacity opinion presumption of correctness and incorrectly attached that presumption to Holtz' vocational rehabilitation report.

In reaching its decision to affirm the review panel's order, the Court of Appeals stated that its decision was mandated by our opinion in *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

Referring to *Variano*, according to the Court of Appeals, "[i]t seems clear [under § 48-162.01(3)] that if the [loss of earning capacity evaluation] process results in a conclusion that there is no loss of earning power, the opinions in connection with that conclusion are entitled to the statutory presumption." *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 7-8, 623 N.W.2d 714, 718 (2001).

The Court of Appeals misapplied our opinion in *Variano* and, as a matter of law, erred in its construction of § 48-162.01(3). In *Variano*, we were dealing with a succession of apparently inconsistent loss of earning capacity opinions expressed by the same court-appointed vocational rehabilitation counselor. We concluded that the series of letters written by the vocational rehabilitation counselor reflected the process during which the vocational rehabilitation counselor evaluated Variano's loss of earning capacity. In *Variano*, we concluded it was the final letter in the process that reflected the vocational rehabilitation counselor's final opinion concerning Variano's loss of earning capacity. Accordingly, the vocational rehabilitation counselor's final letter in which he opined that Variano was totally disabled was an opinion entitled to the § 48-162.01(3) presumption of correctness regarding loss of earning capacity opinions.

[9] On the facts of the case in *Variano,* we concluded that the vocational rehabilitation counselor's final letter was an opinion regarding Variano's loss of earning capacity and was entitled to a rebuttable presumption of correctness. In contrast, in the instant case, Holtz did not evaluate Rodriguez and never expressed an opinion concerning Rodriguez' loss of earning capacity. Indeed, in her August 24, 1999, report, she stated that a loss of earning capacity assessment was "not warranted." Having declined to evaluate Rodriguez' loss of earning capacity, Holtz has not

provided a loss of earning capacity opinion in the instant case from which to afford a rebuttable presumption of correctness. The Court of Appeals' decision to the contrary is in error.

Although not referenced by the parties in their briefs, we observe that the injuries Rodriguez sustained, which injuries are not in dispute, are injuries to his left and right upper extremities, i.e., scheduled member injuries. There is no claim in this case that Rodriguez sustained an injury to the body as a whole. The partial disabilities in this case are limited to scheduled members and are not subject to loss of earning capacity opinions. See, § 48-121(2) and (3); *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 455 N.W.2d 169 (1990). Holtz properly declined to express an opinion concerning Rodriguez' loss of earning capacity.

Section 48-121 of the workers' compensation statutes sets forth the compensation schedule for workers' compensation injuries and provides, inter alia, as follows:

> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . .
>
> (3) For disability resulting from permanent injury of the following classes, the compensation shall be . . . [f]or the loss of an arm, sixty-six and two-thirds percent of daily wages during two hundred twenty-five weeks.

Subsection (2) of § 48-121 provides for compensation based upon an injured worker's loss of earning capacity as a result of disability to the body as a whole. Subsection (2) specifically exempts disabilities listed in subsection (3) from such a loss of earning capacity analysis. Disabilities listed under subsection (3), referred to as scheduled member disabilities, are generally compensated according to the amounts provided by statute. See, *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991); *Fenster v. Clark Bros. Sanitation, supra*.

The trial court found that Rodriguez had sustained permanent partial injuries to his right and left upper extremities, or arms. There is sufficient evidence in the record to support this finding. Under Nebraska's workers' compensation statutes, an injury to the upper extremity constitutes a scheduled member injury. See

§ 48-121(3). See, also, *Fenster v. Clark Bros. Sanitation, supra* (injury to right arm constitutes scheduled injury rather than injury to body as whole); *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983) (same). Thus, in this case, any loss of earning capacity Rodriguez may have sustained as a result of the permanent partial disabilities to his arms is irrelevant for purposes of compensating his workers' compensation injuries, and Holtz properly declined to express an opinion regarding Rodriguez' loss of earning capacity. There was no loss of earning capacity opinion to which to afford a rebuttable presumption of correctness under § 48-162.01(3), and the conclusions of the review panel and the Court of Appeals to the contrary were in error.

CONCLUSION

No vocational rehabilitation plan was prepared by Holtz and approved by a vocational rehabilitation specialist of the Workers' Compensation Court, and thus, there was no vocational rehabilitation plan to which the trial court should have afforded a rebuttable presumption of correctness. Holtz properly declined to evaluate Rodriguez' loss of earning capacity, and thus, there was no loss of earning capacity opinion expressed by the court-appointed vocational rehabilitation counselor to which the trial court should have assigned a rebuttable presumption of correctness. The review panel erred when it ordered the trial court to consider the rebuttable presumptions of correctness provided under § 48-162.01(3), and the Court of Appeals erred in affirming the review panel's decision.

For the reasons set forth herein, we reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to remand the cause to the review panel with directions to affirm the award of the workers' compensation trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS A. KINNEY, APPELLANT.

635 N.W.2d 449

Filed November 9, 2001. No. S-00-750.

1. **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.
2. **Pretrial Procedure: Prosecuting Attorneys.** In Nebraska, the prosecution has not been granted a right of discovery except as permitted by the court, with limitations clearly defined by statute.
3. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded with directions to dismiss.

Gregory C. Scaglione, of Koley Jessen, P.C., L.L.O., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WRIGHT, J.

NATURE OF CASE

After a jury trial, Douglas A. Kinney was convicted of two counts of theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1995). The district court for Douglas County sentenced Kinney to 2 years' probation and ordered restitution and community service. Kinney appeals.

SCOPE OF REVIEW

[1] 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. Sanchez-Lahora*, 261 Neb. 192, 622 N.W.2d 612 (2001).

FACTS

Wolfe Automotive Group (WAG) manages 15 automobile dealerships in Missouri, Kansas, Illinois, and Nebraska. Its headquarters is in Kansas City, Missouri. Jeffrey Wolfe and his sister Cynthia Tucci each own 45 percent of WAG, and Dave Gatchell, WAG's chief operating officer, owns 10 percent. Wolfe and Tucci are also the majority owners in the 15 dealerships, which are organized as independent entities. At all but four of the dealerships, the general manager owns a minority interest in the dealership and is considered the managing partner.

Kinney was hired by WAG in 1994 as an internal auditor. He had a good working relationship with Wolfe and was rapidly promoted to chief controller and eventually to chief financial officer. During this time, Kinney was instrumental in establishing how the dealerships' accounting information would be interpreted, how this information would be reported on WAG's statements, and the standards to which WAG held its employees. Kinney was also involved in formulating and implementing WAG's policies.

In the spring of 1997, WAG was approached by a broker about the possibility of purchasing H.P. Smith Ford (H.P. Smith), an automobile dealership in Omaha, Nebraska. After several months of negotiations, in which Wolfe, Tucci, Gatchell, and Kinney all participated, an agreement was reached for the purchase of the dealership.

During the negotiations prior to the purchase of H.P. Smith, Kinney asked to be considered for the general manager position. Kinney was given the position based on his knowledge of the business. As general manager, Kinney was permitted to purchase a 10-percent equity interest in the dealership for $10,000, which entitled him to a yearend bonus of 10 percent of the dealership's profits. The annual profit of H.P. Smith was projected to be $2 million. Wolfe and Kinney discussed Kinney's compensation and agreed on a salary of $6,000 per month and a monthly draw of $4,000 as an advance on his yearend bonus, for total compensation of $10,000 per month.

While Kinney was general manager, he had full management authority and was the owner with responsibility for the day-to-day operations of H.P. Smith. Kinney worked with the dealership's

controller to improve its accounting system, including streamlining the accounts payable and payroll departments.

As general manager of H.P. Smith, Kinney had a company credit card in his name. Some of the charges made on the credit card while Kinney was general manager were for personal expenses. In addition, during 1997 and 1998, a number of checks were issued by H.P. Smith to Kinney. Some were expensed to different accounts within H.P. Smith, while others were debited to Kinney's accounts receivable employee account. In August and September 1998, Kinney and his wife ordered furniture from a furniture store to be delivered to their residence. The invoices, which were sent to and paid by H.P. Smith, were debited to Kinney's accounts receivable employee account.

On January 20, 1999, Wolfe and Tucci terminated Kinney for perceived irregularities in the accounting of the sale of H.P. Motor Sports, which had been a drag-racing division of H.P. Smith. WAG subsequently hired a forensic audit team to investigate the financial transactions involving Kinney while he was the general manager of H.P. Smith. After WAG complained of Kinney's conduct to the Omaha Police Department, he was arrested at his residence on April 23.

Kinney was originally charged by information on May 12, 1999, with one count of theft by deception, to which he pled not guilty. The trial court overruled a plea in abatement on August 12. Kinney subsequently filed a motion for a bill of particulars. At a pretrial conference on November 8, the trial court ordered counsel to exchange out-of-state witness lists on or before December 1. Prior to December 10, counsel were ordered to use good faith efforts to reach agreement on exhibits and objections to such exhibits. On December 10, over Kinney's objection, counsel were ordered to confer regarding exhibits.

At a hearing on December 22, 1999, the State requested leave to produce an amended information, copies of which were provided to the trial court and Kinney at that time. The amended information divided the case into four counts of theft by unlawful taking, with specific timeframes listed for each count. The State then read each new count and described the evidence it intended to produce on each count. The trial court granted the State's motion for leave to file the amended information, which

it filed on December 23, and Kinney moved for a bill of particulars as to the amended information. The trial court overruled the motion for a bill of particulars on December 28. On the record, but outside the presence of the trial court, defense counsel again objected to the court's order for compulsory production of trial exhibits.

Trial to a jury occurred on January 4 through 7 and 11, 2000. After the State presented its case, Kinney moved to dismiss all four counts with prejudice, which motion the trial court denied. Kinney then presented his case. Closing arguments were delivered, and the case was submitted to the jury on January 12. On January 14, the jury returned verdicts of not guilty on counts II and III. On count I, the jury found Kinney guilty and determined that the value of the property taken was $6,620. On count IV, the jury found Kinney guilty, and the value of the property taken was determined to be $1,665. On January 24, Kinney moved to set aside the verdict or, in the alternative, for a new trial. Both motions were overruled.

On June 20, 2000, the trial court ordered Kinney to complete 2 years' probation, to pay restitution in the amount of $8,285, and to complete 100 hours of community service. Kinney appealed, and we moved the case to our docket pursuant to our statutory authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Kinney assigns as error that the trial court erred in (1) ordering him to produce his trial exhibits and to disclose his potential out-of-state witnesses to the State before trial; (2) receiving evidence of uncharged misconduct; (3) overruling the motion for a protective order and motion to quash regarding a subpoena duces tecum issued to Norwest Bank; (4) overruling Kinney's motion for a bill of particulars; (5) finding sufficient evidence to support Kinney's convictions on counts I and IV; (6) admitting evidence over Kinney's objections; (7) excluding evidence Kinney offered; (8) sustaining the State's motion in limine; (9) sustaining an objection to statements made during Kinney's voir dire; (10) failing to adequately instruct the jury regarding criminal intent; and (11) overruling Kinney's motions to dismiss, for

directed verdict, and to set aside the verdict or, alternatively, for a new trial.

ANALYSIS

Kinney first argues that the trial court erred by ordering him to produce his trial exhibits and to disclose his potential out-of-state witnesses to the State before trial. This same argument was made in support of Kinney's motions to dismiss, his motion for a directed verdict, and his motion to set aside the verdict or, in the alternative, for a new trial, the dispositions of which are the subject of Kinney's 11th assignment of error.

At a pretrial conference on November 8, 1999, the trial court ordered counsel to exchange out-of-state witness lists by December 1 and to use good faith efforts to reach agreement on exhibits and objections on exhibits. At a second pretrial conference on December 10, the trial court again ordered counsel to exchange out-of-state witness lists by the close of business that day and, over the objection of the defense, to confer regarding exhibits on December 17. At a hearing on December 28, the trial court clarified that its order would encompass a document about which testimony would be adduced at trial. The trial court's stated purpose for the order was to ensure that the trial ran smoothly and efficiently. Pursuant to the trial court's orders, Kinney filed a limited witness disclosure on December 2 and original and supplemental out-of-state defense witness disclosures on December 10 and 13, respectively.

[2] In *State v. Woods*, 255 Neb. 755, 764, 587 N.W.2d 122, 128 (1998), we stated:

> The common law recognized no right of discovery in a criminal case by either the prosecution or the defendant. . . . In Nebraska, the prosecution has not been granted a right of discovery except as permitted by the court, with limitations clearly defined by statute. . . . Additionally, in the absence of a statute, Nebraska has not required defendants to plead defenses in advance.

(Citations omitted.)

[3] " '[D]iscovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule.' " *State v. Lotter*, 255 Neb. 456, 490, 586 N.W.2d 591, 618 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673

(1999) (quoting *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991)). This court has not established any court rules that would provide the State with a right of discovery in criminal cases. Neb. Rev. Stat. §§ 29-1912 to 29-1927 (Reissue 1995 & Cum. Supp. 2000) are the statutory provisions governing discovery in criminal cases, and §§ 29-1916 and 29-1917 are the only sections that authorize discovery by the State. Section 29-1917 permits a court to order the taking of depositions of certain witnesses, and therefore, it is inapplicable to Kinney's assignment of error. Section 29-1916(1) provides in part that whenever the court grants a request by the defendant for discovery pursuant to § 29-1912,

> the court may condition its order by requiring the defendant to grant the prosecution like access to comparable items or information included within the defendant's request which:
>
> (a) Are in the possession, custody, or control of the defendant;
>
> (b) The defendant intends to produce at the trial; and
>
> (c) Are material to the preparation of the prosecution's case.

Kinney argues, and we agree, that § 29-1916 did not provide a basis for the trial court to order him to produce his exhibits, since he never requested a discovery order pursuant to § 29-1912. The trial court ordered the production of the exhibits and exchange of witness lists in order to ensure the "smooth running of th[e] trial" and an "efficient presentation of th[e] case." We conclude that the trial court exceeded its authority and erred as a result.

Kinney was required to produce his trial exhibits without restriction and to disclose to the State every document which might have been used for any purpose. In *State v. Woods, supra*, we held that the trial court's order to disclose the identities of potential alibi witnesses was reversible error.

Here, Kinney was required to disclose not only the identities of certain witnesses but the substance of potential rebuttal and impeachment testimony as well. As a result, the State was provided with advance notice of Kinney's potential rebuttal and impeachment evidence. Thus, the witnesses called by the State were apprised of impeachment evidence that would be used in Kinney's defense.

Kinney was required to essentially provide the prosecutor with his entire case, including key impeachment evidence, before the trial began. If a remand were to be allowed, the prosecution would have the advantage of knowing the entire strategy of Kinney's case. The prosecution could then use that knowledge in ways that cannot be cured on remand. For example, the knowledge might allow the prosecutor to (1) craft the opening statement anticipating Kinney's defenses and minimizing his case, including deflating the impeachment evidence; (2) anticipate the cross-examination of the State's witnesses and prepare the witnesses for that cross-examination; (3) orchestrate the order of witnesses; (4) forgo calling certain witnesses because of the knowledge that impeachment evidence exists, perhaps forcing the defense to call those people as witnesses, which would then allow the State to lead these witnesses in questioning; (5) use the knowledge and extra time to obtain new witnesses whose testimony is not as likely to be impeached or to gather evidence to rebut the impeachment evidence; (6) anticipate, formulate, and advance the argument against a motion to dismiss; and (7) prepare the closing arguments well in advance of trial.

Because of the unusual circumstances, no remedy fashioned will return the parties to pretrial status quo. Unlike the situation in *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998), the error committed cannot be cured by remanding for a new trial and ordering discovery restrictions. Therefore, we reverse the judgment of the trial court and remand the cause with directions to dismiss with prejudice.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is reversed and the cause is remanded with directions to dismiss the amended information with prejudice.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. SHAUN O. PARKER, RESPONDENT.

635 N.W.2d 454

Filed November 9, 2001. No. S-01-1219.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, for relator.

Richard M. Jones, of Lee & Bucchino Law Firm, for respondent.

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

PER CURIAM.

On January 30, 2001, the Office of the Counsel for Discipline filed a disciplinary grievance against respondent, Shaun O. Parker, D.D.S. The grievance alleges respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (3), which provide as follows: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (3) Engage in illegal conduct involving moral turpitude."

On September 7, 2001, respondent filed with this court an amended conditional admission of the disciplinary grievance pending against him. In accordance with the amended conditional admission, respondent admitted the following: Respondent was duly admitted to the practice of law in the State of Nebraska on September 22, 1994, and is subject to the Committee on Inquiry of the Second Disciplinary District. Respondent is not actively engaged in the practice of law in Nebraska and has been an inactive member of the Nebraska State Bar Association since his admission to the practice of law in Nebraska. Prior to January 23, 2001, respondent was authorized to practice dentistry in the State of Nebraska.

On January 16, 2001, a "Petition for Disciplinary Action" was filed against respondent with the Department of Health and

Human Services Regulation and Licensure of the State of Nebraska (DHHS) concerning respondent's license to practice dentistry. That same day, respondent filed an "Agreed Settlement" with DHHS and admitted the allegations in the petition for disciplinary action. On January 23, an "Order on Agreed Settlement" was entered by DHHS' chief medical officer, which order adopted the sanctions set forth in the agreed settlement.

In the agreed settlement, respondent admitted that from May through November 1999, he obtained quantities of the drug Vicoprofen for his personal use, by requesting drug samples from a drug wholesaler. The drug samples were delivered to the office where respondent practiced dentistry. Respondent removed the drug samples from the dental office and ingested them over time.

From September 1998 through March 2000, respondent obtained prescription drugs dispensed by Omaha area pharmacies pursuant to fraudulent prescriptions. Respondent had several methods for obtaining the drugs. One method consisted of enlisting employees at respondent's office to obtain drugs for him. Respondent would prescribe drugs in the names of employees, and the employees would pick up the drugs from pharmacies with the employees' claiming that they were patients, then deliver the drugs to respondent for his personal use. Another method involved respondent's having employees call pharmacies with prescriptions purportedly prescribed by other dentists, to be dispensed to respondent. The dentists listed as prescribers on pharmacy records, other than respondent, did not actually authorize the prescriptions.

In February 2000, respondent's employer confronted respondent regarding his drug use and gave him the option of either seeking chemical dependency treatment through DHHS' Licensee Assistance Program or being reported to DHHS for misconduct. Respondent chose to seek treatment through the Licensee Assistance Program.

In February 2000, respondent was evaluated for chemical dependency by the Licensee Assistance Program and was referred to an outpatient chemical dependency treatment program. In March, respondent began treatment through the outpatient program.

While in treatment with the outpatient program, respondent periodically went to the dental offices of his employer, outside of regular business hours, and used nitrous oxide. On July 29, 2000, the business manager at respondent's office found respondent in a dental chair self-medicating with nitrous oxide. That same day, respondent reported to an Omaha hospital and was admitted to the hospital's chemical dependency treatment center. Respondent subsequently sought chemical dependency treatment at the Talbott Recovery Campus in Atlanta, Georgia, which program included approximately 3 months of inpatient treatment.

Pursuant to the agreed settlement, respondent's dental license was placed on probation for a period of 5 years, on probationary conditions which we summarize as follows:

1. During the initial 3 months of probation, respondent was suspended from the practice of dentistry and was required to deliver his dental license to DHHS.

2. At the conclusion of the license suspension period, DHHS would issue to respondent a probationary license.

3. Respondent must abstain from personal use of controlled substances, prescription drugs, nitrous oxide, and all mood-altering substances, unless prescribed for or administered to respondent by a licensed physician or authorized licensed practioner for a diagnosed medical condition.

4. Respondent must abstain from the consumption of alcohol.

5. Respondent must agree to random body fluid or chemical testing at respondent's own expense, at such time and place as DHHS may direct. Respondent shall follow DHHS' instructions and directives for body fluid or chemical testing.

6. Respondent must report the use of any controlled substances, prescription drugs, or inhalants to DHHS on such frequency as is directed by DHHS.

7. Respondent must comply with all aftercare treatment recommendations made by his chemical dependency treatment provider, including any recommendations for counseling and attendance at support group meetings.

8. Respondent must attend a minimum of one Narcotics Anonymous or Alcoholics Anonymous or other chemical dependency support group meeting per week. If respondent's chemical

dependency treatment provider recommends additional attendance at support group meetings, respondent must follow such recommendations.

9. Respondent must advise all personal treating physicians and other treating practitioners, prior to treatment, of his prior history of chemical abuse and dependency and of all medications respondent may be taking at the time of treatment. Respondent authorizes all treating physicians and other treating practitioners to inform DHHS of all conditions for which respondent is being treated, including any drugs or medications, prescribed or over-the-counter, used in any treatment.

10. Respondent must not order controlled substances or nitrous oxide from drug wholesalers.

11. Controlled substances and nitrous oxide shall not be maintained on the premises at any location where respondent practices dentistry.

12. Respondent must maintain a separate log of controlled substance prescriptions sufficient to identify each prescription written or authorized by him during the probationary period by date, drug, patient, and prescription purpose. The prescription log shall be provided to DHHS upon request.

13. Respondent must provide notification of his license discipline to all dental practice partners, dental practice associates, any dental employer, and the licensing authority in any states where respondent may possess, apply for, or obtain an active dental license. Notification shall include providing copies of the petition for disciplinary action, the agreed settlement, and the order by the chief medical officer approving the agreed settlement.

14. If respondent is not self-employed, he must be employed as a dentist only by an employer who provides employer quarterly reports to DHHS. Employer quarterly reports shall be submitted to DHHS by respondent's employer, and shall include a description of respondent's work habits and continued abstinence from drugs, inhalants, and alcohol.

15. Any period during which respondent does not have an active Nebraska dental license, excluding the 3-month license suspension period, shall not reduce the probationary period or satisfy the terms and conditions of probation.

16. Respondent must submit written notification to DHHS within 15 days of any change in employment, employment status, residence, or telephone number.

17. Respondent must permit DHHS or representatives of the Board of Dentistry to conduct inspections of the premises where respondent practices dentistry.

18. Respondent must obey all state and federal laws and rules and regulations regarding the practice of dentistry.

19. Respondent must pay any costs associated with ensuring compliance with the agreed settlement, including, but not limited to, the costs of the random body fluid or chemical testing.

In his conditional admission entered into with the Office of the Counsel for Discipline, respondent admits that the above actions with regard to his drug use constitute violations of DR 1-102(A)(1) and (3) of the Code of Professional Responsibility and of his oath of office as an attorney.

Based on the conditional admission of respondent and the recommendation of the Office of the Counsel for Discipline, this court finds by clear and convincing evidence that respondent has violated his oath of office as an attorney and DR 1-102(A)(1) and (3). Accordingly, we hereby suspend respondent from the practice of law in the State of Nebraska for a period of 1 year, effective immediately, followed by a 2-year period of probation. During the periods of suspension and probation, respondent shall abide by and fully comply with all of the terms of the agreed settlement between respondent and DHHS, which terms are summarized above and are hereby incorporated by reference.

Additionally, during the periods of suspension and probation from the practice of law, respondent shall:

1. Attend a minimum of three meetings per week of Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous.

2. Agree to work with and furnish the name and telephone number of a Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous sponsor who is willing to disclose and confirm to the Nebraska Lawyers Assistance Program (NLAP), upon request, that he or she serves as respondent's sponsor.

3. Provide written verification on a monthly basis to NLAP of respondent's attendance at Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous meetings.

4. Execute a release of information form authorizing DHHS and respondent's treatment provider to immediately report any violation of the agreed settlement to NLAP.

Costs and expenses are taxed to respondent. See Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF SUSPENSION.

RAYMOND RUZICKA ET AL., APPELLEES, V. HAROLD RUZICKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. RUZICKA, DECEASED, APPELLEE, AND BARBARA SUKSTORF ET AL., APPELLANTS.

635 N.W.2d 528

Filed November 16, 2001. No. S-00-608.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **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. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
5. **Interventions.** The right to intervene is granted by statute.
6. ____. The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 1995) is a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.
7. **Interventions: Statutes.** Intervention was unknown both at common law and in equity, and is a creature of statute.
8. ____: ____. The intervention statutes are to be liberally construed.
9. **Interventions.** The right to intervene pursuant to the statute is absolute.
10. **Interventions: Pleadings.** A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.
11. ____: ____. For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the petition are true.

12. **Decedents' Estates: Real Estate: Title.** Under Nebraska law, title to real property passes immediately upon death to devisees or heirs, subject to administration.
13. **Parties: Jurisdiction: Waiver: Appeal and Error.** As a general rule, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. However, the presence of necessary parties is jurisdictional and cannot be waived by the parties. If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
14. **Parties: Words and Phrases.** An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded with directions.

Jeff C. Miller and Malcolm D. Young, of Young & White, for appellants.

Steven J. Riekes, Leanne A. Gifford, and David P. Wilson, of Marks, Clare & Richards, for appellees Raymond Ruzicka, Phyllis Ruzicka, and 3R Farms, Inc.

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

STEPHAN, J.

Raymond Ruzicka, Phyllis Ruzicka, and 3R Farms, Inc. (collectively appellees), brought this action in the district court for Saunders County against Harold Ruzicka, as personal representative of the estate of Robert L. Ruzicka, to determine title to real property in Saunders County which brothers Raymond and Robert owned in fee simple as tenants in common at the time of Robert's death. Appellees claimed that Raymond and Robert had intended to transfer title to 3R Farms, but by "mistake and inadvertence," this had not occurred prior to Robert's death. They petitioned for equitable relief and prayed that title be quieted in 3R Farms. Barbara Sukstorf, John Ruzicka, and Debra Gorley (appellants), who are residuary devisees named in Robert's will, filed a motion for leave to intervene in the action. They appeal from the denial of that motion by the district court.

BACKGROUND

In their operative amended petition, appellees allege that prior to 1983, the land in question was owned by Raymond and Robert in fee simple as tenants in common and utilized by them in a joint farming operation. They further allege that in 1983, the brothers formed 3R Farms, a Nebraska corporation, for the purpose of owning and operating their family farm. Twenty-five thousand shares of capital stock were issued to Robert, and twenty-five thousand shares of capital stock were issued to Raymond. Appellees allege that Raymond and Robert orally agreed that the real estate, along with other assets, would be transferred to 3R Farms in exchange for the stock. They further allege that Raymond and Robert hired an attorney to transfer the real estate to 3R Farms but that the attorney failed to do so. Appellees allege that from and after 1983, all parties treated the real estate as an asset of 3R Farms.

Appellees further allege that in 1996, Robert, Raymond, and Phyllis, then the sole shareholders of 3R Farms, entered into a stockholders' "Buy-Sell Agreement" wherein the parties agreed that in the event of the death of any of the stockholders, 3R Farms was entitled to purchase all outstanding shares of the deceased stockholder at a price computed pursuant to the buy-sell agreement. A copy of the buy-sell agreement was attached to the petition and incorporated therein. Appellees asserted "causes of action" for resulting trust, specific performance, constructive trust, and quiet title. They sought the conveyance of the real estate to 3R Farms and the enforcement of the buy-sell agreement.

Robert died testate in Saunders County on November 22, 1998. At the time of his death, record title to the real estate in question was still held by Raymond and Robert in fee simple as tenants in common and had not been conveyed to 3R Farms. Robert's will did not specifically devise the real estate, but included a residuary clause devising the residuary of his real and personal property to nine nieces and nephews. Three of those nine are appellants in this case and proposed intervenors below.

In their motion for leave to intervene, appellants alleged that they had a valid interest in the real estate that was the subject of the petition by virtue of their standing as residual and remainder

"legatees" under Robert's will. In their proposed petition in intervention submitted to the district court, appellants alleged that Robert's will was duly admitted to probate and that upon information and belief, all debts and claims against the estate and taxes had been paid. They further alleged that there are sufficient liquid assets in the estate to pay all specific bequests and that the remainder of the estate is the real property at issue. The proposed petition in intervention sought a partition of the real estate or, in the alternative, a sale of the property and a division of the proceeds of the sale. In addition, the proposed petition sought an order requiring appellees to produce financial records for an accounting.

On May 17, 2000, the personal representative filed an answer and cross-petition denying the allegation that Raymond and Robert agreed to transfer the real estate to 3R Farms. The cross-petition requested that title to the real estate be quieted and that it be partitioned and divided among its owners.

The district court entered its order denying the motion for leave to intervene on May 30, 2000. The court found that the petition in intervention improperly attempted to present issues not in the original petition and improperly expanded the scope of the proceedings. The court also found that the interests of appellants were already represented by the personal representative and that there was no allegation of a conflict of interest. Furthermore, the court held that appellants did not have a direct interest in the real estate because they were entitled to a distribution of only the residue of the estate in cash after all of the debts and specific bequests had been paid.

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

ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred (1) in denying the motion for leave to intervene and (2) in failing to find, sua sponte, that all of the residual devisees were necessary and indispensable parties to the litigation.

STANDARD OF REVIEW

[1,2] Whether a party has the right to intervene in a proceeding is a question of law. See *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Mecello, ante* p. 493, 633 N.W.2d 892 (2001).

[3,4] The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

Right to Intervene

Appellants argue that the essential issue for our review is whether they have a direct legal interest in the proceedings that entitles them to intervene pursuant to Neb. Rev. Stat. § 25-328 (Reissue 1995). Appellees contend that the case turns on whether the personal representative or an heir is the proper party to defend a quiet title action involving real property to which title was held by Robert at the time of his death. The issues presented require us to examine the interplay between our intervention statutes and the Nebraska Probate Code, codified at Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1995 & Cum. Supp. 1998).

[5-9] The right to intervene is granted by statute in Nebraska. Section 25-328 provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming

> what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

The interest required as a prerequisite to intervention under § 25-328 is a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. *In re Interest of Kayle C. & Kylee C., supra*. Intervention was unknown both at common law and in equity, and is a creature of statute. *Wightman v. City of Wayne*, 146 Neb. 944, 22 N.W.2d 294 (1946). The intervention statutes are to be liberally construed. *Id.* The right to intervene pursuant to the statute is absolute. *Id.*

[10,11] The procedure for intervening is also set forth in our statutes. Neb. Rev. Stat. § 25-330 (Reissue 1995) provides:

> The intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same rules as obtain in regard to other pleadings provided for by this code. If such petition is filed during term, the court shall direct the time in which answers thereto shall be filed.

We have recently recognized the statutory requirement that intervention be by petition. *In re Interest of Kiana T., ante* p. 60, 628 N.W.2d 242 (2001). A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the petition are true. *Id.*

[12] Appellants contend that they have a direct and legal interest in the controversy because distributive shares of Robert's title to the disputed real property passed to them immediately upon his death. Under Nebraska law, title to real property passes immediately upon death to devisees or heirs, subject to administration. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997); *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986). The probate code also clearly recognizes this principle:

> The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. *Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them . . . or, in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them*[,] . . . subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

(Emphasis supplied.) § 30-2401. According to the allegations in the petition for intervention, which we must accept as true, all of the debts of the estate have been paid, there are sufficient assets to pay specific bequests made by Robert in his will, and the real estate at issue constitutes the remainder. Under these circumstances, each appellant as a residual devisee is the vested titleholder of an interest in the real property presently included in the residue of the estate. If appellees are successful in removing the real property from the estate, appellants' interest in the residuary remainder will be substantially diminished.

The district court stated three reasons in support of its finding that appellants were not entitled to intervene in the proceedings. First, the court found that they lacked a direct interest in the real estate because, as "residuary legatees," appellants were entitled to only a distribution of the residue in cash. We disagree with this reasoning. Initially, we note that appellants are not "legatees" either as that term is used at common law or under the probate code. Under the common law, a legatee is one who takes personal property under a will. Black's Law Dictionary 908 (7th ed. 1999). The appellants in this situation are the takers of real property under the will, or common-law devisees. *Id.* at 463. Furthermore, the probate code uses the generic term "devisee" to refer to parties who take either real or personal property under a will, and "legatee" is not used in the code. § 30-2209(7) and (8).

More importantly, the record does not support the district court's conclusion that appellants' interests are in a cash distribution after the settlement of debts and specific bequests, rather than

in the real estate in the residuary. The petition in intervention makes factual allegations, which we must accept as true for purposes of our review, that all debts of the estate have been paid. The petition also alleges that there are sufficient assets to pay specific bequests and that the real estate at issue constitutes the remainder of the estate. The petition requests that the real estate be partitioned and, only as an alternative, requests that it be sold and the proceeds divided. Unless there is a contrary intention indicated by the will, the assets of an estate are to be distributed in kind to the extent possible. § 30-24,104. Section 30-24,104(4) specifically provides that "[t]he residuary estate shall be distributed in kind if there is no objection . . . and it is practicable to distribute undivided interests." On the record before us, there is no objection to an in-kind distribution of the real estate that constitutes the residuary and no showing that such a distribution would be impractical. Moreover, we note that even if the real estate is sold and the proceeds distributed, the interest of appellants remains in the real estate, regardless of how the interest is satisfied.

The district court also found that appellants' interests in this matter "are already represented by the Personal Representative who has the duty to defend this lawsuit in the best interests of those persons who take under decedent's will." It reasoned that because appellants made no showing that the personal representative would act contrary to their interests, they were not entitled by law to be represented twice in the same action. This rationale requires us to examine other relevant provisions of the probate code.

As noted, the probate code clearly provides that title to real estate passes immediately upon death to heirs or devisees. § 30-2401. Appellees argue, however, that §§ 30-2462 to 30-2482, which set forth the duties and powers of the personal representative, illustrate that the personal representative nevertheless adequately represents appellants. Section 30-2464 provides:

> (a) A personal representative is a fiduciary who shall . . . comply with the Nebraska Uniform Prudent Investor Act. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and

> as expeditiously and efficiently as is consistent with the best interests of the estate. He or she shall use the authority conferred upon him or her by this code, the terms of the will, if any, and any order in proceedings to which he or she is party for the best interests of successors to the estate.
>
> . . . .
>
> (c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his or her death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his or her decedent had immediately prior to death.

Section 30-2470 governs the duty of a personal representative with respect to possession of an estate, providing:

> Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. *He may maintain an action to recover possession of property or to determine the title thereto.*

(Emphasis supplied.) Appellees argue that the above statutes, particularly the italicized portion of § 30-2470, are dispositive of the appeal, as they clearly authorize the personal representative to represent the estate in a quiet title action. They argue that although title still passes at death, the other provisions of the probate code make the concept of title "relatively unimportant" in matters of probate except in the absence of administration. Brief

for appellee at 8. This argument is also based upon § 30-2472, which provides:

> Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. Unless otherwise specifically ordered by the court, this power may be exercised without notice, hearing, or order of court.

Since the enactment of the probate code, we have addressed issues relating to the power of a personal representative over real estate of a decedent. In *In re Estate of Kesting*, 220 Neb. 524, 371 N.W.2d 107 (1985), the will of a testator devised the north half of a quarter section of land to his daughter and the south half to his son. Prior to his death, however, the testator by warranty deed conveyed the entire quarter section to his son. The son was subsequently appointed as personal representative of the estate. The daughter filed a petition alleging that the warranty deed was procured by undue influence and requesting that a special administrator be appointed for the purpose of taking action on behalf of the estate to set aside the warranty deed. In resolving the issue, we noted that "[g]enerally, and in a proper situation, an heir, devisee, or interested person in his or her own right may challenge a deed executed by the decedent defeating descent to the challenger." *Id.* at 526, 371 N.W.2d at 109. Citing § 30-2470, we reasoned that there was no allegation that the real estate at issue was necessary for the purposes of administering the estate, and that in the absence of a request from the personal representative for possession of the real estate, there was " 'conclusive evidence' " that the real estate was not necessary for administration of the estate. *Id.* at 527, 371 N.W.2d at 109. We then concluded that when real property is not needed for purposes of administration, the probate code could not be construed so as to authorize a special administrator to bring an action, thereby permitting one heir or devisee to finance a lawsuit against another out of the funds of the estate.

In *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997), we interpreted § 30-2470 in a similar manner. In that case, the trial court awarded certain heirs a partial interest in real property.

We held that this was error, noting that the personal representative had made a demand for surrender of the property and that pursuant to § 30-2470, such demand was conclusive proof that the property was necessary for administration. In *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986), we addressed who is the proper party in a revivor action involving real property of a decedent. In examining the issue presented, we interpreted our revivor statutes to require that

> "the revivor should be against the representatives of the deceased person whose property rights would be affected by the revivor. If the revivor would affect only the personal property in the hands of the administrator, then it may be revived as against him, but, if it is intended to affect real property which passed, on the death of the judgment debtor, to his heirs, then it should be revived against such heirs at law . . . ."

Willis, 223 Neb. at 53-54, 388 N.W.2d at 105, quoting *Dougherty v. White*, 112 Neb. 675, 200 N.W. 884 (1924). We then stated:

> The reason for the rule is simple. A suit must be brought by or against a person or persons who have an interest in the property which will be affected by the order of the court. If the property to be affected is personal property, the proper party is the personal representative, who, until the estate is closed, has lawful title to the property. . . . On the other hand, if the property is realty, the proper party or parties are the heirs or devisees, because title to real estate immediately vests in the heirs or devisees upon the death of the party having an interest in the property just prior to death.

(Citations omitted.) *Willis*, 223 Neb. at 55, 388 N.W.2d at 105-06.

In *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982), the appellant contended that he should have been awarded the decedent's business under the terms of an oral promise that the decedent would leave the property to the appellant in his will. At issue was whether this was a request for specific performance of an oral contract or whether it was a claim against an estate. We noted that we had previously addressed the issue in *Peterson v. Estate of Bauer*, 76 Neb. 652, 107 N.W. 993 (1906), and found it was an equitable action for specific performance. In support of our holding, we quoted from *Peterson*:

> "The suit is one to bind specifically the estate, real and personal, of the deceased with a contract alleged to have been made by him in his lifetime . . . . To such a suit the persons claiming title to the lands of the decedent as heirs or devisees, and asserting rights as distributees of the personalty by will or by statute, are indispensable parties without whose presence a final determination of the controversy cannot be made. It follows that such a claim is not litigable in the ordinary course of probate administration, but must be prosecuted, if at all, in a court of original and general equitable jurisdiction and powers, the executor or administrator being a proper but not in all instances a necessary party."

In re Estate of Layton, 212 Neb. at 521-22, 323 N.W.2d at 819-20.

These cases demonstrate that a personal representative may maintain an action with respect to real estate only to the extent the personal representative has possession of the real estate for purposes of administration. In the instant case, the allegations in the petition for intervention indicate that the real property at issue is no longer necessary for purposes of administration. The personal representative therefore does not have a possessory interest in the real estate and cannot already be adequately representing the interests of appellants.

Moreover, even if the personal representative does in some manner already represent appellants, the district court nevertheless erred in denying the petition to intervene on this ground. Appellees rely upon two cases from other jurisdictions in support of their argument that because the probate code gives authority to the personal representative to represent all interested parties of the estate, allowing those parties to intervene will unnecessarily complicate the litigation. Both of these cases are inapplicable, however, because they involve intervention rules substantially different from ours.

In *In re Est. of Scott*, 40 Colo. App. 343, 577 P.2d 311 (1978), and *State ex rel. Palmer v. District Ct., Etc.*, 190 Mont. 185, 619 P.2d 1201 (1980), the courts interpreted intervention rules providing that a party could intervene as a matter of right if the party

> "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that

> the disposition of the action may as a practical matter, impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*."

(Emphasis supplied.) *In re Est. of Scott*, 40 Colo. App. at 345, 577 P.2d at 312, quoting Colo. R. Civ. P. 24(a)(2). Accord *State ex rel. Palmer, supra*, quoting Mont. R. Civ. P. 24(a)(2). These intervention rules make an exception for a party already adequately represented by an existing party. There is no such qualification in § 25-328.

Section 25-328 requires only that an intervenor have a direct and legal interest in the matter in litigation. The language of the intervention statute is clear, and the right to intervene under it is "absolute." *Wightman v. City of Wayne*, 146 Neb. 944, 946, 22 N.W.2d 294, 296 (1946). The district court erred in denying the petition in intervention for the reason that appellants were already adequately represented by the personal representative.

The district court also found that the petition in intervention impermissibly attempted to expand the scope of the proceedings by seeking an accounting. An intervenor who is not an indispensable party cannot change the nature and form of the action or the issues presented therein. *Arnold v. Arnold*, 214 Neb. 39, 332 N.W.2d 672 (1983). Because we conclude based on the analysis below that appellants are necessary parties, we do not address this finding.

Pursuant to Nebraska law, title to the real property immediately vested in appellants at the time of Robert's death. They therefore have a sufficient direct and legal interest in the matter in litigation to entitle them to intervene pursuant to § 25-328, and the district court erred in denying their petition in intervention.

Necessary Parties

[13] Appellants also argue that the district court erred in not sua sponte requiring that all nine residual devisees be made parties to the proceeding. We note that the necessary party argument was not made before the district court. As a general rule, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001). However, the presence of

necessary parties is jurisdictional and cannot be waived by the parties. *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000). If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy. *Id.* We therefore address the merits of this argument.

[14] An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). See, also, Neb. Rev. Stat. § 25-323 (Reissue 1995). All nine residual devisees were immediately vested with title to the residuary real estate upon Robert's death. See, § 30-2401; *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997); *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986). A determination of this controversy in favor of appellees would necessarily prejudice the rights of all the residual devisees, and therefore, the controversy cannot be properly resolved without their participation in the suit.

We conclude that the district court erred in not sua sponte requiring that all nine residual devisees be made parties to the instant case. We remand with directions that all residual devisees be made defendants to the instant proceedings.

CONCLUSION

As vested titleholders to the real property in the residuary estate, appellants have a direct and legal interest entitling them to intervene pursuant to § 25-328. Because a determination of the controversy in favor of appellees would prejudice the rights of all nine residual devisees, all of them are also necessary parties to this case. We reverse, and remand with directions to grant appellants leave to intervene and to order that all of the residual devisees be made parties defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

LYNDA F. PAULK, PERSONAL REPRESENTATIVE OF THE ESTATE OF GREG W. ANDERSON, DECEASED, APPELLANT AND CROSS-APPELLEE, V. CENTRAL LABORATORY ASSOCIATES, P.C., ET AL., APPELLEES AND CROSS-APPELLANTS.

636 N.W.2d 170

Filed November 30, 2001. No. S-00-109.

1. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
3. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
4. **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.
5. **Pretrial Procedure.** The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination. Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case.
6. **Rules of the Supreme Court: Pretrial Procedure.** Failure to seasonably supplement discovery responses may be grounds for sanctions imposed under Neb. Ct. R. of Discovery 37(d) (rev. 2000).
7. ____: ____. An appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 2000) is determined in the factual context of a particular case and is initially left to the discretion of the trial court.
8. **Motions for Mistrial.** A motion for mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
9. **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.
10. **Actions: Decedents' Estates: Wrongful Death.** The right to maintain an action for wrongful death did not exist under the common law and exists in Nebraska, as in other states, solely by statute.
11. **Wrongful Death: Words and Phrases.** The phrase "next of kin" as used in Nev. Rev. Stat. § 30-809 (Reissue 1995) means persons nearest in degree of blood surviving, or,

in other words, those persons who take the personal estate of the deceased under the statutes of distribution.

12. **Constitutional Law: Courts.** Article I, § 13, of the Nebraska Constitution does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy, but where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none.
13. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Denzel Rex Busick for appellant.

Mark E. Novotny and Kyle Wallor, of Lamson, Dugan & Murray, L.L.P., for appellees.

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

STEPHAN, J.

This is a professional liability action in which Lynda F. Paulk, as the personal representative of the estate of Greg W. Anderson, seeks damages for personal injury and wrongful death. Defendants named in the action include G.L. Morris, M.D.; A.F. Kielhorn, M.D.; and Central Laboratory Associates, P.C. (CLA), a professional corporation with which Morris and Kielhorn were affiliated at all pertinent times (collectively the defendants). Following a trial in the district court for Buffalo County, the jury returned a verdict in favor of the defendants and the district court entered judgment thereon. Paulk appeals from an order overruling her motion for new trial.

BACKGROUND

On April 17, 1991, Anderson had a mole surgically removed from his back. The surgeon submitted a specimen of the excised tissue to a pathology laboratory operated by CLA, where it was first examined by Morris, a board-certified pathologist. Morris diagnosed the specimen as an "[i]rritated junctional nevus," a type of benign lesion. Kielhorn, who is also a board-certified

pathologist, then independently examined the specimen and concurred with Morris' diagnosis. On April 18, CLA reported the diagnosis reached by Morris and Kielhorn to the surgeon, who, in reliance thereon, notified Anderson that the surgically removed tissue was benign.

On June 17, 1995, Anderson was admitted to St. Francis Medical Center in Grand Island, Nebraska, with complaints of severe back pain, dizziness, vomiting, slurred speech, and headaches. He was thereafter diagnosed as suffering from a metastatic cancerous lesion in his brain, caused by metastatic malignant melanoma. On June 23, in an attempt to determine the primary source of the malignancy, pathologists at St. Francis Medical Center reexamined the specimen slide from the 1991 surgery. They concluded that the specimen was not a benign lesion, as Morris and Kielhorn had concluded, but, rather, a primary nodular malignant melanoma. Anderson's health deteriorated rapidly, and he died as a result of the malignancy on September 11, 1995.

In her operative petition, Paulk alleged that Morris and Kielhorn were negligent in failing to correctly diagnose and report the malignancy in 1991 and that such negligence was attributable to CLA under the doctrine of respondeat superior. She further alleged that

> [a]s a direct and proximate result of the negligence of the Defendants, [Anderson] died on September 11, 1995, and his surviving next of kin have been deprived of his care, comfort, companionship, services, earnings, contributions, and consortium, and all other pleasures and rights, having a pecuniary value, which attend inter-family relationships.

In their answer, the defendants admitted that the 1991 diagnosis was incorrect, but specifically denied that they were negligent in any manner and further alleged that "there was no causal relationship between any action or inaction on the part of these defendants in the death of [Anderson], the same being an unavoidable medical sequela of his pathological condition as it there and then existed . . . ."

Prior to trial, the defendants responded to written interrogatories propounded by Paulk. One of the interrogatories directed to each defendant stated:

> Identify each person whom defendant expects to call as an expert witness, stating the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each such opinion.

Each defendant identified David Bouda, M.D.; Jerry Jones, M.D.; and David Howe, M.D., as experts whom they had consulted, and responded to the aforementioned interrogatory as follows: "Dr. David Bouda and Dr. David Howe will testify as to causation. Dr. Jones will testify as to causation and standard of care." In supplemental responses, each defendant identified George Bascom, M.D., as an additional defense expert who would testify as to "causation."

After the first of these responses was served, Paulk made a written request by letter for a curriculum vitae for each expert identified and further requested by letter the "facts and opinions upon which each expert is expected to testify." In response, defense counsel wrote:

> [E]ach of the . . . expert witnesses . . . will testify, based on a review of the materials in the case . . . that the actions of the defendants were not the proximate cause of [Anderson]'s death. The experts will testify as to the nature of this type of cancer, its curability rate, and the treatments available at the time the decedent suffered from the disease. The experts will further opine regarding the pathology of metastatic melanoma, the disease process itself, and the manner and shape in which the disease manifests itself. Dr. Jones will specifically testify regarding the standard of care regarding the defendants and the difficulty in diagnosing metastatic melanoma. Dr. Jones will testify in detail regarding the process of examining and diagnosing this disease versus other processes of skin samples.

Paulk deposed Jones prior to trial. Jones, a pathologist who practices in Omaha, testified that he reviewed the specimen slide containing tissue from Anderson's 1991 surgery and concluded that it reflected a malignant melanoma. Jones also identified a series of seven photomicrographic slides which he had prepared from the specimen slide, depicting the tissue excised in 1991. When asked why he prepared these slides, Jones stated: "Well, I

may — I would like to offer a caveat that I may have additional things to say about these slides." Paulk's counsel then stated, "I would like to know everything you are going to say about those slides, Doctor[.]" Jones was then questioned and commented upon what was depicted in each of the seven photomicrographic slides. He did not disclose that any of the slides depicted melanoma cells in the blood. After expressing his opinions regarding the applicable standard of care, Jones stated his opinion that the melanoma had already metastasized at the time of Anderson's 1991 surgery. Paulk's counsel then stated, "Tell me all the reasons why you are of that view[.]" Jones discussed "several reasons" but did not mention any detection of melanoma cells in the blood in the 1991 tissue specimen.

At trial, Kris Mleczko, M.D., a board-certified pathologist, was called as an expert witness on behalf of Paulk. Mleczko testified he reviewed a specimen from a scalp lesion biopsy performed during Anderson's 1995 hospitalization and reached a diagnosis of metastatic malignant melanoma, indicating that the malignancy had spread from a distant primary site. In an effort to ascertain the primary site, Mleczko reviewed the tissue specimen from Anderson's 1991 surgery and concluded that it reflected a primary lesion from which the metastatic tumor had originated. He opined that the failure of Morris and Kielhorn to diagnose and report the malignancy in 1991 fell below the applicable standard of care.

Donald Bell, M.D., a board-certified surgeon, also testified as an expert witness on behalf of Paulk. Bell stated that if the malignant melanoma had been diagnosed in 1991, the appropriate treatment would have been a "wide local excision" to surgically remove tissue around and below the scar left by the excision of the mole, as well as postoperative followup care. Bell opined that with such treatment and care, Anderson would have had a greater than 50-percent chance of survival. Bell admitted on cross-examination, however, that patients with *metastatic* melanoma have virtually no chance of survival.

Paulk also offered the deposition testimony of Adour R. Adrouny, M.D., a board-certified oncologist. Based upon a review of medical records, Adrouny testified that if the malignant melanoma had been correctly diagnosed and properly

treated in 1991, Anderson would more likely than not have been alive and free of the disease 5 years later.

In their case in chief, the defendants called, among other persons, Bouda, Jones, Howe, and Bascom, the defense experts previously identified. Bascom and Howe, both board-certified oncologists, testified that in their opinion, the 1991 misdiagnosis was not causally related to Anderson's death because, by that time, the melanoma had already metastasized beyond the skin where it had originated and no treatment could have prolonged Anderson's life. Bouda, another board-certified oncologist, expressed similar opinions. After a hearing outside the presence of the jury, the district court sustained Paulk's motion in limine and excluded Bouda's testimony regarding calculation of tumor growth rates based upon "doubling times" on the ground that this methodology lacked an adequate scientific basis.

On direct examination, Jones gave an opinion that the 1991 diagnosis, while incorrect, did not constitute a deviation from the appropriate standard of care because 100 percent accuracy in pathologic diagnosis is not achievable. He further testified that the lesion had been completely excised in 1991. He was then asked a series of questions concerning images projected from the photomicrographic slides that he prepared from the 1991 specimen slide. When asked what could be seen on one of the images, Jones responded that a melanoma cell could be seen within a blood vessel. He characterized this as "very important" and something he had searched for "very carefully and diligently to try to find." When asked the significance of this finding, Jones stated:

> Well, it [sic] obviously at this stage — at this time when this was excised we have melanoma cells in blood vessels already. We can demonstrate these melanoma cells in blood vessels. What does that mean? That's how melanoma spreads. Melanoma is not like other cancers. It spreads by way of the lymph vessels, and it spreads by the way of the blood vessels. And once it gets in the blood vessels, it goes everywhere. . . . The fact that it's in the blood vessel, it indicates it has already spread systemically to other areas of the body.

Jones further stated his conclusion that "these melanoma cells having been demonstrated in blood vessels have already spread from this site to multiple other areas of the body."

Paulk moved for a mistrial on the ground that the presence of melanoma cells in Anderson's blood as a basis for Jones' opinion regarding the onset of metastasis had not been disclosed in response to pretrial discovery. The district court took the motion under advisement and permitted the trial to proceed. At the conclusion of Jones' testimony, the court questioned him outside the presence of the jury and confirmed that Jones had formed his opinions regarding the presence of melanoma cells in Anderson's blood prior to the taking of Jones' deposition.

Following a brief recess, the trial resumed. On the following day, the defendants rested and Paulk re-called Mleczko to the stand as a rebuttal witness. Mleczko testified that he had obtained the 1991 tissue specimen slide from Jones on the previous evening and had reviewed it again. He also reviewed the photomicrographic slides and Jones' trial testimony in reference to them. Mleczko testified that the photomicrographic slides did not conclusively establish the presence of melanoma cells in the blood and that even if such cells were present, one could not conclude with reasonable medical certainty that the melanoma had metastasized beyond the primary site.

At the conclusion of the evidence, the trial court conducted an instruction conference. The court proposed instruction No. 14, which stated: "A proximate cause is a substantial factor that produces a result in a natural and continuous sequence, *and without which the result would not have occurred*." (Emphasis supplied.) Paulk objected to the italicized portion of the instruction and requested an instruction on concurring cause. Paulk also objected to instruction No. 8 insofar as it defined Anderson's "next of kin" as his surviving spouse and children. The court overruled the objections and declined to give the requested instruction.

The jury returned its verdict for the defendants on November 12, 1999. On November 15, the district judge filed a journal entry overruling Paulk's motion for mistrial, stating:

> The Court is in agreement that the testimony of Dr. Jones constituted surprise and the type of opinion expressed by Dr. Jones should have been but was not previously disclosed by

> the defendants to the plaintiff. The Court finds further, however, that the provision of opportunity to the plaintiff to offer additional evidence contrary to the evidence offered by Dr. Jones was sufficient to remedy the difficulties raised by the plaintiff's motion.

In the same journal entry, the district court accepted and entered judgment upon the verdict.

Paulk filed a timely motion for new trial on multiple grounds, including the overruling of her objections to jury instructions, the refusal of the court to give certain requested jury instructions, and the refusal to grant the motion for mistrial based upon unfair and prejudicial surprise arising from Jones' testimony. Following an evidentiary hearing on this motion, it was overruled. Paulk then perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Paulk contends, restated and summarized, that the district court erred in (1) declining to grant her motions for mistrial and new trial based upon unfair surprise; (2) overruling her objection to jury instructions Nos. 8 and 14; and (3) refusing to give a concurring cause instruction.

The defendants have cross-appealed, asserting that the district court abused its discretion in sustaining the motion in limine and precluding the testimony of Bouda with respect to "doubling times."

STANDARD OF REVIEW

[1] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

[2,3] To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Nebraska Nutrients v. Shepherd*, 261 Neb.

723, 626 N.W.2d 472 (2001); *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). Whether a jury instruction given by a trial court is correct is a question of law. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001).

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

ANALYSIS

Unfair Surprise

It is undisputed that Morris and Kielhorn missed the diagnosis of malignant melanoma when reviewing the tissue specimen submitted after the 1991 surgery. At trial, the two critical issues of fact pertaining to liability were (1) whether the missed diagnosis constituted a deviation from the applicable standard of care and (2) if so, whether the missed diagnosis was the proximate cause of Anderson's injuries and death. The causation issue turned on whether the cancer had already metastasized, i.e., spread to other parts of the body, by the time the mole was excised in 1991. There was sharply conflicting evidence on this point.

Whether a causal relationship existed between the misdiagnosis and the metastasis of the primary tumor is a complex medical issue requiring expert testimony. See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Accordingly, an important aspect of each party's trial preparation was discovery of the opinions that the opposing party's expert witnesses would state at trial and the facts upon which such opinions were based.

[5] The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997); *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination. *Id*. Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case. *Id*.

Neb. Ct. R. of Discovery 26(b)(4)(A)(i) (rev. 2000) provides:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Rule 26(b)(4)(A)(ii) provides that upon motion, the trial court "may order further discovery by other means." Here, it appears that the parties informally agreed to identify each expert witness and the general nature of his or her testimony through answers to interrogatories, and then to voluntarily tender the expert for a discovery deposition to be taken by opposing counsel. We therefore view the interrogatory response regarding Jones' testimony and his subsequent discovery deposition testimony as components of the defendants' initial response to expert witness discovery.

Jones' opinion that malignant melanoma cells were visible within the blood vessels in the 1991 tissue specimen, thereby establishing that metastasis had already occurred, was clearly within the scope of the expert witness interrogatory propounded by Paulk. In addition, the information should have been disclosed by Jones in his deposition when he was asked to disclose all of his anticipated testimony concerning the photomicrographic slides, and again when he was asked to give all the reasons for his opinion that metastasis had occurred prior to the 1991 surgery. Jones' own testimony at trial underscores that the presence of melanoma cells in the bloodstream would be a "very important" factor in determining when metastasis occurred.

The record is unclear as to exactly when the defendants or their counsel became aware of this evidence, but that fact is immaterial to our analysis. It is ultimately a party's responsibility to ensure that the party's experts have fairly and adequately responded to an opposing party's deposition questions. Rule 26(e)(1) provides:

> A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to
>
> . . . .
>
> (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or

> she is expected to testify, and the substance of his or her testimony.

The record clearly indicates that the defendants failed to supplement prior discovery responses regarding Jones' testimony that in his opinion, melanoma cells could be detected in Anderson's bloodstream. Pursuant to rule 26(e)(1)(B), such critical evidence should have been disclosed prior to trial, and consequently, we agree with the district court that its disclosure for the first time at trial constituted surprise.

[6,7] Failure to seasonably supplement discovery responses may be grounds for sanctions imposed under Neb. Ct. R. of Discovery 37(d) (rev. 2000). *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). An appropriate sanction under rule 37 is determined in the factual context of a particular case and is initially left to the discretion of the trial court. *Norquay, supra*.

[8] In *Norquay*, we held that a party claiming unfair surprise due to the admission of evidence at trial which was not disclosed in response to discovery requests must make a timely request for an appropriate remedial measure, such as a motion to strike, a motion for a continuance, or a motion for a mistrial. Here, Paulk made a timely motion for mistrial when suddenly confronted with Jones' previously undisclosed opinion that malignant cells were visible in the bloodstream on the 1991 tissue specimen. A motion for mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), *overruled in part on other grounds, State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

Based upon our review of the record, we conclude that the district court abused its discretion in denying Paulk's motion for mistrial. We reach this conclusion for three reasons. First, Jones' testimony concerning the presence of melanoma cells in the bloodstream was perhaps the most critical evidence offered by the defense. If believed by the jury, the testimony provided objective, tangible proof that the malignancy had already spread at the time of the 1991 surgery. This fact would convincingly refute Paulk's liability theory that the misdiagnosis prevented prompt treatment which would have averted metastasis and death. The critical

importance of the evidence intensified the unfairness occasioned by the failure to disclose it during discovery.

Second, the surprise introduction of this testimony, coupled with the district court's reservation of a ruling on the timely motion for mistrial, placed Paulk in the unenviable position of cross-examining Jones with respect to damaging medical evidence which was disclosed for the first time during trial. This thwarted one of the essential purposes of discovery, which is to provide a basis for an informed cross-examination. See *Norquay, supra*.

Third, the fact that Paulk was permitted to present rebuttal testimony did not eliminate or ameliorate the prejudice occasioned by the unfair surprise. Paulk would have been entitled to present rebuttal evidence even if Jones' opinion had been disclosed during discovery, as it should have been. Timely pretrial disclosure, however, would have permitted Paulk a reasonable period of time in which to develop such rebuttal evidence. Instead, Paulk had approximately 24 hours to arrange for the 1991 tissue specimen to be transported from Jones' office in Omaha to Mleczko's office in Grand Island, so that Mleczko could review it again in light of Jones' trial testimony. Counsel had only a limited time to confer with Mleczko prior to his rebuttal testimony. In an affidavit submitted in support of Paulk's motion for new trial, Mleczko stated that he had inadequate time to examine the specimen slide prior to his rebuttal testimony and therefore had to qualify his opinions. The belated disclosure also denied Paulk the opportunity to have her expert in the courtroom during Jones' testimony in order to visualize the areas on the projected photomicrographic slide which Jones identified as melanoma cells within the blood.

For these reasons, we conclude that Jones' trial testimony regarding his previously undisclosed opinion that melanoma cells were present in Anderson's blood in 1991 resulted in unfair and prejudicial surprise. The district court abused its discretion in denying Paulk's motions for mistrial and new trial.

Jury Instructions

[9] Because we are remanding this cause for a new trial for the reasons stated above, we need not reach the assigned errors

pertaining to jury instructions. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001); *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). We do not address the assigned errors pertaining to the proximate cause instruction that was given, or the requested concurring cause instruction, because the question of whether such instructions should be given will depend upon the evidence adduced at the retrial. Nevertheless, Paulk's contention that the phrase "next of kin" was incorrectly defined in instruction No. 8 presents a question of law that is likely to recur on retrial, so we address it here.

Jury instruction No. 8 stated:

> The plaintiff Lynda F. Paulk is suing in this case as the personal representative of the Estate of Greg W. Anderson and *for the benefit of the decedent's next of kin who are his surviving spouse, Connie E. Anderson, and his children Jaden Anderson and Latisha Trump.* It is the decedent's next of kin who are the persons who will receive the benefits of any recovery you may find.

(Emphasis supplied.) Paulk asserts on appeal that the italicized portion of the instruction is too restrictive in that "next of kin" should also include the sibling and parents of Anderson.

[10] The right to maintain an action for wrongful death did not exist under the common law and exists in Nebraska, as in other states, solely by statute. *Smith v. Columbus Community Hosp.*, 222 Neb. 776, 387 N.W.2d 490 (1986). The cause of action is authorized by Neb. Rev. Stat. § 30-809 (Reissue 1995). The damages that may be recovered and the disposition of the avails of any judgment obtained are defined by Neb. Rev. Stat. § 30-810 (Reissue 1995). Section 30-810 provides that a wrongful death action shall be brought by the personal representative "for the exclusive benefit of the widow or widower and next of kin" and that the avails of a judgment in a wrongful death action "shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons."

[11] In *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959), we construed the phrase "next of kin" as used in § 30-809 to mean persons nearest in degree of blood surviving, or, in other words, those persons who take the personal estate of the deceased under the statutes of distribution. See, also, *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). In *Mabe*, we held that where the deceased was survived by a daughter and his parents, the daughter was the next of kin under the wrongful death statute but the parents were not. Applying this rule, the next of kin in the present case would include the surviving spouse and children of Anderson, but not his parents or his sibling.

[12,13] While acknowledging the controlling authority of *Mabe*, Paulk suggests that we reexamine that case for several reasons. First, she argues that our interpretation of the phrase "next of kin" in *Mabe* runs afoul of Neb. Const. art. I, § 13, which provides, "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay . . . ." This argument misconstrues the scope of this constitutional provision. In *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 288, 70 N.W.2d 86, 91 (1955), *overruled on other grounds, Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966), we stated that

> [article I, § 13,] of the [Nebraska] Constitution does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but where no right of action is given or remedy exists, under either the common law or some statute, this constitutional provision creates none.

The cause of action created by § 30-809 is purely a statutory remedy which may be enlarged, reduced, or completely eliminated at the pleasure of the Legislature. Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000). Thus, there is no

constitutional basis for expanding the wrongful death remedy to persons who do not fall within the statutory classification of "next of kin," as that phrase has been construed by this court.

Paulk also argues that the statutes of descent and distribution in effect at the time of *Mabe, supra*, were repealed and recodified in 1974. See 1974 Neb. Laws, L.B. 354 (operative January 1, 1977). While that is true, it does not compel a departure from the rule announced in *Mabe* because there has been no substantive change in the applicable law. In *Mabe*, we noted that it is only when there is no child of the deceased or descendants of a deceased child that property descends to the parents of the deceased. The same is true under present law. See Neb. Rev. Stat. §§ 30-2301 through 30-2303 (Reissue 1995).

Paulk invites us to abandon the holding in *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959), for the "modern and enlightened" approach, brief for appellant at 34, taken by the Michigan Supreme Court in *Crystal v Hubbard*, 414 Mich. 297, 324 N.W.2d 869 (1982), which interpreted the phrase "next of kin" in a wrongful death statute to encompass any potential heir of the deceased who could prove a pecuniary loss. We decline to do so because we conclude that any expansion of the class of persons entitled to recover under the wrongful death statutes falls within the province of the Legislature. We therefore conclude that instruction No. 8 was a correct statement of the law.

Cross-Appeal

The defendants' cross-appeal presents the single issue of whether the district court erred in excluding portions of Bouda's testimony regarding cancer growth rates as calculated through doubling times on the ground that the testimony lacked a scientific basis. At the time of trial, Nebraska followed the "general acceptance" test for the admissibility of expert testimony concerning scientific evidence, set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring). We have subsequently held that for trials commencing on or after October 1, 2001, the admissibility of such testimony should be determined under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct.

2786, 125 L. Ed. 2d 469 (1993). *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). We therefore do not reach the issue presented in the cross-appeal because the admissibility of any scientific evidence offered on retrial of this case will be governed by the *Daubert* standards adopted in *Schafersman*.

CONCLUSION

For the reasons above, we conclude that the trial court did not err in defining "next of kin" in instruction No. 8. However, we conclude that the court did err in not granting Paulk's motions for mistrial and for new trial on the ground that Jones' trial testimony with respect to matters requested but not disclosed in discovery resulted in unfair and prejudicial surprise that deprived Paulk of a fair trial. Because of this error, we reverse, remand for a new trial, and do not reach the remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

KEVIN D. RUSSELL, APPELLANT, V.
BRANT STRICKER AND LEE SWIRES, APPELLEES.

635 N.W.2d 734

Filed November 30, 2001. No. S-00-264.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
3. **Negligence: Jury Instructions: Appeal and Error.** It is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).
4. **Negligence: Jury Instructions: Statutes: Words and Phrases.** The Nebraska Supreme Court has consistently understood the plain meaning of the word "instructed" in Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) to require formal jury instructions.
5. **Legislature: Negligence: Jury Instructions.** The Nebraska Legislature has chosen to require that the jury be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence.
6. **Jury Instructions: Verdicts.** The verdict form is not a substitute for a proper instruction.

7. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
8. **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.
9. **Jury Instructions: Appeal and Error.** Trial judges are under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made.
10. **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 Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded for a new trial.

James L. Zimmerman, of Sorensen & Zimmerman, P.C., for appellant.

John F. Simmons, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee Stricker.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee Swires.

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

HENDRY, C.J.

INTRODUCTION

Kevin D. Russell brought a negligence action against Brant Stricker and Lee Swires (collectively defendants) for injuries Russell sustained as a passenger in Stricker's truck when Stricker engaged in a speed contest with Swires. The jury found Russell 36 percent negligent, Stricker 47 percent negligent, and Swires 17 percent negligent. Russell was awarded $17,330, which was 64 percent of the $27,077 total award. The court granted Stricker's motion for a credit against the judgment and reduced Russell's judgment by $5,000. Russell appealed. We moved this case to our docket pursuant to our power to regulate

the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

On March 3, 1995, Stricker engaged in a speed contest with Swires in Scottsbluff, Nebraska, which resulted in an accident when Stricker lost control of the truck he was operating and struck a light pole. Russell, a passenger in Stricker's truck at the time of the accident, brought this negligence action against defendants, seeking damages for his injuries. Defendants contended that Russell was contributorily negligent.

At the jury instruction conference at the close of evidence, defendants did not object to the court's proposed instructions and Russell objected only to the extent that the instructions referred to Russell's assumption of the risk or contributory negligence. The court gave the jury five instructions and three verdict forms. Jury instruction No. 2, under "C. Effect of Findings," informed the jury how to utilize the verdict forms. The instruction stated:

> 1. If the Plaintiff failed to meet his burden of proof against the Defendants then your verdict must be for the Defendants and you will complete only Verdict Form Number 1. However, if the Plaintiff has met his burden of proof, then you must consider the defendant's defenses.
>
> 2. If the Defendants have met their burden of proof that the Plaintiff assumed the risk, then your verdict must be for the Defendants, and this is true even if you find that one or both of the Defendants were negligent and this negligence was also a proximate cause of Plaintiff's injury. You will complete only Verdict Form Number 1. If the Defendants have not met their burden of proof, you must disregard the defense of "assumption of risk".
>
> 3. If the Plaintiff has met his burden of proof against Defendant Stricker or Defendant Swires or both, <u>AND</u> the Defendants <u>HAVE NOT</u> met their burden of proof that the Plaintiff was also negligent, then your verdict must be for the Plaintiff in the amount of damages you find, and you will complete only Verdict Form Number 2.
>
> 4. If the Plaintiff has met his burden of proof against Defendant Stricker or Defendant Swires or both, <u>AND</u> the

> Defendants HAVE met their burden of proof that the Plaintiff was also negligent then you must complete only Verdict Form Number 3.

(Emphasis in original.)

After receiving these instructions, the jury deliberated and returned verdict form No. 3. Using verdict form No. 3, the jury allocated percentages of negligence to each of the parties as follows: Russell, 36 percent; Stricker, 47 percent; and Swires, 17 percent. The jury then found that Russell had incurred total damages of $27,077. The jury, finding that the sum of both defendants' negligence totaled 64 percent, multiplied that percentage by $27,077 to determine that Russell was entitled to recover $17,330 in damages. The district court entered judgment against defendants for that amount on January 25, 2000.

Russell filed a motion for new trial on January 31, 2000. A hearing was held on February 9 regarding the motion for new trial and Stricker's motions for credit against the judgment. The court overruled Russell's motion for new trial and granted Stricker's motion for credit against the judgment, reducing Stricker's judgment by $5,000 to $12,330. Russell appealed.

ASSIGNMENTS OF ERROR

Russell asserts as error that (1) the court failed to properly instruct the jury with respect to the effects of its allocation of negligence as required by Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) and (2) the court erred in sustaining Stricker's motion for credit against the judgment in the sum of $5,000 pursuant to the medical payments coverage provision in Stricker's automobile insurance policy and Neb. Rev. Stat. § 25-1222.01 (Reissue 1995).

STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001); *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

ANALYSIS

Jury Instructions and Verdict Forms

[3] Russell contends the district court did not properly instruct the jury regarding the effects of its allocation of negligence as required by § 25-21,185.09. This is a question of statutory interpretation. Section 25-21,185.09 states:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury *shall be instructed* on the effects of the allocation of negligence.

(Emphasis supplied.) We have concluded previously that "it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with § 25-21,185.09." *Wheeler v. Bagley*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998). In *Wheeler*, the trial court did not instruct the jury or provide a verdict form that sufficiently conveyed the effects of the allocation of negligence. The result was a jury verdict form that found 49 percent negligence on the plaintiff's part, 51 percent negligence on the defendant's part, and the plaintiff's damages in the amount of $40,000.

In *Wheeler*, the plaintiff argued that the verdict form indicated she should receive $40,000. The defendant, however, asserted that the verdict form indicated the plaintiff's total damages were $40,000 and should be reduced by the plaintiff's percentage of negligence, which would result in a $20,400 award for the plaintiff. The trial court granted a new trial because it concluded that the jury instruction given did not comply with the requirements of § 25-21,185.09. In *Wheeler*, we affirmed the decision of the trial court and provided a jury instruction and a verdict form as guidelines to be used in single-defendant negligence cases and "adjusted as the circumstances of a particular case merit." 254 Neb. at 239, 575 N.W.2d at 621.

The district court's jury instructions in this case are not consistent with the instructions we provided in *Wheeler*. The district

court's instruction No. 2, part C, speaks only in terms of whether plaintiff and defendants have met their burden of proof, but it never addresses what the result will be if " 'the negligence of the plaintiff was equal to or greater than the negligence of the defendant' " or how " '[i]f the plaintiff is allowed to recover, you will then reduce the total damages by the percentage of the plaintiff's negligence,' " as *Wheeler* requires. 254 Neb. at 240, 575 N.W.2d at 620-21. Therefore, the district court did not give the jury instruction required by § 25-21,185.09. Defendants assert that even in the absence of a formal jury instruction, the jury was adequately instructed in this case pursuant to § 25-21,185.09 by the verdict form the district court provided. This raises the issue of whether a verdict form may serve as a substitute for the instruction required by § 25-21,185.09.

[4] Section 25-21,185.09 states, "The jury shall be *instructed* on the effects of the allocation of negligence." (Emphasis supplied.) This court has consistently understood the plain meaning of the word "instructed" in § 25-21,185.09 to require formal jury instructions. See, e.g., *Wheeler, supra*.

Allowing a verdict form to substitute for a proper jury instruction is inconsistent with the historical underpinnings of § 25-21,185.09. As we discussed in *Wheeler*, courts and legislatures across the nation have adopted various rules regarding informing juries of the effects of their allocation of negligence. Some courts enforce the so-called blindfold rule, which requires that jurors deliberate with no knowledge of the effect of the allocation of negligence between plaintiffs and defendants. In these jurisdictions, it is reversible error to inform the jury of the effects of its allocation of negligence. See, e.g., *McGowan v. Story*, 70 Wis. 2d 189, 234 N.W.2d 325 (1975). The blindfold rule is based on the concern that jurors might "attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable." *Id.* at 198, 234 N.W.2d at 329.

As we noted in *Wheeler*, there has been a "strong, if not overwhelming, recent trend away from the blindfold rule in comparative negligence states." *Wheeler v. Bagley*, 254 Neb. 232, 237, 575 N.W.2d 616, 619 (1998). See, also, *Sollin v. Wangler*, 627 N.W.2d 159 (N.D. 2001) (citing jurisdictions with statutes, court rules, and judicial decisions that allow juries to be informed of

consequences of allocation of negligence). These jurisdictions have determined that failing to instruct the jury on the effects of the allocation of negligence only "propagates error" and "propels the jury to arrive at verdicts that may have legal effects different from those the jury believed were warranted." Price Ainsworth & Mike C. Miller, *Removing the Blindfold: General Verdicts and Letting the Jury Know the Effects of Its Answers*, 29 S. Tex. L. Rev. 233, 234 (1987). See, also, Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 Duke L.J. 824, 842 (noting concern of some courts that "uninformed jurors, anticipating the legal effect of the numerical findings, will speculate incorrectly and render a verdict that does not reflect the jury's true intent"). The legislatures and courts in these states have decided that a " ' "jury is not to be set loose in a maze of factual questions, to be answered without intelligent awareness of the consequences." ' " *Seppi v. Betty*, 99 Idaho 186, 192, 579 P.2d 683, 689 (1978) (quoting *Porche v. Gulf Mississippi Marine Corporation*, 390 F. Supp. 624 (E.D. La. 1975)).

[5] In enacting § 25-21,185.09, the Nebraska Legislature has required that juries be instructed on the effects of the allocation of negligence. "The Nebraska Legislature has chosen to require that the jury be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence." *Wheeler*, 254 Neb. at 238, 575 N.W.2d at 619. In Nebraska, the trial court must inform the jury that the ultimate outcome of a 50-50 allocation of negligence between a plaintiff and a defendant will be a verdict in favor of the defendant; the plaintiff will recover nothing. A jury cannot be "fully and openly informed before making its determination" when it does not receive this proper ultimate outcome charge. *Id*. Defendants would have this court rely on an inference that the jury will understand the effects of its responses by walking through a maze of verdict forms without proper instruction. This is in conflict with the plain language of § 25-21,185.09, which mandates removal of the blindfold. The unguided maze of verdict forms does not fulfill the Legislature's mandate.

[6] Allowing a verdict form to substitute for a proper jury instruction would not be consistent with this court's prior rulings

interpreting § 25-21,185.09. In *Wheeler*, we stated, "[T]he verdict form is not a substitute for a proper instruction, and, in any event, the verdict form did not adequately convey the effects of the allocation of negligence in the present case." 254 Neb. at 238, 575 N.W.2d at 620.

Defendants argue that *Wheeler* is distinguishable because the district court in this case used a verdict form consistent with the verdict form provided by this court in *Wheeler*. It is true that the verdict form in this case is consistent with *Wheeler*, but the verdict form is not a substitute for a proper instruction. We specifically stated in *Wheeler* that an ultimate outcome charge is required and may not be circumvented. The verdict form in *Wheeler* was never designed to stand alone, but, rather, it was to be used "*in conjunction with* the instruction regarding the effects of the allocation of negligence in cases where a jury finds some contributory negligence on the part of the plaintiff." (Emphasis supplied.) *Wheeler v. Bagley*, 254 Neb. 232, 240, 575 N.W.2d 616, 621 (1998).

The argument that a verdict form can cure a defective jury instruction under § 25-21,185.09 was implicitly rejected in *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). In *Pleiss*, the trial court denied the plaintiff's request for the *Wheeler* jury instruction and the plaintiff appealed. The defendant argued on appeal that the plaintiff was not prejudiced because the jury's completion of the verdict form in favor of the defendant revealed that the jury never reached the issue of contributory negligence. We found this argument to be without merit and restated our findings in *Wheeler* that "a verdict form is not a substitute for a proper instruction and that the verdict form utilized in *Wheeler* did not adequately convey the effects of the allocation of negligence in any event." *Pleiss*, 260 Neb. at 774, 619 N.W.2d at 828.

Based on our prior rulings and the plain meaning and purpose of § 25-21,185.09, we hold that a jury verdict form cannot serve as a substitute for the proper jury instruction as to the allocation of negligence. The district court erred in not properly instructing the jury as to the effects of the allocation of negligence as required by § 25-21,185.09.

Plain Error

[7,8] Nevertheless, defendants argue that even if the district court's failure to give the proper instruction is error, it is not plain error. At trial, none of the parties objected to the district court's proposed jury instructions on the basis of failing to instruct the jury as to the allocation of negligence. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001). 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. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

We addressed the issue of plain error in the context of § 25-21,185.09 in *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998). In *Fiscel*, the jury returned verdict forms finding that the plaintiff was 40 percent negligent and the defendant was 60 percent negligent. The jury further determined that the plaintiff's damages were $63,500, but did not indicate whether the plaintiff should recover 100 percent or 60 percent of the $63,500. The trial judge held an off-the-record conversation with the jury to clarify the ambiguity. The district court thereafter awarded a judgment of $63,500 to the plaintiff on the basis of the conversation with the jury. The defendant appealed. While the issue was not raised by either party, this court found that "an overriding issue lies in the district court's failure to provide a proper verdict form and a written jury instruction regarding the effect of the allocation of negligence." *Id.* at 684, 578 N.W.2d at 56. We noted that the jury did not receive a proper verdict form, written jury instruction, or oral instruction regarding the effect of its allocation of negligence and affirmed the holding in *Wheeler* that § 25-21,185.09 mandated a jury instruction regarding the effect of the allocation of negligence. *Fiscel, supra*. This court further found it was plain error to fail to give such an instruction. *Id.*

Defendants seek to distinguish our holdings in *Fiscel, supra*, and *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998), on the basis that in those cases, the plaintiff experienced actual prejudice because it was impossible to ascertain what the jury intended through the verdict forms. In this case, defendants argue that the jury understood and intended the effect of allocating negligence because of the clear step-by-step process of completing the verdict form. They contend that the jury's damage award would have been the same whether or not the jury had received the proper instruction. This we do not know—that is the problem.

In *Wheeler*, we stated as part of the required instruction, " 'If the plaintiff is allowed to recover, you will *first* determine the plaintiff's total damages *without regard to his or her percentage or degree of negligence*.' " (Emphasis supplied.) 254 Neb. at 240, 575 N.W.2d at 620. The jury never received this charge through either the jury instructions or the verdict form. Instructing the jury of its need to first determine a plaintiff's damages without considering the plaintiff's negligence reduces the potential that the jury will inappropriately discount the plaintiff's damages. See Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 Psychol. Pub. Policy & L. 712 (2000).

The jury in this case reached its verdict without this preventative instruction. Were Russell's damages inappropriately reduced, or did the jury reach the same result it would have if properly instructed? We do not know the answers to these questions. Therein lies the prejudice to Russell. As we stated in *Wheeler*, " 'It seems to us that a jury's deliberations should not be attended by such surmises but rather they should be openly informed as to the legal principles involved in our comparative negligence doctrine so that they may make a rational decision.' " *Wheeler*, 254 Neb. at 239, 575 N.W.2d at 620 (quoting *Adkins v. Whitten*, 171 W. Va. 106, 297 S.E.2d 881 (1982)). In this case, we cannot determine that the jury's verdict was free of the "surmises" that concerned this court in *Wheeler*, and which the Legislature sought to eliminate in enacting § 25-21,185.09.

The Nebraska Legislature's enactment of § 25-21,185.09 created an obligation for courts to instruct juries on the effects of the allocation of negligence in every case where contributory negligence is a defense. See *Wheeler, supra*. We recognize that some

states allow a trial judge to exercise discretion in giving the instruction. See, e.g., Minn. R. Civ. P. 49.01(b) (West 1996) ("the court shall inform the jury of the effect of its answers to the comparative fault question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law or complex issues of law or fact are involved which may render such instruction or comment erroneous, misleading, or confusing to the jury"); *Seppi v. Betty*, 99 Idaho 186, 195, 579 P.2d 683, 692 (1978) ("the trial courts should be given discretion not to so inform the jury in those cases where the issues are so complex or the legal issues so uncertain that such instructions would confuse or mislead the jury"). Other states require the parties to request the instruction. See, e.g., *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982) (if requested, trial court must inform jury of effect of apportioning negligence). However, the Nebraska Legislature has made this instruction mandatory. Nebraska trial judges have no discretion regarding this type of instruction. As we have stated, "The Nebraska Legislature has made the . . . judgment that a jury should be fully and openly informed with respect to the effects of the allocation of negligence in every case." *Wheeler v. Bagley*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998).

[9] The Legislature has obligated courts to give this instruction. Trial judges are "under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made." *Haag v. Bongers*, 256 Neb. 170, 188, 589 N.W.2d 318, 331 (1999).

"[T]he courts of this state may not circumvent the ultimate outcome charge requirement, either purposely or inadvertently." *Wheeler*, 254 Neb. at 238, 575 N.W.2d at 619-20. The obligation to instruct the jury on the allocation of negligence cannot be waived, even if a party contends that a jury found the proper "instruction" in the midst of the verdict forms. To do otherwise would "result in damage to the integrity, reputation, and fairness of the judicial process" by ignoring the Legislature's clear mandate set out in § 25-21,185.09. See *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 761, 619 N.W.2d 579, 583 (2000).

Given the clear mandate of the Legislature and this court, it is the duty of a trial court to instruct the jury on the effects of the allocation of negligence under § 25-21,185.09, and failure to do so constitutes plain error. See *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998). Courts of this state have the responsibility to give the proper instruction and to ensure that compliance with § 25-21,185.09 is not made an occasion for gamesmanship. It was plain error for the district court to fail to give the proper jury instruction under § 25-21,185.09.

Remaining Assignment of Error

[10] Since we hold that the district court's failure to instruct the jury on the allocation of negligence requires reversal, it is unnecessary to address Russell's remaining assignment of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001).

CONCLUSION

For the foregoing reasons, we reverse the decision and remand the cause to the district court for a new trial.

Reversed and remanded for a new trial.

Wright, J., dissenting.

The majority has reversed the judgment of the district court and remanded the cause for a new trial, finding plain error in the court's failure to give the proper jury instruction under Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). I respectfully dissent.

Kevin D. Russell sustained injuries while a passenger in Brant Stricker's truck when Stricker and Lee Swires engaged in a speed contest. The jury found in favor of Russell and against Stricker and Swires. The jury apportioned the negligence among Russell (36 percent), Stricker (47 percent), and Swires (17 percent). Russell was awarded $17,330, which represented 64 percent of the total award of $27,077.

Although Russell did not object to the jury instructions as given, he now asserts that the district court failed to properly instruct the jury with respect to the effect of its allocation of negligence as required by § 25-21,185.09.

We have previously held that it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with § 25-21,185.09. See *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). In *Wheeler*, the jury found the plaintiff 49 percent negligent and the defendant 51 percent negligent and valued the plaintiff's damages at $40,000. Because we were unable to determine whether the jury had apportioned this amount between the plaintiff and the defendant, we reversed the judgment and remanded the cause for a new trial.

In *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000), the trial court denied the plaintiff's request for a *Wheeler*-type jury instruction. On appeal, the defendant argued that the plaintiff was not prejudiced because the jury did not reach the issue of contributory negligence, since it found in favor of the defendant. As in *Wheeler*, it was not apparent to this court that the jury had ever considered the possibility of apportioning the negligence between the parties. Thus, we reversed the judgment and remanded the cause for a new trial.

Here, the result would not have been any different had the jury been instructed in the language of § 25-21,185.09. The jury determined the total amount of the award to be $27,077. The jury then apportioned contributory negligence to Russell and awarded him $17,330.

The majority concludes that the district court's error 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. In my opinion, since the jury did what it would have been instructed to do had the district court given an instruction on the allocation of negligence, there is no plain error. The jury's verdict shows that the jury allocated the negligence among the parties.

Although the district court erred in not giving an instruction on the allocation of negligence, there is no prejudice to Russell. I would affirm.

CONNOLLY and STEPHAN, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. EDDIE L. ARELLANO, APPELLANT.

636 N.W.2d 616

Filed November 30, 2001. No. S-00-1305.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Arson: Damages.** Under Neb. Rev. Stat. § 28-504 (Reissue 1995), the amount of damages involved in the crime of third degree arson affects the severity of the punishment.
3. **Arson: Damages: Proof.** Although the amount of damages is not an element of arson, the State must prove by evidence beyond a reasonable doubt the amount of damages to the property that was damaged by arson in order to prove that the arson was a Class IV felony.
4. **Value of Goods: Criminal Law.** Rules for establishing value in civil actions apply in a criminal case to determine the grade of the crime prosecuted.
5. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
6. **Value of Goods: Criminal Law: Proof.** In examining proof of value in a criminal case, when a criminal statute requires proof of a particular amount of value in order to raise the grade of a crime, proof of "*some* value" is insufficient to do so.
7. **Juries: Value of Goods.** A jury cannot be allowed to speculate as to value merely from the appearance of the property.
8. **Sentences.** A crucial fact that distinguishes a crime punishable by 1 year's imprisonment from a crime punishable by 5 years' imprisonment cannot rest on guesswork or speculation.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed, sentence vacated, and cause remanded for resentencing.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

The appellant, Eddie L. Arellano, was convicted by a jury of third degree arson, a Class IV felony. Under Neb. Rev. Stat.

§ 28-504(1) (Reissue 1995), the intentional burning of the property of another without his or her consent is third degree arson if the burning causes damage to the property. Under § 28-504(2) and (3), third degree arson is a Class IV felony if the damages amount to $100 or more, but is a Class I misdemeanor if the damages are less than $100. On appeal, Arellano contends that there was insufficient evidence to prove that damages were $100 or more, and thus, his sentence was excessive. Because there was no proof that damages were $100 or more, we reverse the verdict, vacate the sentence, and remand the cause for resentencing.

BACKGROUND

Sometime between 4:30 and 4:45 a.m. on August 1, 2000, Matthew Ault's 1987 Chevrolet Beretta caught fire. Deputy State Fire Marshal Charles Hoffman determined that the fire was started by the use of an ignitable liquid that was poured on the vehicle. A book of matches and three burnt matches were later found at the scene. The book of matches advertised a Conoco cafe and motel. Also, a red gas can was found near the scene.

Two police officers testified that at around 4:40 a.m. on August 1, 2000, they observed Arellano outside a Conoco gas station and convenience store located a few blocks from the scene of the fire. The officers observed that Arellano had a red object or container near him. The clerk who was working at the Conoco store on the morning of August 1 testified that Arellano came into the store and that she gave him two books of matches that advertised the Conoco cafe and motel.

At approximately 7 a.m. the same day, two other officers encountered Arellano and observed that hair on Arellano's fingers was either cut short or burned. The officers also observed that Arellano's socks were wet and smelled of gasoline or petroleum. Arellano was then arrested.

Arellano was charged with third degree arson. The information listed the charge as a Class IV felony and stated that the fire caused damages over $100.

At trial, Ault testified that he had just purchased the vehicle and that he was still making payments on it. He stated that he thought he paid $2,250 for the vehicle. He testified that when he observed the fire, the front and back bumpers of the vehicle

were burning the most, and that a tire blew out on the vehicle. When asked to describe the damages to the vehicle, he stated that "[t]he front bumper, all up under the engine, wiring burnt, front bumper burnt, back bumper burnt . . . all the wiring throughout . . . the car." Ault testified that he did not have insurance and that at the time of trial, the vehicle was inoperable.

Hoffman testified that the fire damage patterns were on the exterior of the vehicle and that there was no damage on the interior of the passenger compartment. There was no direct testimony that the amount of damages to the vehicle was $100 or more.

Arellano made a motion for a directed verdict at the end of the State's evidence. Arellano renewed the motion at the end of all the evidence on the basis that the State had failed to prove the amount of damages to the vehicle. The district court overruled the motions based on Ault's testimony that he had just purchased the vehicle for $2,500; the vehicle sustained damages to its bumpers, tire, and electrical system; and the vehicle was inoperable. The jury found Arellano guilty. The district court sentenced Arellano to 20 to 60 months' imprisonment. Arellano appeals.

ASSIGNMENTS OF ERROR

Arellano assigns that the district court erred in (1) finding the evidence sufficient to convict him of third degree arson, a Class IV felony, and (2) imposing an excessive sentence.

STANDARD OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Ildefonso, ante* p. 672, 634 N.W.2d 252 (2001).

ANALYSIS

Arellano contends that there was insufficient evidence to convict him of a Class IV felony because the prosecution failed to prove that Ault's vehicle sustained $100 or more in damages. In his brief, Arellano concedes that the evidence was sufficient to

convict him of a Class I misdemeanor—damages less than $100. Thus, Arellano contends that his sentence was excessive because he was sentenced to a maximum penalty greater than allowed for third degree arson as a Class I misdemeanor.

Section 28-504 provides:

> (1) A person commits arson in the third degree if he intentionally sets fire to, burns, causes to be burned, or by the use of any explosive, damages or destroys, or causes to be damaged or destroyed, any property of another without his consent, other than a building or occupied structure.
>
> (2) Arson in the third degree is a Class IV felony if the damages amount to one hundred dollars or more.
>
> (3) Arson in the third degree is a Class I misdemeanor if the damages are less than one hundred dollars.

A Class IV felony carries a maximum penalty of 5 years' imprisonment, while a Class I misdemeanor carries a maximum penalty of not more than 1 year's imprisonment. See Neb. Rev. Stat. §§ 28-105 and 28-106 (Cum. Supp. 2000).

[2,3] Under § 28-504, the amount of damages involved in the crime affects the severity of the punishment. Although the amount of damages is not an element of arson, the State must prove by evidence beyond a reasonable doubt the amount of damages to the property that was damaged by arson in order to prove that the arson was a Class IV felony. See, generally, *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

[4,5] We have held that rules for establishing value in civil actions apply in a criminal case to determine the grade of the crime prosecuted. *State v. Garza, supra*. We determine that the same principle applies to issues involving proof of damages. In civil actions, we have often stated that while damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000); *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000).

[6,7] In examining proof of value in a criminal case, when a criminal statute requires proof of a particular amount of value in order to raise the grade of a crime, proof of "*some* value" is insufficient to do so. See *State v. Watkins*, 804 S.W.2d 859, 861

(Mo. App. 1991). The jury cannot be allowed to speculate as to value merely from the appearance of the property. *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960) (reversal of conviction for theft of property over $100 when 72 rifles were stolen but no evidence presented of their value). See, also, *United States v. Thweatt*, 433 F.2d 1226 (D.C. Cir. 1970).

[8] In this case, evidence showed that specific parts of Ault's vehicle were burned, that the vehicle was currently inoperable, and that Ault paid $2,250 for the vehicle. Although the evidence makes it appear likely that the damages to the vehicle were over $100, no evidence was given regarding the dollar amount of damages to the vehicle. The State failed to provide evidence such as the cost to repair the vehicle or the diminution in value of the vehicle due to the fire. A crucial fact that distinguishes a crime punishable by 1 year's imprisonment from a crime punishable by 5 years' imprisonment cannot rest on guesswork or speculation. See *United States v. Wilson, supra*. Absent additional evidence, the amount paid for the vehicle is irrelevant to a determination of damages the vehicle sustained. Without evidence of the monetary amount of damages, any estimate was based on speculation. The State failed to present sufficient evidence to prove beyond a reasonable doubt that the damages to the vehicle were $100 or more. Accordingly, we determine that the evidence was insufficient to convict Arellano of third degree arson as a Class IV felony and that Arellano's sentence was excessive.

CONCLUSION

We hold that the evidence was insufficient to convict Arellano of third degree arson as a Class IV felony. Arellano admits that he may be sentenced to third degree arson as a Class I misdemeanor. Accordingly, we reverse the verdict, vacate Arellano's sentence, and remand the cause for resentencing.

REVERSED, SENTENCE VACATED, AND
CAUSE REMANDED FOR RESENTENCING.

McCORMACK, J., participating on briefs.

IN RE INTEREST OF SABRINA K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JACK K. AND MARY K., GUARDIANS, APPELLEES, AND CHARLES H., APPELLANT.

635 N.W.2d 727

Filed November 30, 2001. No. S-01-012.

1. **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 trial 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 another.
2. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
5. **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.
6. ____. A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute.
7. **Juvenile Courts: Jurisdiction: Minors: Guardians and Conservators.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) clearly anticipates a juvenile court's obtaining exclusive jurisdiction of a minor ward in a previously established guardianship.
8. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
9. **Juvenile Courts: Jurisdiction: Guardians and Conservators.** Unlike a guardianship proceeding under chapter 30 of the Nebraska Revised Statutes, an adjudication under the Nebraska Juvenile Code brings all the parties under the juvenile court's exclusive jurisdiction.
10. **Juvenile Courts: Jurisdiction: Minors: Guardians and Conservators.** A county court's jurisdiction over a previously established guardianship must yield to the juvenile court's exclusive jurisdiction over a minor and his or her guardian if the juvenile court determines that there is a sufficient factual basis for an adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1998).
11. **Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase.
12. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 1998).
13. **Juvenile Courts: Parental Rights: Child Custody.** Whether a noncustodial parent is fit or unfit to have custody does not arise and should not arise until the dispositional phase of a juvenile proceeding.

14. **Juvenile Courts: Parental Rights: Child Custody: Guardians and Conservators.** A guardian's admission of allegations of abuse in a juvenile petition is a sufficient factual basis for an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) when evidence shows that a parent has previously lost custody of his or her natural child and plays no role in the child's living conditions at the time the child is taken into custody.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Pamela Lynn Hopkins for appellant.

Joe Stecher, Dodge County Attorney, and Cynthia Schuele for appellee State of Nebraska.

Adam J. Sipple, of Johnson & Mock, for appellees Jack K. and Mary K.

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

CONNOLLY, J.

The main issue presented is whether the juvenile court can acquire jurisdiction over a juvenile under Neb. Rev. Stat. § 43-247(3) (Reissue 1998) when the county court has previously appointed a guardian for the juvenile, under Neb. Rev. Stat. § 30-2608 (Reissue 1995).

The county court, sitting as a juvenile court, determined that Sabrina K., the natural child of the appellant, Charles H., was an abused or neglected minor as defined by § 43-247(3)(a). Charles objected to the juvenile court's jurisdiction. He claimed that the county court had previously appointed permanent guardians for Sabrina under § 30-2608 before the juvenile petition was filed and, thus, the county court, not the juvenile court, had jurisdiction. The juvenile court overruled the objection, found that there was a sufficient factual basis for the adjudication, and continued temporary custody with the Nebraska Department of Health and Human Services (DHHS) until further hearing. Charles appeals.

We hold that § 43-247(3) permits a juvenile court to acquire exclusive jurisdiction over a minor whose guardians were previously appointed by the county court and that the juvenile court correctly found a sufficient factual basis for the adjudication. We affirm.

BACKGROUND

In July 1996, the county court appointed Jack K. and Mary K., Sabrina's maternal grandparents, as her permanent guardians. In October 2000, the State filed a juvenile petition in the county court, sitting as a juvenile court, alleging that Sabrina was a minor as defined in § 43-247(3)(a). The petition alleged that Jack had whipped Sabrina with a car antenna, causing her to have red welts on her buttocks. The court ordered emergency temporary custody of Sabrina with DHHS, and an adjudication hearing was set for November 1.

After the juvenile petition was filed, Charles filed a motion in county court to terminate Jack and Mary's guardianship. Charles also filed a motion for an emergency ex parte order to terminate the guardianship and an amended motion in county court for an order finding that (1) Jack and Mary's guardianship of Sabrina should be terminated, (2) the county court had jurisdiction, and (3) Sabrina should be returned to Charles' custody. The county court did not rule on either motion.

At the adjudication hearing, Charles filed an objection to the juvenile court's subject-matter jurisdiction of Sabrina. The court noted Charles' jurisdictional objection and his motion to terminate the guardianship in county court. The court, however, declined to consider the jurisdictional question until an evidentiary hearing could be held on the issue and continued the adjudication hearing. The court ordered that emergency custody remain with DHHS until that time.

At the adjudication hearing, Charles asked the juvenile court to take judicial notice of the county court's guardianship file. Without objection, the court took judicial notice. The guardianship file showed the following facts leading to the 1996 guardianship appointment.

Sabrina was born in 1988 to Tammy K. and Charles, who were living together but were not married. Both parents allegedly suffered from alcoholism. Before Sabrina was born, Charles was arrested for felonious assault and received treatment for alcoholism at the Hastings Regional Center. When Sabrina was 6 months old, Charles violated his probation and served 15 months of an 18-month to 3-year sentence.

In 1996, Charles filed a petition requesting that he be appointed Sabrina's temporary guardian. He alleged that Tammy was an alcoholic who was constantly involved in abusive relationships, creating an emergency situation for Sabrina. Charles was appointed temporary guardian, but Tammy filed an objection to his appointment and nominated her parents, Jack and Mary, as guardians. After a hearing, the county court removed Charles and appointed Jack and Mary as temporary guardians for Sabrina. Charles then nominated himself as permanent guardian, and Jack and Mary nominated themselves. The county court appointed Jack and Mary as Sabrina's permanent guardians and gave Charles and Tammy visitation rights.

After taking judicial notice of the guardianship file, the court overruled Charles' objection to subject-matter jurisdiction. The court ruled that it acquired jurisdiction when the State filed a juvenile petition on behalf of a child even though a preexisting guardianship was in place. During the hearing, Jack admitted the allegations in the juvenile petition and the guardian ad litem admitted the allegations on behalf of Sabrina. Based upon these admissions, the court found that it had jurisdiction and that Sabrina was a juvenile as described by § 43-247(3)(a). The court ordered a home study for four potential placements, which included Charles.

ASSIGNMENTS OF ERROR

Charles assigns that the county court, sitting as juvenile court, erred in (1) failing to find that the county court had exclusive original jurisdiction in all matters relating to the care, custody, and control of Sabrina and overruling his objections to juvenile court jurisdiction and (2) finding that the facts presented were a sufficient factual basis for adjudication under § 43-247(3)(a).

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial 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 another. *In re Interest of Kiana T., ante* p. 60, 628 N.W.2d 242 (2001).

[2,3] A jurisdictional question which does not involve a factual dispute is a matter of law. *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997). Statutory interpretation presents a question of law. *Hunt v. Trackwell, ante* p. 688, 635 N.W.2d 106 (2001).

ANALYSIS

JUVENILE COURT'S JURISDICTION

Charles contends that the juvenile court did not acquire jurisdiction over Sabrina. He argues that under Neb. Rev. Stat. § 24-517(2) (Cum. Supp. 2000), the county court retains exclusive original jurisdiction over a guardianship appointment if the appointment is made before the State files a juvenile petition under § 43-247. The State contends that the county court's jurisdiction must yield to the juvenile court's exclusive jurisdiction once a juvenile petition is filed and an adjudication takes place.

[4] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Home Pride Foods v. Johnson, ante* p. 701, 634 N.W.2d 774 (2001).

Section 24-517(2) provides that a county court shall have "[e]xclusive original jurisdiction in all matters relating to the guardianship of a person, except if a separate juvenile court already has jurisdiction over a child in need of a guardian, concurrent original jurisdiction with the separate juvenile court in such guardianship[.]"

Section 43-247(3)(a), however, gives a juvenile court exclusive, original jurisdiction over "[a]ny juvenile . . . who lacks proper parental care by reason of the fault or habits of his or her parent, *guardian*, or custodian . . . ." That jurisdiction continues "until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." § 43-247. Further, when a juvenile court adjudicates a minor under § 43-247(3), it also obtains exclusive jurisdiction over the "parent, guardian, or custodian who has custody of any juvenile described in this section." § 43-247(5).

Although there is an apparent conflict between these jurisdictional provisions, we have recently held that a county court may

not acquire jurisdiction for a guardianship appointment under the probate code when the court, sitting as a juvenile court, has previously adjudicated a minor under § 43-247(3). See *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Applying established principles of statutory construction, we conclude that this rule also applies to cases where the juvenile court finds a sufficient factual basis for the adjudication of a minor in a previously established guardianship under chapter 30 of the Nebraska Revised Statutes.

[5,6] 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. *Keller v. Tavarone, ante* p. 2, 628 N.W.2d 222 (2001). If we were to hold that the juvenile court could not exercise jurisdiction when a guardianship is already in place under chapter 30, it would be contrary to the plain language of § 43-247. A court must attempt to give effect to all parts of a statute, 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 a court to read anything plain, direct, and unambiguous out of a statute. *Hatcher v. Bellevue Vol. Fire Dept., ante* p. 23, 628 N.W.2d 685 (2001).

[7] Subsection 43-247(3)(a) sets out the circumstances of neglect or abuse under which a juvenile court shall have exclusive jurisdiction of any minor under the age of 16. There is no distinction made between a parent and guardian in this paragraph. Any circumstance which would permit a juvenile court to take jurisdiction over a juvenile in his or her parent's custody would also permit the court to take jurisdiction when the juvenile has a guardian. In total, the Legislature refers to a "parent, guardian, or custodian" five separate times in subsection (3)(a). Thus, we agree with the juvenile court that the statute clearly anticipates a juvenile court's obtaining exclusive jurisdiction of a minor ward in a previously established guardianship.

[8] Furthermore, we have held that "[t]o the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute." *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 860, 620 N.W.2d 339, 350 (2000). In this case, the exclusive, original jurisdiction conferred upon a

juvenile court under § 43-247(3)(a) is specific to circumstances where the State alleges a child in a guardianship has been abused or neglected, whereas the county court has jurisdiction over guardianships generally.

But Charles relies on two Nebraska Court of Appeals opinions to argue that a guardian cannot be subject to the simultaneous jurisdiction of the county court and juvenile court: *In re Guardianship of Alice D. et al.*, 4 Neb. App. 726, 732, 548 N.W.2d 18, 22 (1996) (holding that "when a minor has been adjudicated a juvenile as defined under § 42-247(3) and the juvenile court retains jurisdiction, a probate court cannot appoint a guardian of that juvenile without the consent of the juvenile court"), and *In re Interest of Justin C. et al.*, 7 Neb. App. 251, 581 N.W.2d 437 (1998) (extended holding in *In re Guardianship of Alice D. et al., supra*, to cases where county court judge presided over both juvenile adjudication and subsequent appointment of guardians under probate code). See, also, *In re Guardianship of Rebecca B. et al., supra*. The concern in those cases about simultaneous jurisdiction over a guardian in two separate courts, however, is not present when an adjudication takes place after a guardianship appointment.

[9] Unlike a guardianship proceeding under chapter 30, an adjudication under the Nebraska Juvenile Code brings all the parties under the juvenile court's exclusive jurisdiction. See § 43-247(3) and (5). In addition, § 43-247(3) requires the juvenile court to maintain exclusive and continuing jurisdiction over a minor until the child reaches the age of majority or the court discharges the individual. This continuing jurisdiction creates a conflict if the county court attempts to obtain jurisdiction for a guardianship after an adjudication in juvenile court. But chapter 30 does not contain a counter statutory mandate that requires it to maintain exclusive jurisdiction. There is no merit to Charles' argument.

[10] We determine that a county court's jurisdiction over a previously established guardianship must yield to the juvenile court's exclusive jurisdiction over a minor and his or her guardian if the juvenile court determines that there is a sufficient factual basis for an adjudication under § 43-247.

JUVENILE COURT'S ADJUDICATION UNDER § 43-247(3)(a)

Charles also contends that the juvenile court lacked a sufficient basis for an adjudication under § 43-247(3)(a) because the allegations in the juvenile petition were directed against Jack and that there was no showing that Charles was unfit or unable to exercise appropriate parental control.

[11-13] The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999). To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Kantril P. & Chenelle P., supra*. " '[W]hether the [noncustodial] father was fit or unfit to have custody did not arise and should not have arisen until the dispositional phase.' " *Id*. at 458, 598 N.W.2d at 736.

[14] Charles asked the juvenile court to take judicial notice of the county court's guardianship appointment, and the court complied. Thus, the evidence showed that Charles had previously lost custody of Sabrina and that he played no role in Sabrina's living conditions at the time she was taken into custody. The only question before the court was whether Sabrina—in her present living situation with Jack and Mary—lacked proper parental care by reason of the fault or habits of her guardians. See, *id.*; § 43-247(3)(a). The allegations in the petition were admitted by both Jack and Mary and Sabrina's guardian ad litem. Based upon these admissions, the court found that Sabrina was a juvenile as described in § 43-247(3)(a). We conclude under our de novo review that the juvenile court was correct in finding a sufficient factual basis for the adjudication. See *In re Interest of Amber G.*, 250 Neb. 973, 554 N.W.2d 142 (1996) (concluding that juvenile court properly took jurisdiction where mother admitted to allegations in petition).

CONCLUSION

The county court, sitting as a juvenile court, correctly determined that Sabrina was a minor within its jurisdiction because § 43-247(3)(a) allows a juvenile court to obtain exclusive

jurisdiction over a minor and his or her guardian when the county court has previously appointed a guardian under the probate code. Also, the court correctly found a sufficient factual basis for the adjudication.

AFFIRMED.

McCORMACK, J., participating on briefs.

LuANN NICHOLSON, APPELLANT, V. GENERAL CASUALTY COMPANY OF WISCONSIN, APPELLEE.
DENNIS GALE NICHOLSON, APPELLANT, V. GENERAL CASUALTY COMPANY OF WISCONSIN, APPELLEE.

636 N.W.2d 372

Filed December 7, 2001. Nos. S-00-230, S-00-231.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below.
4. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute.
5. **Statutes: Appeal and Error.** An appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result.
6. **Statutes.** In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.

Appeals from the District Court for Douglas County: MICHAEL McGILL, Judge. Affirmed.

David B. Latenser and Daniel L. Johnson, of Latenser & Johnson, P.C., for appellants.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

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

GERRARD, J.

BACKGROUND

Dennis Gale Nicholson was injured on August 2, 1991, when the vehicle he was driving was struck by an underinsured motorist (UIM). The UIM was insured under an automobile liability policy issued by Union Insurance Company, which settled Dennis' claim on that policy for the policy limit of $50,000.

At the time of the accident, Dennis was driving a vehicle owned by Dennis' employer. The vehicle was covered under a policy of automobile insurance issued by Royal Insurance Company of America (Royal Insurance), which included UIM coverage up to a limit of $500,000. Dennis and his wife, LuAnn Nicholson, also had their own automobile insurance policy issued by General Casualty Company of Wisconsin (General Casualty), which provided UIM coverage up to a limit of $300,000. Pursuant to Neb. Rev. Stat. § 60-580(2) (Reissue 1988), in effect at the time of the accident, coverage under the policy issued by Royal Insurance had priority over coverage under the General Casualty policy.

Dennis and LuAnn each made a separate claim against the General Casualty UIM coverage, both of which were denied by General Casualty. Dennis and LuAnn sued General Casualty to recover under their policy. General Casualty filed a motion for summary judgment, which was granted by the district court, on the basis that given the limitation on recovery set forth in § 60-580, there were no circumstances under which General Casualty's coverage could be implicated. See *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999). On appeal, this court disagreed and reversed the decision and remanded the cause for further proceedings. See *id.*

During the pendency of the prior appeal, Dennis and LuAnn settled their claims against Royal Insurance for $215,221.29. Dennis and LuAnn are now pursuing their claims under the General Casualty policy for damages they allege are uncompensated by the payments from Union Insurance and Royal Insurance.

After the cause was remanded, based on the settlement with Royal Insurance, General Casualty filed another motion for summary judgment, which was granted by the district court. The

district court stated that Dennis and LuAnn "had to be aware that any settlement with Royal [Insurance] could be construed as a full and final settlement of their claims." The district court found that Dennis and LuAnn, "having jointly accepted a settlement of less than one-half of the $500,000.00 coverage, are precluded from proceeding under underinsured motorist policy against [General Casualty]." Dennis and LuAnn appeal.

ASSIGNMENTS OF ERROR

Dennis and LuAnn assign, consolidated and restated, that the district court erred in (1) concluding that Dennis and LuAnn were precluded from seeking recovery from General Casualty for their uncompensated damages resulting from the accident; (2) construing § 60-580 to contain an exhaustion clause; (3) failing to conclude that General Casualty is entitled to a credit in the amount of the $500,000 limit of the Royal Insurance policy, regardless of the amount of the settlement with Royal Insurance; (4) excluding from evidence exhibits 9 through 12, which provided evidence of the extent of LuAnn's loss of consortium claim, and that General Casualty was not prejudiced by Dennis and LuAnn's settlement with Royal Insurance; and (5) accepting into evidence the legislative history of 1994 Neb. Laws, L.B. 1074, operative January 1, 1995, which amended § 60-580 after Dennis' accident.

[1] The appellants' brief, however, contains no argument supporting their third assignment of error. Therefore, we do not consider it. Errors that are assigned but not argued will not be addressed by an appellate court. *Holmes v. Crossroads Joint Venture, ante* p. 98, 629 N.W.2d 511 (2001).

STANDARD OF REVIEW

[2] 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. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, ante* p. 387, 631 N.W.2d 510 (2001).

[3] The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001).

ANALYSIS

The primary issue presented in this appeal is whether the district court erred in concluding that Dennis and LuAnn were required to exhaust the UIM limits of the Royal Insurance policy as a prerequisite to their UIM claim under the General Casualty policy. At the time of the accident, on August 2, 1991, § 60-580 provided:

> (1) In the event an insured is entitled to underinsured motorist coverage under more than one policy of motor vehicle liability insurance, the maximum amount an insured may recover shall not exceed the highest limit of any one such policy.
>
> (2) When multiple policies apply, payment shall be made in the following order of priority, subject to the limit of liability for each applicable policy:
>
> (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> (b) A policy covering a motor vehicle which came into contact with the insured while a pedestrian; and
>
> (c) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.

The General Casualty policy also provided, in accord with the language of § 60-580:

> If there is other applicable similar insurance available under more than one policy or provision of coverage:
>
> 1. Any recovery for damages for "bodily injury" sustained by an "insured" may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.
>
> 2. The following priorities of recovery apply:
>
> FIRST The Underinsured Motorist Coverage applicable to the vehicle the "insured" was occupying at the time of the accident.
>
> SECOND Any other policy affording Underinsured Motorist Coverage to the "insured" as a named insured or family member.

General Casualty contends that the language of § 60-580, and the corresponding language of the policy, required exhaustion of

the primary UIM policy before seeking payment under another, excess UIM policy. This reading of the statute is consistent with the general rule that when multiple policies apply, primary uninsured motorist or UIM coverage must be exhausted before excess uninsured motorist or UIM coverage is triggered. See, e.g., *Nationwide General Ins. Co. v. Perry*, 2 F. Supp. 2d 857 (S.D. Miss. 1997); *Illinois Nat. Ins. Co. v. Kelley*, 764 So. 2d 1283 (Ala. App. 2000); *Iodice v. Jones*, 133 N.C. App. 76, 514 S.E.2d 291 (1999); *Donovan v. State Farm Auto. Ins. Co.*, 105 Ohio App. 3d 282, 663 N.E.2d 1022 (1995). See, generally, 3 Alan I. Widiss, Uninsured and Underinsured Motorist Insurance § 40.5 (rev. 2d ed. 2001). An insurer providing excess uninsured motorist or UIM coverage is usually entitled to enforce a provision that no liability exists until the primary UIM coverage is exhausted. See *id.*

[4,5] We conclude that the language of § 60-580 required Dennis and LuAnn to exhaust their primary UIM coverage with Royal Insurance prior to pursuing a claim under their excess UIM coverage with General Casualty. The statute provided that payment under successive UIM coverages was to be made in the specified "order of priority, subject to the limit of liability for each applicable policy." It would make little sense for the Legislature to utilize the phrase "order of priority" and to establish a succession of primary and excess coverage unless exhaustion was a prerequisite to proceeding against the excess carrier. When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). An appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result. See, *In re Estate of Eickmeyer, ante* p. 17, 628 N.W.2d 246 (2001); *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

We note that the language of the General Casualty UIM policy mirrored that of § 60-580. It is quite clear from the language in General Casualty's policy that the insurer of the vehicle that Dennis was "occupying at the time of the accident" (i.e., Royal Insurance) provided primary coverage and that General Casualty provided excess coverage. Thus, while nothing in the then Underinsured Motorist Insurance Coverage Act precluded

General Casualty from offering or providing coverage to Dennis and LuAnn on more favorable terms than required by the act, see Neb. Rev. Stat. § 60-582(4) (Reissue 1988), now codified at Neb. Rev. Stat. § 44-6413(4) (Reissue 1998), there is no indication in the General Casualty policy that such was intended. The consistency of the language in § 60-580 and the General Casualty policy leads to the conclusion that the General Casualty policy required primary UIM coverage to be exhausted before excess UIM coverage attached.

We conclude, therefore, that § 60-580 is consistent with, and was intended to effectuate, the general rule that primary UIM coverage must be exhausted before excess UIM coverage is triggered. The district court did not err in determining that Dennis and LuAnn's failure to exhaust the limits of the primary UIM coverage available to them under the Royal Insurance policy precluded their claims against the excess UIM coverage provided by General Casualty. Dennis and LuAnn's first two assignments of error are thus without merit.

Dennis and LuAnn argue, under their fourth assignment of error, that the district court erred in excluding evidence that they claim would have shown the extent of LuAnn's damages and that their settlement with the UIM did not prejudice General Casualty. In view of our determination regarding Dennis and LuAnn's failure to exhaust the limits of their primary UIM coverage, we need not consider this assignment of error, since the issues of LuAnn's damages and prejudice to General Casualty from settlement with the UIM do not affect our disposition of the case. Error regarding the exclusion of this evidence, if any, is not prejudicial and provides no basis for reversal. See *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

Dennis and LuAnn also claim, in their final assignment of error in this case of last impression, that the district court erred in accepting into evidence the legislative history of L.B. 1074, which amended § 60-580 after Dennis' accident. In 1994, § 60-580 was amended and recodified as Neb. Rev. Stat. § 44-6411 (Reissue 1998), and now specifically provides that in the event of bodily injury, sickness, disease, or death of an insured while occupying a motor vehicle not owned by the

insured, the UIM coverage on the occupied motor vehicle is primary, and if such primary coverage is exhausted, other UIM coverage available to the insured is excess. See L.B. 1074. Dennis and LuAnn argue, as we understand it, that this legislative history was irrelevant.

[6] However, in order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Gage Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 260 Neb. 750, 619 N.W.2d 451 (2000); *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). While the district court might have erred had it relied on the legislative history, we are hard pressed to find reversible error solely in the district court's acceptance and examination of the legislative history. There is no indication in the record or the district court's reasoning, as expressed in its order, that the district court actually relied on the legislative history in reaching its conclusion.

In any event, we have independently determined, without reference to the legislative history of L.B. 1074, that § 60-580 bars Dennis and LuAnn's recovery under the General Casualty UIM coverage. Any error in the district court's acceptance into evidence of the legislative history is, therefore, harmless and provides no basis for reversal. See *John Markel Ford v. Auto-Owners Ins. Co., supra.*

CONCLUSION

Section 60-580 and the consistent language of the General Casualty UIM policy required Dennis and LuAnn to exhaust their primary UIM coverage before proceeding against their excess UIM coverage carrier, General Casualty. The district court did not err in determining that Dennis and LuAnn's claims against General Casualty were barred after their failure to exhaust the policy limits of the Royal Insurance UIM coverage, nor did the district court commit reversible error in its evidentiary rulings. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. MATTHEW R. RHEA, APPELLEE.

636 N.W.2d 364

Filed December 7, 2001. No. S-01-145.

1. **Statutes: Appeal and Error.** 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.
2. **Plea in Abatement: Probable Cause: Evidence: Verdicts.** In order to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it. The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt.
3. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry.
4. ____. If it can be avoided, no word, clause, or sentence of a statute should be rejected as superfluous or meaningless.
5. **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.
6. **Fraud: Words and Phrases.** The final sentence of Neb. Rev. Stat. § 28-618(7) (Reissue 1995) requires that for purposes of Neb. Rev. Stat. §§ 28-618 to 28-630 (Reissue 1995 & Cum. Supp. 2000), a "financial transaction device" must be something which is capable of being used to execute a transaction in a financial account.
7. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
8. **Double Jeopardy: Juries.** Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. In a case tried to a jury, jeopardy attaches when the jury is empaneled and sworn.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Exception sustained, and cause remanded for further proceedings.

L. Kenneth Polikov, Sarpy County Attorney, and John E. Higgins for appellant.

Michael N. Schirber, of Schirber Law Offices, P.C., for appellee.

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

STEPHAN, J.

This is an error proceeding brought pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). The State, through the Sarpy County Attorney, takes exception to an order of the district court for Sarpy County sustaining a plea in abatement filed on behalf of Matthew R. Rhea and dismissing all criminal charges against him. We removed the matter to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). Rhea waived his right to file a brief and has not participated in the appellate proceedings. We conclude that the district court erred, and because jeopardy has not attached, we remand for further proceedings.

BACKGROUND

The evidence offered with respect to Rhea's plea in abatement discloses the following facts: Rhea, Andrew J. Hawkins, and Alvaro Castillo III met in an advanced computer class at the high school they attended in Papillion, Nebraska. In late summer 1999, they devised a plan whereby Rhea, who worked as a mail sorter at First Data Resources (FDR) in Omaha, would take credit card billing statements from FDR and sell them to Hawkins and Castillo. Hawkins and Castillo would then use these billing statements, which contained the names, addresses, and credit card account numbers of numerous individuals, to order merchandise using the Internet.

In early August 1999, Rhea took 40 to 50 billing statements from FDR and sold them to Castillo for $100 cash. Castillo then gave the billing statements to Hawkins, who entered the information into his personal computer and then destroyed the statements. Hawkins then sent encrypted e-mails containing the same information back to Castillo.

Over the next several months, Castillo used the credit card account numbers to make approximately 50 purchases using the Internet. Hawkins used the same information to make 10 to 15 purchases. As part of the process, Castillo and Hawkins had the merchandise shipped to various vacant houses located in Papillion and LaVista, Nebraska. If delivery of the package did not require a signature, the package was simply left on the

doorstep of the vacant house, where Castillo or Hawkins would later pick it up.

In the course of retrieving these packages, Castillo and Hawkins aroused the suspicion of the neighbors living near the vacant houses which Castillo and Hawkins used as "drops." These persons reported the suspicious activity to the Papillion Police Department, who assigned the case to Investigator Jim Murcek.

On December 2, 1999, Murcek observed a young man park a vehicle in front of one of the vacant houses and retrieve a package from the doorstep. Murcek then followed the vehicle to a Papillion residence, where he made contact with the driver, who was subsequently identified as Castillo. After being advised of his rights, Castillo made a voluntary statement confessing to his participation in the plan and implicating both Rhea and Hawkins. Castillo and his parents then consented to a search of their home which yielded numerous electronic devices that Castillo had ordered utilizing the credit account numbers supplied by Rhea.

Murcek accompanied Castillo to Hawkins' home and then to Rhea's home. After being advised of their rights, both Rhea and Hawkins confessed to their participation in the plan. A search of Hawkins' bedroom uncovered numerous electronic devices which he had purchased using the account numbers on the statements which Rhea took from FDR. A search of Rhea's home produced nothing, but Murcek found 174 additional billing statements under the rear passenger-side floorboard of Rhea's vehicle.

The record reflects that Castillo and Hawkins used the account numbers supplied by Rhea to place electronic orders for merchandise totaling $121,000 in value, of which $3,865 remains unreturned or unrecovered. Rhea denied using the account numbers to order merchandise but admitted that on four or five occasions, he attempted to pick up packages which had been ordered by Hawkins or Castillo and delivered to vacant houses.

On September 8, 2000, Rhea was charged with criminal possession of a financial transaction device, unlawful circulation of a financial transaction device, and conspiracy to commit theft in violation of Neb. Rev. Stat. §§ 28-621, 28-622, and 28-202(1) (Reissue 1995), respectively. On October 26, Rhea filed an amended plea in abatement requesting dismissal of all charges filed against him. The district court dismissed the conspiracy

charge for reasons unrelated to this error proceeding. After conducting an evidentiary hearing, the district court sustained Rhea's plea in abatement and dismissed all remaining charges against him.

The district court explained the reasons for its ruling in a written opinion and order. First, the court held that the billing statements Rhea obtained did not constitute "financial transaction devices" within the definition of that term provided in Neb. Rev. Stat. § 28-618(7) (Reissue 1995). Specifically, the district court reasoned that the terms "instrument" and "device" in § 28-618(7) referred to "tangible bank or credit card[s]" and not account numbers on a billing statement. Second, the district court held that in any event, Rhea and Hawkins could not be convicted under §§ 28-621 and 28-622 because § 28-618(7) "requires the device to 'affect' an account," which the district court interpreted as making the possession and circulation unlawful "only when the device is actually used." Finally, noting that §§ 28-621 and 28-622 require a financial transaction device to be, inter alia, "stolen" to constitute a crime, the district court held that although Rhea may have taken the billing statements in violation of FDR's policies, "the information was not actually 'stolen' or in any way taken from the cardholders [because] they still own[ed] and possess[ed] their own credit cards and the ability to utilize them."

STANDARD OF REVIEW

[1] 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. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

ASSIGNMENTS OF ERROR

The State assigns as error, rephrased, (1) the district court's conclusion that credit card numbers on a billing statement do not constitute a "financial transaction device" under § 28-618(7), (2) the district court's conclusion that the word "affect" in § 28-618(7) requires a financial transaction device to be used before an individual can be charged with criminal possession or unlawful circulation of such devices under §§ 28-621 and 28-622, and (3) the district court's determination that the billing

statements were not "stolen" within the meaning of §§ 28-621 and 28-622.

ANALYSIS

Applicable Statutes

We are asked in this error proceeding to review the district court's interpretation of the penal statutes under which Rhea was charged, as well as other related statutes. In count I of the information, Rhea was charged with criminal possession of a financial transaction device in violation of § 28-621, which provides:

> (1) A person commits the offense of criminal possession of a financial transaction device if, with the intent to defraud, such person has in his or her possession or under his or her control any financial transaction device issued to a different account holder or which he or she knows or reasonably should know to be lost, stolen, forged, altered, or counterfeited.
>
> (2) Any person committing the offense of criminal possession of one financial transaction device shall be guilty of a Class III misdemeanor.
>
> (3) Any person committing the offense of criminal possession of two or three financial transaction devices, each issued to different account holders, shall be guilty of a Class IV felony.
>
> (4) Any person committing the offense of criminal possession of four or more financial transaction devices, each issued to different account holders, shall be guilty of a Class III felony.

Rhea was specifically charged with a violation of § 28-621(4). In count II, Rhea was charged with unlawful circulation of a financial transaction device in violation of § 28-622, which provides:

> (1) A person commits the offense of unlawful circulation of a financial transaction device in the first degree if such person sells or has in his or her possession or under his or her control with the intent to deliver, circulate, or sell two or more financial transaction devices which he or she knows or reasonably should know to be lost, stolen, forged, altered, counterfeited, or delivered under a mistake as to the identity or address of the account holder.

> (2) Any person committing the offense of unlawful circulation of a financial transaction device in the first degree shall be guilty of a Class III felony.

The term "financial transaction device" as used in these statutes is defined by § 28-618(7) as

> any instrument or device whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, debit card, electronic funds transfer card, *or account number representing a financial account*. Such device shall affect the financial interest, standing, or obligation of the financial account for services or financial payments for money, credit, property, or services.

(Emphasis supplied.)

Financial Transaction Device

[2] In order to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it. The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

[3] The State's first assignment of error requires us to determine whether credit card account numbers included on the billing statements taken from the premises of FDR constitute a "financial transaction device" as defined by § 28-618(7). In making this determination, we consider the language of the statute in conjunction with the familiar principle that if the language of a statute is clear, the words of such statute are the end of any judicial inquiry. *In re Guardianship & Conservatorship of Garcia, ante* p. 205, 631 N.W.2d 464 (2001); *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[4] We respectfully disagree with the reasoning of the district court that the terms "instrument" and "device" in § 28-618(7) refer exclusively to such items as "tangible bank or credit card[s]" and not to account numbers on billing statements. This construction ignores the plain language of the statute which includes an "account number representing a financial account" within the definition of a "financial transaction device." § 28-618(7). If it can be avoided, no word, clause, or sentence of a statute should be

rejected as superfluous or meaningless. *Hatcher v. Bellevue Vol. Fire Dept., ante* p. 23, 628 N.W.2d 685 (2001); *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001). Here, it is clear that the Legislature intended to include both tangible items such as credit cards *and* the account numbers reflected on such cards within the definition of a financial transaction device.

We note that even under statutes less explicit than ours, other state courts have held that the wrongful use of a credit card *number* is the equivalent of wrongfully using the credit card itself. See, *State v. Morgan*, 985 P.2d 1022 (Alaska App. 1999); *State v. Shea*, 221 Wis. 2d 418, 585 N.W.2d 662 (Wis. App. 1998); *Patterson v. State*, 326 Ark. 1004, 935 S.W.2d 266 (1996); *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976). The reasoning of the Alaska Court of Appeals in *State v. Morgan*, 985 P.2d at 1023, is typical and instructive:

> Policy considerations and case law support the conclusion that a credit card number is included in the definition of "credit card." As the Arkansas Supreme Court recognized in *Patterson v. State*, "[i]t is the use of the account numbers on a credit card which gives the plastic card any credit value." Most people are aware that once they memorize the number on their plastic credit card, they no longer need the plastic card to make long-distance telephone calls *or to purchase other goods or services over the telephone or across the Internet*. In these transactions, merchants and buyers do not meet face-to-face, and merchants do not demand proof that the buyer is holding a plastic card. Rather, the buyer's knowledge of the credit card number is what allows the buyer to make these purchases on credit. Physical possession of the plastic card is unnecessary, for the value of the card resides in the number.

(Emphasis supplied.) We conclude that the district court erred in holding that the credit card account numbers on the statements Rhea took from FDR did not constitute financial transaction devices as defined by § 28-618(7).

Meaning of "Affect"

In its second assignment of error, the State contends that the district court erred in its interpretation of the word "affect" in

the second sentence of § 28-618(7). In its order, the district court held that "since the definition [of financial transaction device] requires the device to 'affect' an account, the plain meaning of the wording may make the possession or circulation unlawful only when the device is actually used." In other words, the district court interpreted the word "affect" in § 28-618(7) to mean "use" and then concluded that Rhea could not have criminally possessed or circulated financial transaction devices, since the possession and circulation of such devices does not involve their use.

[5,6] 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, ante* p. 17, 628 N.W.2d 246 (2001); *In re Estate of Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001). The unauthorized *use* of a financial transaction device is proscribed by Neb. Rev. Stat. § 28-620 (Reissue 1995). Criminal *possession* of a financial transaction device is proscribed by § 28-621, and the unlawful *circulation* of a financial transaction device is proscribed by § 28-622. The phrase "shall affect the financial interest, standing, or obligation of [a] financial account" in § 28-618(7) is part of the definition of "financial transaction device," and that definition applies to all of the aforementioned penal statutes. The construction given to § 28-618(7) by the district court, which requires actual use in order to meet the definition of a "financial transaction device," would render the unlawful-use proscription of § 28-620 redundant and would be inconsistent with §§ 28-621(1) and 28-622(1), which criminalize possession and circulation of lost, stolen, forged, altered, or counterfeited financial transaction devices under certain circumstances without requiring their actual use. Based upon our independent review, we conclude that the final sentence of § 28-618(7) requires that for purposes of Neb. Rev. Stat. §§ 28-618 to 28-630 (Reissue 1995 & Cum. Supp. 2000), a "financial transaction device" must be something which is capable of being used to execute a transaction in a financial account. In the instant case, there is evidence that the account numbers reflected on the statements which Rhea removed from the

premises of FDR could be and in fact were used to purchase merchandise which was billed to such accounts.

Meaning of "Stolen"

In its third assignment of error, the State contends that the district court erroneously interpreted the word "stolen" in §§ 28-621 and 28-622 when it stated:

> It would not appear that the statements in question come under the umbrella of 'lost, stolen, forged, altered, counterfeited, or delivered under a mistake,' considering the fact that the information was obtained through the course of Defendant's employment at First Data Resources, albeit in violation of FDR's policies and without their permission. The strongest argument would be that the 'device' was 'stolen,' but the information was not actually 'stolen' or in any way taken from the cardholders, whereas they still own and possess their own credit cards and the ability to utilize them. They were not deprived of property as the term 'stolen' typically connotes.

The term "steal" means "[t]o take (personal property) illegally with the intent to keep it unlawfully" or "[t]o take (something) by larceny, embezzlement, or false pretenses." Black's Law Dictionary 1425 (7th ed. 1999). Acting without authorization and with the knowledge that they would be used unlawfully, Rhea physically removed the statements containing the credit account numbers from his employer's premises. As noted, the account numbers reflected on the statements constituted financial transaction devices as defined by § 28-618(7), and on these facts, we have no difficulty in concluding from the record that there was competent evidence upon which a trier of fact could conclude that they were stolen.

Double Jeopardy

For the reasons above, we find merit in the State's exceptions to the district court's ruling on Rhea's amended plea in abatement. Disposition of the case is therefore governed by Neb. Rev. Stat. § 29-2316 (Reissue 1995), which provides:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been

> placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

[7,8] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. *State v. Bottolfson, supra*; *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). In a case tried to a jury, jeopardy attaches when the jury is empaneled and sworn. *State v. Bottolfson, supra*; *State v. Bostwick, supra*.

The record in this case reflects that no jury was empaneled and that no evidence was heard by the district court pertaining to Rhea's guilt or innocence on the charges on which he stood accused. The focus of the district court's inquiry with respect to the amended plea in abatement was whether the charged offenses had been committed and whether there was probable cause to believe that Rhea committed them. See *State v. Bottolfson, supra*. Accordingly, we conclude that jeopardy has not attached.

CONCLUSION

Based upon our independent review of the pertinent penal statutes and the record in this case, we conclude that the district court erred in sustaining Rhea's plea in abatement and in dismissing the charges which were the subject thereof. Accordingly, the State's exception is sustained, and because

jeopardy did not attach, the cause is remanded to the district court for further proceedings pursuant to § 29-2316.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD NELSON, APPELLANT.

636 N.W.2d 620

Filed December 7, 2001. No. S-01-160.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
3. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
4. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
5. **Sentences: Prior Convictions: Waiver: Proof: Appeal and Error.** In the absence of proof on the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence.
6. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, 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.
7. **Habitual Criminals: Sentences: Double Jeopardy.** Double jeopardy principles do not apply to habitual criminal enhancement proceedings under Neb. Rev. Stat. § 29-2221 (Reissue 1995).
8. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Sentence vacated, and cause remanded for resentencing.

Scott A. Calkins, of Byam & Hoarty, for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Richard Nelson was convicted in the district court for Douglas County of unlawful possession with intent to deliver a controlled substance. Nelson was found to be a habitual criminal and was sentenced to imprisonment for a term of 10 to 15 years. Nelson appeals his conviction and his sentencing as a habitual criminal. We affirm the conviction but vacate the sentence and remand the cause for resentencing.

STATEMENT OF FACTS

Following a bench trial held November 18, 1997, Nelson was found guilty of possession with intent to deliver a controlled substance, cocaine. At trial, Omaha police officer David Turco testified that he was on patrol in a cruiser on January 9, 1997, with his partner, Officer Shawn LeClair, in the vicinity of 33d and Parker Streets in Omaha. Turco had turned the cruiser onto Parker Street heading eastbound when he observed a blue Buick Electra in the eastbound lane of Parker Street parked facing westbound. The Buick pulled away from the curb heading westbound which required Turco to stop the cruiser in order to avoid a collision. After stopping the cruiser, Turco maneuvered around the Buick, which then proceeded westward and turned south on 33d Street. Turco made a U-turn, proceeded south on 33d Street, and saw that the Buick had pulled over to the curb. Nelson got out of the Buick and began to walk eastward. Turco asked Nelson to return to the Buick, and Nelson complied.

Because LeClair recognized Nelson, the officers ran a check of Nelson's record which revealed an outstanding warrant issued

by the sheriff's department. The officers approached the Buick and advised Nelson of the warrant and that he was under arrest. Turco directed Nelson to exit the Buick and handcuffed Nelson after he had exited the vehicle. Turco patted Nelson down to check for weapons. During the pat down, Turco found some candy in Nelson's jacket pocket. Turco then brought Nelson to the cruiser, put him in the back seat, and closed the door. Turco returned to the Buick to assist LeClair with a passenger who was inside the vehicle.

The officers took Nelson to the police station. When they arrived, LeClair escorted Nelson out of the cruiser, and Turco immediately checked the back seat of the cruiser. Turco found a plastic bag containing what was later identified as 9.1 grams of crack cocaine. Nelson was then arrested on a charge of possession with intent to deliver a controlled substance. At the time of the arrest, a pager and $166 in cash, including seven $20 bills, were found in Nelson's possession.

Turco and LeClair testified that they had started their shift approximately 1 hour before the incident with Nelson. They also testified that prior to starting the shift, LeClair had searched the back seat area, and that such searches were routinely made at the start of a shift and after an arrest. LeClair testified that he specifically remembered searching the back seat that day. LeClair typically straps his duty bag into the back seat, and on that day, the seatbelts were buried underneath the back seat cushion, so he had to pull the seat cushion out to retrieve the seatbelts. LeClair testified that the search of the back seat had occurred in daylight at approximately 4 p.m. and that because of the thoroughness of his search, he did not think it possible that he had missed seeing anything in the back seat area. Turco testified that no other passenger had been in the back seat prior to Nelson's arrest and that immediately following Nelson's removal from the cruiser, Turco observed the plastic bag upon inspection of the back seat.

Turco testified that based on his experience, the amount of crack cocaine found in the bag would be characterized as "dealer amounts" rather than "user amounts" because the bag contained approximately 90 hits valued at almost $2,000. Turco further testified that the presence of several $20 bills and a pager on Nelson's person at the time of arrest was significant because

pagers were typically used in narcotics transactions and $20 bills were often used in the trade of crack cocaine, which was commonly sold at $20 per hit.

At the time of Nelson's arrest, swabs were taken of his hands. The swabs were tested by a forensic chemist and tested negative for controlled substances. However, the forensic chemist testified at trial that if an individual had handled a bag containing crack cocaine, residue might be on that individual's hands if residue was on the outside of the bag, but there would not likely be residue on that individual's hands if residue was on only the inside of the bag and none on the outside.

At defense counsel's request, on July 3, 1997, fingerprint tests were performed on the bag found in the cruiser. No identifiable fingerprints were found. The crime laboratory technician who performed the test testified at trial that plastic bags are generally not hard enough to receive fingerprint impressions and noted that it had been almost 6 months between the time the bag had been found in the cruiser and the time it was tested.

Nelson was convicted following a bench trial. On December 9, 1997, an enhancement proceeding was held at which Nelson was found to be a habitual criminal. On June 16, 1998, Nelson was sentenced as a habitual criminal to a term of imprisonment of 10 to 15 years.

On November 22, 1999, Nelson filed a motion for postconviction relief asserting, inter alia, that his counsel had provided ineffective assistance of counsel by failing to perfect a direct appeal of his conviction and sentence. A postconviction evidentiary hearing was held on January 3 and 10, 2001. Thereafter, the district court entered an order finding that Nelson had been provided ineffective assistance of direct appeal counsel and concluding that, pursuant to *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), and *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), the appropriate relief was to grant Nelson a new direct appeal. The present direct appeal followed.

ASSIGNMENTS OF ERROR

In his new direct appeal, Nelson asserts that (1) the district court erred in finding the evidence sufficient to prove he was a habitual criminal; (2) he was rendered ineffective assistance of

counsel at the enhancement hearing because trial counsel failed to object to the introduction of his prior plea-based convictions and failed to object regarding the sufficiency of the evidence in support of the habitual criminal finding; and (3) the evidence at trial was insufficient to convict him of the charge of possession with intent to deliver a controlled substance, and the district court therefore erred in failing to direct a verdict in his favor.

STANDARDS OF REVIEW

[1,2] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Castor, ante* p. 423, 632 N.W.2d 298 (2001). Circumstantial evidence is not inherently less probative than direct evidence. *Id.*

[3] Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997); *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

ANALYSIS

Sufficiency of Evidence—Possession With Intent to Deliver.

We first consider Nelson's assignment of error with respect to the sufficiency of evidence in the underlying conviction because if such conviction was not valid, the assignments of error regarding sentence enhancement would become moot. Nelson argues that the evidence on the possession charge was almost solely circumstantial. He claims that there was no direct evidence that he was the individual responsible for placing the plastic bag containing crack cocaine in the back seat of the cruiser and that there was evidence which cast substantial doubt on the assertion that he was so responsible.

In reviewing the sufficiency of the evidence following a conviction, we must view the evidence in the light most favorable to the State to determine whether it supports a conviction for possession with intent to deliver a controlled substance. *Castor, supra*. In reviewing the evidence, we must remember that circumstantial evidence is equally probative as direct evidence. *Id*. Therefore, Nelson's complaint that the evidence against him is almost solely circumstantial is not meritorious if such evidence, even though circumstantial, is sufficient to support the conviction.

Turco testified that after he and LeClair had removed Nelson from the back seat, he noticed the bag of crack cocaine under the seat where Nelson had been sitting. LeClair testified that he had searched this area prior to their patrol shift and had not seen a bag at that location at that time. Turco further testified that during the shift, no one had been in the back seat prior to Nelson. Such testimony, if believed by the trier of fact, could reasonably lead to the finding that the bag of crack cocaine had been in Nelson's possession and deposited by him in the back seat of the cruiser.

Turco also testified that the amount of crack cocaine in the bag was a "dealer amount" and that the pager and the $20 bills found on Nelson at the time of his arrest were indications of involvement in narcotics trade. Such testimony supports a finding that Nelson's possession of the crack cocaine was with the intent to deliver it.

Nelson points to evidence in his favor, including the results of tests which failed to detect residue on his hands and which failed to detect his fingerprints on the bag. However, there was also testimony which indicated that residue would not necessarily have been on his hands if he had handled the bag but not the contents and if there had been no residue on the outside of the bag. There was also testimony to the effect that plastic bags do not easily receive fingerprint impressions. The evidence asserted by Nelson therefore does not preclude a finding that he had possessed the bag containing crack cocaine.

Viewing the evidence in the light most favorable to the State, we conclude that, if believed by the trier of fact, there was evidence beyond a reasonable doubt which supports a conviction for possession with intent to deliver a controlled substance.

Nelson's assignment of error regarding sufficiency of the evidence to support his conviction is therefore without merit.

Habitual Criminal Enhancement.

The State sought enhancement of Nelson's sentence pursuant to the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), based on two prior felony convictions.

Nelson asserts that the district court erred in finding him to be a habitual criminal because the State did not present evidence proving that his prior plea-based convictions were obtained when he either was represented by counsel or had knowingly, intelligently, and voluntarily waived his right to counsel.

[4] We have held that in a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

[5] The State in this case concedes that the evidence of Nelson's two prior felony convictions presented at the enhancement hearing did not affirmatively establish that Nelson was represented by counsel at the time of his pleas or that he voluntarily, intelligently, and knowingly waived counsel. The State nevertheless argues that such evidence was subject to challenge by Nelson and that Nelson waived the error regarding the sufficiency of the enhancement evidence by failing to object at the enhancement hearing and instead raising the challenge for the first time on appeal. Given the constitutional dimension of the right to counsel, we have held, however, that in the absence of proof on the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986).

The State recognizes such authority in its brief, but asserts that such holdings were in error and urges this court to overrule such cases. The State further refers to *State v. McGhee*, 184 Neb.

352, 359, 167 N.W.2d 765, 770 (1969), in which this court held that "the failure of the defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court." See, similarly, *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980) (stating in postconviction case that validity of prior conviction offered to enhance punishment under habitual criminal statute must be challenged at habitual criminal hearing and that failure to challenge prior conviction at trial level waives issue, and prior conviction not subject to collateral attack in postconviction proceeding). See, also, *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978).

[6] We have stated that plain error will be noted only where an error is evident from the record, 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. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). We conclude that based on these standards and our prior cases, *Ristau, supra*, and *Huffman, supra*, the use of a defendant's prior convictions to enhance the defendant's sentence absent proof on the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error.

We observe that the holdings in *Ristau* and *Huffman*, decided in 1994 and 1986, respectively, created an exception to the proposition stated earlier in *McGhee*, decided in 1969. Although *McGhee* foreclosed a challenge to the "validity" of a prior conviction on direct appeal when such challenge was not raised at the trial level, we have held in *Ristau* and *Huffman* that in the circumstance in which the challenge to the validity of the prior conviction was limited to the absence of proof on the record in an enhancement hearing—that the prior conviction was obtained at a time when the defendant was represented by counsel or had knowingly waived such right—such error was plain error, meaning that it could be considered on appeal even though it had not been raised at the trial level. *Ristau* and *Huffman* therefore overruled *McGhee* to the extent that under *Ristau* and *Huffman*, such counsel-based challenges will be

permitted on direct appeal, notwithstanding a failure by trial counsel to raise such challenges.

In the present case, the district court committed plain error in sentencing Nelson as a habitual criminal where the State failed at the enhancement hearing to affirmatively establish that Nelson was represented by counsel at the time of the pleas in his two prior felony convictions. See, *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986). We therefore vacate Nelson's enhanced sentence and remand the cause to the district court for resentencing. Because of the disposition of this assignment of error, we need not consider Nelson's assignment of error claiming ineffective assistance of counsel at the enhancement hearing.

Double Jeopardy in Enhancement Proceeding.

Nelson asserts that in the event of a remand for resentencing, the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions, U.S. Const. Amend. V and Neb. Const. art. I, § 12, prohibit the State from attempting to resentence him as a habitual criminal. Nelson bases his argument on the holding of the Nebraska Court of Appeals in *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000). In *Gray*, the Court of Appeals held that double jeopardy principles apply to habitual criminal proceedings under § 29-2221 and that the State is prohibited from attempting to resentence a defendant as a habitual criminal where the enhanced sentence has been vacated because of insufficient evidence.

The State questions the Court of Appeals' holding in *Gray*. In so arguing, the State cites to this court's holding in *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000), and the U.S. Supreme Court's holding in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). In *Neiss*, we held that double jeopardy principles do not apply to Nebraska's driving under the influence enhancement proceedings. In deciding *Neiss*, we relied in part on the U.S. Supreme Court's decision in *Monge*. In *Monge*, the Court held that in noncapital sentencing proceedings, the Double Jeopardy Clause of the U.S. Constitution does not preclude resentencing enhancement proceedings even where the

enhancement sentencing proceeding has certain hallmarks of a trial. The Court noted that double jeopardy protections are generally inapplicable to sentencing proceedings because the determinations at issue in sentencings do not place a defendant in jeopardy for an "offense." The Court in *Monge* noted, however, that double jeopardy protections do apply to capital sentencing proceedings. We have similarly concluded in *State v. Hochstein and Anderson, ante* p. 311, 632 N.W.2d 273 (2001).

At issue in *Monge* was California's "three-strikes" law, which provides that a defendant convicted of a felony who has two qualifying prior convictions for "serious felonies" shall be sentenced to a minimum prison sentence of 25 years to life, and a defendant convicted of a felony who has one prior serious felony shall be sentenced to a double term of imprisonment. The Court concluded that the Double Jeopardy Clause did not preclude a resentencing hearing, the subject of which would be the merits of allegations regarding the existence of prior serious felony convictions under California's "three-strikes" law.

[7] We conclude that the rationale of *Monge* applies to habitual criminal enhancement proceedings under § 29-2221. Habitual criminal proceedings under the Nebraska statutes are similar to proceedings under the California "three-strikes" law at issue in *Monge* in that the determinations made in habitual criminal proceedings are sentencing determinations involving establishing the existence of prior convictions. Such determinations are not trials regarding an element of an offense. *Monge, supra*. We hold that double jeopardy principles do not apply to habitual criminal enhancement proceedings under § 29-2221, and we therefore overrule *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), to the extent it held that double jeopardy principles applied to habitual criminal enhancement proceedings.

[8] Nelson urges us to conclude that even if the U.S. Constitution's Double Jeopardy Clause does not apply to habitual criminal enhancement proceedings, the Nebraska Constitution's double jeopardy clause prohibits the State from attempting to sentence him as a habitual criminal on remand. However, we have held that the protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001); *Neiss,*

supra; *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). We, therefore, reject Nelson's argument that the Nebraska Constitution provides greater protection, and we conclude that on remand, neither the U.S. nor the Nebraska Constitution's double jeopardy provisions preclude resentencing Nelson as a habitual criminal.

CONCLUSION

Following conviction, and viewing the evidence in the light most favorable to the State, we determine the evidence was sufficient to convict Nelson of possession with intent to distribute a controlled substance. We, therefore, affirm Nelson's conviction. However, at the habitual criminal enhancement proceeding, the State did not establish that Nelson's pleas in his two prior felony convictions were counseled or that Nelson had waived counsel. Based on such evidence, we conclude that it was plain error for the district court to find Nelson to be a habitual criminal for sentencing purposes, and the sentence should be vacated. We further conclude that double jeopardy principles do not preclude a subsequent habitual criminal sentencing proceeding upon remand. We, therefore, vacate Nelson's sentence and remand the cause to the district court for resentencing consistent with this opinion.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V.
ANDREW J. HAWKINS, APPELLEE.

636 N.W.2d 378

Filed December 7, 2001. No. S-01-381.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Exception sustained, and cause remanded for further proceedings.

L. Kenneth Polikov, Sarpy County Attorney, and John E. Higgins for appellant.

James E. Blinn, of Blinn & Rees, P.C., for appellee.

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

STEPHAN, J.

This is an error proceeding brought pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). The State, through the Sarpy County Attorney, takes exception to a portion of an order of the district court for Sarpy County sustaining a plea in abatement filed on behalf of Andrew J. Hawkins with respect to one of three counts in the information filed against him, and dismissing that count.

We removed the matter to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). Hawkins waived his right to file an appellate brief and has not participated in the appellate proceedings.

This case arises from the same underlying facts set forth in *State v. Rhea, ante* p. 886, 636 N.W.2d 364 (2001). Hawkins was charged by information with conspiracy to commit theft by unlawful taking in violation of Neb. Rev. Stat. § 28-202(1) (Reissue 1995) (count I); criminal possession of financial transaction devices, in violation of Neb. Rev. Stat. § 28-621(4) (Reissue 1995) (count II); and receiving stolen property having a value of more than $500 and less than $1,500, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1995) (count III). Hawkins filed a plea in abatement directed to all three counts. Following an evidentiary hearing, the district court for Sarpy County overruled the plea in abatement with respect to counts I and III. The record reflects that Hawkins was subsequently arraigned on those charges and entered pleas of not guilty.

With respect to count II, the district court sustained Hawkins' plea in abatement and dismissed the charge, referring to the reasoning set forth in its opinion and order in State v. Rhea, Sarpy County District Court, docket CR 00, page 502. The Sarpy County Attorney initiated these error proceedings, taking exception to the district court's ruling with respect to count II.

The issues of statutory interpretation presented for our review in this case are the same as those addressed in *State v. Rhea, supra*. Our reasoning in that case has equal application to this

case, and no purpose would be served in reiterating it here. Accordingly, for the reasons detailed in *Rhea*, we conclude that the district court erred in sustaining Hawkins' plea in abatement with respect to count II of the information and in dismissing the charge of criminal possession of financial transaction devices. Accordingly, the State's exception is sustained, and because jeopardy has not attached, the cause is remanded to the district court for further proceedings pursuant to Neb. Rev. Stat. § 29-2316 (Reissue 1995).

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

SUBURBAN AIR FREIGHT, INC., APPELLEE, V. GERALD J. AUST, APPELLANT.

636 N.W.2d 629

Filed December 14, 2001. No. S-00-221.

1. **Courts: Appeal and Error.** The district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
2. ____: ____. On appeal from the district court, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **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.
5. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
6. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
7. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
8. ____. The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence.

9. **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 discretion.
10. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
11. **Motions for New Trial: Courts.** A motion for new trial may appropriately be filed only in a trial court.
12. **Motions for New Trial: Courts: Appeal and Error.** It is improper to move for a new trial in a court which reviewed the decision of a lower court and thus functioned not as a trial court but as an intermediate court of appeals.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court affirmed.

Frederick R. Strasheim, of Blackwell, Sanders, Peper & Martin, and Jerrold L. Strasheim, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Suburban Air Freight, Inc. (Suburban Air), sued Gerald J. Aust for breach of an agreement for reimbursement of training costs after Aust left his employment and refused to pay for pilot training provided by Suburban Air. A jury in the county court for Douglas County entered a verdict in favor of Suburban Air in the amount of $2,916. On appeal, the district court affirmed, and Aust timely appealed.

SCOPE OF REVIEW

[1] The district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990).

[2] On appeal from the district court, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher

appellate court. See *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

FACTS

In its amended petition, Suburban Air claimed that it suffered $3,000 in damages when Aust left his employment with Suburban Air and did not reimburse the company for pilot training as required by the training agreement. Aust asserted in a counterclaim that Suburban Air wrongfully withheld wages from him although he continued to work for a short time after informing Suburban Air that he planned to leave its employment. Aust claimed he was damaged in the amount of $83 or $84 in bank charges.

Suburban Air provides air transportation for freight, and in 1996, it hired Aust as a pilot to be based in North Platte. In May, Aust signed the first of two agreements in which Suburban Air agreed to provide general indoctrination training and Aero Commander 500/680 ground and flight training so that Aust would be certified to fly the Aero Commander 680FL aircraft. A pilot must pass oral and written examinations and an inflight competency check for each type of aircraft flown by the pilot. The parties agreed that the fair value of the training was $5,000. This agreement provided that if Aust voluntarily terminated his employment with Suburban Air at any time prior to or 1 calendar year from the date of the agreement or if Aust's employment was terminated for cause, Aust would reimburse Suburban Air for the training on a prorated schedule.

In November 1996, Aust requested a transfer to Omaha, and he and his family moved to Omaha in February 1997 at Aust's expense. Aust continued to fly the Aero Commander 680FL and began training on the Cessna 402.

On June 3, 1997, the parties entered into a second training agreement which is the basis of this appeal. In the agreement, Suburban Air agreed to provide training for Aust on a Cessna 402 in return for his agreement to stay in Suburban Air's employ for 1 year. The fair value of the training was set at $3,000. The specifics of the second agreement varied from the original agreement as to the deadlines and amounts of reimbursement. Under the second agreement, if the termination occurred within

210 days of the agreement, Aust agreed to repay the entire training cost of $3,000. If the termination occurred after 210 days or before 240 days following the signing of the agreement, Aust agreed to repay five-sixths of the training cost. The amount that would be reimbursed upon early termination decreased by one-sixth of the training cost for every additional 30 days during which termination did not occur. If the termination occurred more than 330 days and on or before 365 days following the signing of the agreement, Aust agreed to pay one-sixth of the training cost. Aust was not required to repay any part of the training cost if the termination occurred more than 365 days from the date of the agreement.

Initially, Aust refused to sign the second training agreement, but he eventually signed it in the presence of Louis Kuhn, Jr., senior line pilot and director of training for Suburban Air. In October 1997, Aust quit his job with Suburban Air and took a position with Silver Hawk Aviation in Lincoln, where he was employed at the time of trial. Suburban Air sued Aust for breach of the second agreement, seeking reimbursement of the training costs.

On February 12, 1999, a county court jury found in favor of Suburban Air and awarded damages in the amount of $2,916. In addressing Aust's motion for directed verdict or, in the alternative, a new trial, the county court found that the evidence supported the amount of damages and a finding of proximate cause and substantial performance by Suburban Air. The county court found that the purpose of the training agreement was not to effect an assignment of wages but, instead, was to ensure that Suburban Air would be reimbursed for its investment in Aust's training. The county court concluded that the provision of the agreement alleged to be a wage assignment was severable from the rest of the agreement and that the agreement should be enforced even if it contained a wage assignment provision which would not be enforced. The county court denied Aust's motion for directed verdict and/or a new trial.

Aust timely appealed to the district court, which found no error appearing on the record and affirmed the judgment of the county court. Aust timely appealed to the Nebraska Court of Appeals, and the case was moved to this court's docket pursuant

to our authority to regulate the caseloads of this court and the Court of Appeals.

ASSIGNMENTS OF ERROR

Aust assigns as error that the county court erred (1) in refusing to grant judgment as a matter of law in favor of Aust because the training agreement contained an unlawful wage assignment provision; (2) in submitting the issue of damages to the jury because the evidence was not sufficient to support the verdict and in refusing to grant judgment as a matter of law in favor of Aust because there was no evidence of substantial performance of Suburban Air's obligations under the agreement; (3) in refusing to invalidate the agreement because it contained a liquidated damages provision; and (4) in failing to grant Aust's motion for a directed verdict or, in the alternative, a new trial. Aust also assigns error in the district court's affirmance of the county court's judgment and the district court's denial of his motion for directed verdict and/or a new trial.

ANALYSIS

This action was originally brought in county court and subsequently appealed to the district court. The district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). On appeal from the district court, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. See *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

Aust asserts that the county court should have granted judgment in his favor as a matter of law because paragraph 5 of the training agreement is an unlawful wage assignment which makes the agreement void and that the county court erred in finding the provision to be severable from the remainder of the agreement. Paragraph 5 provided:

> Withholding from wages: All amounts due in reimbursement shall be paid in full by employee to Suburban Air Freight, Inc., within fourteen (14) days from any date of termination. In executing this agreement, Employee specifically authorizes Suburban Air Freight, Inc., to withhold

> from any wages or other sums of money due to him/her, any balance due under this agreement . . . .

Aust suggests that this provision voids the training agreement because it violates state law, which requires that wage assignments be signed by both a husband and a wife, and Aust's wife did not sign the agreement. Neb. Rev. Stat. § 36-213 (Reissue 1998) states: "[E]very assignment of the wages or earnings of the head of a family and every contract or agreement intending or purporting to have the effect of such assignment shall be void unless such contract, agreement, assignment, or transfer is executed and acknowledged by both husband and wife . . . ." The county court granted partial summary judgment in favor of Aust, finding that paragraph 5 of the agreement was null and void and unenforceable. However, the county court found that paragraph 5 was severable and that the agreement had a legitimate purpose independent of the assignment of wages.

[3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000). We conclude that paragraph 5 was severable from the remainder of the training agreement and that the county court did not err in severing this provision from the agreement.

Aust also argues that the county court erred in submitting the issue of damages to the jury without sufficient evidence to support a verdict and in refusing to grant judgment as a matter of law in favor of Aust. Aust claims that Suburban Air failed to prove the existence or amount of damages by sufficient evidence or with reasonable certainty and that Aust's alleged breach of the training agreement was the actual or proximate cause of any damages suffered by Suburban Air.

[4] In this case, the jury acted as the fact finder. 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. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995).

[5] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996), *cert. denied* 519 U.S. 1058, 117 S. Ct. 688, 136 L. Ed. 2d 612 (1997). The evidence at trial included two training agreements signed by Aust. He fulfilled the first agreement by working for Suburban Air for more than 1 year. This case arises from Aust's alleged breach of the second agreement, which he signed on June 3, 1997. There is no dispute as to whether Aust signed the agreements. The 1997 agreement was received into evidence without objection.

At trial, Geoffrey Gallup, treasurer of Suburban Air, was asked to identify the factors used by the company to determine the value of the training provided to its pilots. He stated that the figure includes the cost of airplane parts, fuel, maintenance, insurance, and inspection, as well as administrative costs for staff who maintain records on each plane. For example, the Federal Aviation Administration requires that each plane be inspected after every 150 hours of flight, and these inspections cost between $5,000 and $25,000. Gallup also stated that Suburban Air must meet federal aviation regulations for its pilots, who fly solo, and must ensure that each pilot is skilled for the particular aircraft he or she flies.

The jury determined that the $3,000 figure set forth in the second training agreement was reasonable and was supported by the evidence. The $2,916 verdict reflects that the jury subtracted the amount of Aust's counterclaim from the $3,000 value stated in the agreement. Viewing the evidence most favorably to Suburban Air, the evidence was sufficient to sustain the verdict, and we find no prejudicial error which requires that the verdict be overturned.

Aust complains that the county court erred in refusing to invalidate the purported liquidated damages provision in the training agreement as an unlawful penalty clause and in instructing the jury that the "agreed upon value" of the training was $3,000.

Jury instruction No. 2 states in part:

> The agreement provided that the parties agreed that the value of the training was $3,000.00. Further, the parties

> agreed that if Gerald Aust left his employment prior to the expiration of one year, he would be responsible for repaying on a pro rata basis the cost of his training. Gerald Aust subsequently left his employment before the year was up and Suburban Air Freight now sues to collect the agreed upon value of the training, $3,000.00.
>
> The Plaintiff claims that the Defendant breached the contract after he left employment, he failed, neglected and refused to repay the $3,000.00 called for in the agreement for reimbursement of training costs.
>
> The Plaintiff also claims that it was damaged as a result of this breach of contract, and it seeks a judgment against the Defendant for these damages, in the amount of **$3,000.00**.

[6] During the jury instruction conference, Aust made no objection to instruction No. 2, which stated that the amount of damages in dispute was $3,000. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Aust cannot now complain about instruction No. 2 when he failed to object during the instruction conference.

Aust claims the county court erred in refusing to grant judgment in his favor because no evidence was offered regarding substantial performance of Suburban Air's obligations under the training agreement. He asserts that Suburban Air did not show that it had provided the company indoctrination training specified in the agreement. The county court denied Aust's motion for directed verdict on this issue.

[7,8] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). The party against whom the motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence. See *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

Kuhn, director of training for Suburban Air, testified that he provided Aust with general indoctrination training, which included a review of the company manual, an explanation of

company procedures, and a review of company operation specifications. We conclude that the evidence was sufficient to establish that Suburban Air substantially performed its obligations under the training agreement, and the county court was correct in denying Aust's motion for a directed verdict on this issue.

[9,10] Aust's final assignment of error argues that the county court erred in failing to grant his motion for a directed verdict or, in the alternative, for a new trial. 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 discretion. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Id*. The record contains no evidence that the county court abused its discretion in denying the motion or that any error prejudiced Aust.

[11,12] Aust also filed a motion for a directed verdict or a new trial in the district court, which was sitting as an appellate court.

> [A] motion for new trial may appropriately be filed only in a trial court. See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). It is improper to move for a new trial in a court which reviewed the decision of a lower court . . . and thus functioned not as a trial court but as an intermediate court of appeals.

Booker v. Nebraska State Patrol, 239 Neb. 687, 688, 477 N.W.2d 805, 806 (1991). Thus, the district court could not properly consider Aust's motion.

We find no error on the record in the county court that would have required the district court to reverse the jury verdict. The decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *In re Estate of Mecello, ante* p. 493, 633 N.W.2d 892 (2001).

CONCLUSION

The district court did not err in affirming the county court's judgment. Thus, the judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V. ERIC M. KNUDTSON, APPELLEE.

636 N.W.2d 379

Filed December 14, 2001. No. S-00-1307.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, 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. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.
3. ____. The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
4. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.
5. ____: ____. To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1995), a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within the 6 months in accordance with Neb. Rev. Stat. § 29-1207(2) (Reissue 1995).

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Exception overruled.

James S. Jansen, Douglas County Attorney, and Donald W. Kleine for appellant.

Emil M. Fabian, of Fabian & Thielen, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court granted Eric M. Knudtson's motion for absolute discharge based on a denial of the right to a speedy trial. The Nebraska Court of Appeals granted the State's application to docket an error proceeding, and we moved the case to our docket pursuant to our power to regulate the caseloads of this court and the Court of Appeals. See Neb. Rev. Stat. §§ 24-1106(3) and 29-2315.01 (Reissue 1995).

SCOPE OF REVIEW

[1] Ordinarily, 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. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001).

FACTS

On August 11, 1999, Knudtson was charged by information with first degree assault. He was arraigned on August 19, and he pleaded not guilty.

Knudtson was not present at a January 25, 2000, hearing, after which the district court granted defense counsel's motion for a continuance of 120 days. A second hearing was held on January 31, at which time Knudtson appeared personally. The district court then informed Knudtson that an entry had been made on January 25 continuing the case for 120 days and that the running of the 6-month speedy trial period had been abated as of that date. When asked if he was seeking a continuance of 120 days, Knudtson responded, "Yes, sir." Defense counsel stated that he had advised Knudtson of his constitutional and statutory rights to a speedy trial and that Knudtson understood those rights. The following colloquy took place:

> THE COURT: And during this 120-day continuance, will the six months, in fact, run?
>
> [Defense counsel]: Yes, sir.
>
> THE COURT: Okay. So you are, in effect, waiving your right to a speedy trial by asking for and receiving this continuance. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. You're working on this now, [defense counsel]? You just got into it?
>
> [Defense counsel]: Yes, sir, I did.
>
> THE COURT: All right. Then the 120-day continuance again will be granted, and the running of the six months is abated — I guess it would be as of this date?
>
> [Deputy county attorney]: As of today.

On October 3, 2000, Knudtson filed a motion for absolute discharge pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1995); article I, § 11, of the Nebraska Constitution; and the 6th and

14th Amendments to the U.S. Constitution. Knudtson asserted that the matter had been pending for 419 days and that even if the 120-day abatement based on his continuance was subtracted, there remained 299 days attributable to the State. He claimed that originally, the last date for commencement of the trial was February 11 and that after adding the 120 days allowed by the district court, the last date for commencement of trial should have been June 10. Knudtson asserted that as of the date of the motion, the statutory speedy trial deadline had been exceeded by a total of 115 days.

A transcript of the January 31, 2000, hearing was offered and received at a hearing on the motion for absolute discharge. The district court noted that while its "musings . . . might have caused some confusion," the court's comments were intended to be "more informative than anything else to remind Mr. Knudtson that during this 120-day continuance, if granted, your speedy trial date would come and go. It didn't mean and it didn't state that that would affect you at all because during the 120 days, it was your continuance."

The motion for absolute discharge was granted. In its order, the district court stated that at the time of the request for a continuance, 173 days had run on the 6-month speedy trial period and that following the continuance granted by the court, 7 days remained in the 6-month period. The district court noted that the State had made no request for any type of continuance or delay in the trial, and the order stated: "The 120 day continuance period would have expired on May 30, 2000. This matter would have had to been brought to trial at least by June 7, 2000, in order to comply with the six month rule." The district court found that Knudtson had not been brought to trial within the 6-month speedy trial period, that the State had offered no valid reason for the motion for absolute discharge to be overruled, and that the State had submitted no authority to assist the court in deciding the matter. The district court did not find that Knudtson had waived his right to a speedy trial within the meaning of § 29-1207. Rather, the district court found that Knudtson had requested and was granted a 120-day continuance, after which the time for bringing him to trial began again. The county attorney sought review of this order.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in granting an absolute discharge because Knudtson offered no evidence to prove that his waiver of the right to a speedy trial was not made knowingly, intelligently, or voluntarily and in granting Knudtson an absolute discharge because § 29-1207 does not allow for a limited waiver of the right to a speedy trial.

ANALYSIS

Ordinarily, 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. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001). The State argues that Knudtson waived his right to a speedy trial when he requested a 120-day continuance. Knudtson claims that he did not waive his right but merely requested a continuance of 120 days to allow his new counsel time to prepare for trial.

[2-4] Section 29-1207 provides that every person indicted or informed against for any offense shall be brought to trial within 6 months. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *State v. Blackson*, 256 Neb. 104, 588 N.W.2d 827 (1999). To avoid a defendant's absolute discharge from an offense charged, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *State v. Steele, supra*. See, also, Neb. Rev. Stat. § 29-1208 (Reissue 1995).

In this case, the State asserts that it does not bear the burden to prove any excludable period under § 29-1207(4) because Knudtson unconditionally waived his right to a speedy trial. Although Knudtson and the district court both stated at the hearing on the motion for absolute discharge that they understood that Knudtson had waived his right to a speedy trial for only 120 days, the State argues that this was not its understanding of the

events that took place at the January 31, 2000, hearing and that the result was unfairly prejudicial to the State. It asserts that § 29-1207 does not provide for a conditional waiver and that a defendant cannot waive his right to a speedy trial for a limited period of time. The State provides no authority to support this argument, but it suggests that *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999), is analogous.

In *Herngren*, the defendant was charged by information on January 29, 1996. On July 23, the trial court made a finding that the defendant had freely, knowingly, intelligently, and voluntarily waived his right to a speedy trial. At the end of the hearing, the trial court stated:

> "If there are any hearings that will be held, they will be as a result of your attorneys filing the motions, which means that that may put it off past September. But at this point I'm allowing you to waive your six month speedy trial right, and at this point the matter is scheduled for September 10."

Id. at 209, 590 N.W.2d at 873. The docket entry indicated that the defendant had made a knowing and intelligent waiver of his speedy trial right until the September 1996 jury panel. The defendant's counsel then filed a motion to suppress, and the case was continued until resolution of the suppression issues. The motion to suppress was overruled on November 21.

On April 23, 1997, the defendant appeared in person to waive his right to a jury trial. He filed a motion to dismiss on speedy trial grounds on March 27, 1998. The prosecution offered no evidence to support its contention that the defendant had waived his right to a speedy trial. The motion to dismiss was overruled. On appeal, the defendant argued that his knowing and voluntary waiver was limited to the specific time period from July 23 to the September 1996 jury term. He conceded that the time during which the motion to suppress was pending was excludable.

The Court of Appeals found that the journal entry and the bill of exceptions presented a conflict because the journal entry stated that the waiver was until the September 1996 jury panel, while the verbatim transcript showed that the defendant had made a full and unconditional waiver of his right. Noting that the verbatim record of the proceedings in open court prevails when there is a conflict with the record of a judgment, the Court

of Appeals held that the trial court's finding that the waiver was full and unconditional was not clearly erroneous. In addition, the prosecutor had stated that the defendant was entering an actual waiver of speedy trial and that he was not just requesting a continuance. The defendant's counsel verbally acquiesced to that statement. The Court of Appeals found that the State had proved by a preponderance of the evidence that the defendant unconditionally waived his right to a speedy trial.

The case at bar is different in several respects. In *Herngren*, the trial court that originally accepted the waiver found again at the discharge hearing that the waiver was full and unconditional and that the clearly erroneous standard was not satisfied. In the case at bar, the district court which granted the continuance also found at the discharge hearing that the court's comments at the hearing on the continuance were intended to inform Knudtson that the 6-month period would abate during the 120-day continuance. The district court made no finding that Knudtson had unconditionally waived his right to a speedy trial.

In addition, the bill of exceptions and the journal entry both reflect that Knudtson had requested a continuance of 120 days, that a continuance of 120 days was granted, and that the running of the 6-month speedy trial time period was "abated" during the continuance. There is no conflict between the verbatim record of the proceedings in open court and the journal entry, as there was in *Herngren*.

The State also relies on *State v. Lundquist*, 134 Idaho 831, 11 P.3d 27 (2000), for support. In *Lundquist*, the defendant was arraigned on January 4, 1996, and trial was set for July 9. The defendant filed a motion to separate on April 18, which was granted on May 31. On June 14, the defendant filed a motion to substitute a new attorney. The court agreed on the condition that the defendant agree to a continuance and waive his right to a speedy trial. The defendant agreed, and trial was set for September 5. The State requested and was granted a continuance and moved to consolidate the trial with the trial of two other defendants. Trial began on January 29, 1997, 1 year 25 days after the defendant's arraignment.

On appeal, the defendant did not challenge the continuance granted on his motion after substitution of counsel. Rather, he

objected to the State's continuance from September to January, arguing that his waiver of speedy trial was limited to the first continuance. The Idaho Supreme Court found that the state's speedy trial statute did not allow for a limited waiver and that once the trial had been postponed, the 6-month statutory period no longer applied.

The facts in the case at bar are distinguishable from those in *Lundquist*. Here, no trial date was ever set and trial was not postponed, as was the case in *Lundquist*. Knudtson did not waive his right to a speedy trial for an indefinite period. His waiver was for the 120-day continuance only. The district court informed Knudtson that the 6-month period would expire during the 120-day continuance, and Knudtson indicated that he was aware of that fact. The district court also advised Knudtson that the "running of the six months" was abated. However, the district court made no finding that Knudtson had knowingly, intelligently, and voluntarily waived his right to a speedy trial.

The State argues that Knudtson's waiver was absolute and cannot be limited in time. Section 29-1207 does not mention a waiver or suggest that a waiver cannot be limited in time. In addition, the statute provides that the 6-month period shall exclude "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." § 29-1207(4)(b). The statute does not provide that requesting a continuance results in a complete waiver of the right to a speedy trial; rather, it provides that the delay caused by a continuance granted for the defendant is excluded from the 6-month period and counted against the defendant.

In this case, the information was filed on August 11, 1999. The continuance was initially granted on January 25, 2000, and then again on January 31, when Knudtson was present at the hearing with counsel. The motion for absolute discharge was filed on October 3. No trial had been scheduled or commenced prior to the filing of the motion. Between January and October, the State made no request for a continuance, and the record does not show that the State was actively proceeding toward trial.

[5] To obtain absolute discharge under § 29-1208, a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within the 6 months in accordance

with § 29-1207(2). *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000). Ordinarily, 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. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001). The State did not try Knudtson within the 6-month speedy trial period, and the district court's determination to grant the motion for absolute discharge was not clearly erroneous.

CONCLUSION

We conclude that the State did not bring Knudtson to trial within the required time. The district court's determination that the charge against Knudtson should be dismissed is not clearly erroneous, and the State's exception is overruled.

EXCEPTION OVERRULED.

McCORMACK, J., participating on briefs.

JOAN L. WAGNER, NOW KNOWN AS JOAN L. ROSENBERG, APPELLEE, v. LEWIS T. WAGNER, APPELLANT.

636 N.W.2d 879

Filed December 21, 2001. No. S-00-770.

1. **Modification of Decree: Child Support: Appeal and Error.** 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.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or 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.
3. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred after the entry of the original decree or a previous modification, and which was not contemplated when the prior order was entered.
4. **Rules of the Supreme Court: Child Support: Modification of Decree.** Amendment of the child support guidelines after the entry of a decree constitutes a material change in circumstances to justify a modification of a parent's child support obligation.
5. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.

6. ____: ____. Under the Nebraska Child Support Guidelines, paragraph D, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
7. **Child Support.** Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in the amount of that parent's support obligation would seriously impair the needs of the children.
8. **Divorce: Child Support.** A divorce decree does not require a parent to remain in the same employment, and child support may be calculated based on actual income when a career change is made in good faith.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for further proceedings.

Jane F. Langan, of Rembolt, Ludtke & Berger, L.L.P., for appellant.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellee.

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

PER CURIAM.

The appellant, Lewis T. Wagner, was previously married to the appellee, Joan L. Wagner, now known as Joan L. Rosenberg, and pays child support for a child of that marriage. Lewis voluntarily left his employment at Central States Indemnity Company of Omaha (Central States) to accept an appointment as Nebraska's Director of Insurance, resulting in a reduction in Lewis' annual income. Joan filed an application to modify the decree, and the district court calculated Lewis' child support obligation based on his income at Central States. Lewis appeals. We reverse because the record shows that Lewis changed employment in good faith and nothing in the record indicates that the child's needs will be impaired.

BACKGROUND

The Wagners were divorced in 1994. Under the original decree, Lewis was required to pay $587 per month in child support based on an income of $88,000. The decree was later modified, and his child support obligation was raised to $669 per month. He was also responsible for providing health insurance

for the child and was required to make available to the child a coinsurance fund for noncovered medical expenses up to $5,000. He was awarded the dependency exemption for the child, contingent upon his being current on his obligation to pay child support and daycare expenses at the end of each calendar year.

In October 1999, Joan filed an application to modify the decree. The record shows Joan is employed by the Lincoln Public School District as a teacher and earns $3,333 per month. In the application, she alleged that Lewis had voluntarily left his employment for another position, no longer had a coinsurance fund, and had refused to pay his share of uncovered medical expenses. She requested a review of the amount of the child support award and insurance provisions and requested attorney fees.

Lewis filed an answer and cross-application for modification. In the cross-application, he requested that should the court determine that a material change in circumstances had occurred, he be awarded the dependency exemption. Joan filed a reply denying that Lewis was entitled to the dependency exemption.

The record shows that before January 7, 1999—Lewis' starting date as Director of Insurance—he was employed by Central States as vice president of government relations. In 1997, he earned $92,170 and received a bonus of $27,651, resulting in total compensation of $119,821. In 1998, he earned $92,170, received a bonus of $65,151, and received other compensation of $16,000, resulting in total compensation of $173,321. The record shows that he earned dividends of $3,046 in 1999. Lewis left Central States and accepted an appointment as the Director of Insurance. He earns approximately $70,000 in that position.

Lewis testified that he voluntarily left his employment at Central States because he believed the profitability and the ability of Central States to survive was short lived. The company specialized in a single area of insurance that could be affected by the passage of a federal act. He also was concerned that he did not receive a salary increase in 1998. A former Director of Insurance testified that in his opinion, the passage of the federal act would have a dramatic adverse effect on insurance companies like Central States that write insurance for credit disability. On cross-examination, the former director conceded that serving as Director of Insurance had enhanced his career.

The parties stipulated that Lewis did not make the career change in bad faith. During trial, the court questioned Lewis about former Directors of Insurance who had found more lucrative positions after they served in that position. The court asked Lewis what part that knowledge played in his decision to accept the appointment. He admitted that usually the position serves as a "jumping stone to other places." He stated that because he was 56 years old and was hoping to serve as Director of Insurance for 8 years, he felt he might be able to act as a consultant after his tenure as Director of Insurance instead of simply retiring.

The district court entered a detailed order finding that Lewis earned $92,170 in 1998 and that his current income was approximately $75,000 per year. The court determined child support based on Lewis' earning capacity, excluding bonuses, and determined that that capacity was $92,170 per year. As a result, the court found that child support should be increased to $854 per month, and the award was made retroactive to January 1, 2000. The court ordered that the decree would remain in effect on all other issues.

ASSIGNMENTS OF ERROR

Lewis assigns that the district court erred in (1) refusing to use his present income when calculating child support, (2) concluding that his earning capacity was equal to his base rate of pay with Central States, (3) retroactively increasing child support, and (4) failing to grant him the dependency exemption for the child.

STANDARD OF REVIEW

[1] 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. *Workman v. Workman, ante* p. 373, 632 N.W.2d 286 (2001).

[2] 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. *Kirchner v. Wilson, ante* p. 607, 634 N.W.2d 760 (2001).

ANALYSIS

Lewis contends that the district court abused its discretion by calculating his child support obligation based on his salary at Central States. He argues that because he left his job at Central States in good faith and because of a probable decline in income, child support should have been calculated based on his present income.

[3,4] A party seeking to modify a child support order must show a material change of circumstances which occurred after the entry of the original decree or a previous modification, and which was not contemplated when the prior order was entered. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). We have held that amendment of the child support guidelines after the entry of a decree constitutes a material change in circumstances to justify a modification of a parent's child support obligation. See *id*. In this case, the child support guidelines were amended after the entry of the decree. There is no dispute that a material change in circumstances warranting modification of child support is present. Therefore, the issue is whether the court abused its discretion when it calculated Lewis' child support obligation based on the income he earned at Central States.

[5,6] In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). The Nebraska Child Support Guidelines, paragraph D, provide that "if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities."

[7,8] We have held that child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in the amount of that parent's support obligation would seriously impair the needs of the children. See, generally, *Sabatka v. Sabatka, supra*. Under those circumstances, whether the decision to leave employment was made in good faith was only a factor to be considered and an award of child support could be based on a parent's earning capacity even when the parent acted in good faith. *Id*. But we have also stated

that a divorce decree does not require a parent to remain in the same employment and that child support may be calculated based on actual income when a career change is made in good faith. *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969).

In *Fogel*, a parent was employed as a salesman, earning $20,000 annually. He left his employment after his work was curtailed by managerial duties and he could not work out a satisfactory salary arrangement with his employer. He then took another sales position on the promise that it would lead to an executive position. When it became apparent that the promise would not be fulfilled, he decided to enter the real estate field. He estimated that his annual earnings for the next year would be $10,000 and would increase substantially when he later became eligible to sell commercial property. The district court reduced his child support obligation. On appeal, this court affirmed on the basis that the career change was made in good faith. We stated:

> A divorce decree does not freeze a father in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his children. . . . Ordinarily, a man makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the children rises or falls with the changes in the father's fortunes. Should this readjustment be any different because divorce has separated them physically? We think not, unless the move is made to avoid responsibility or made in bad faith.

Id. at 428, 168 N.W.2d at 277.

Lewis left his position at Central States because he was concerned that the company would not remain profitable. Furthermore, the parties stipulated that he changed employment in good faith. Joan did not dispute that Central States might not remain profitable. Because of his age, he will likely be of retirement age when his term as Director of Insurance ends. At that time, he testified that he hopes to do some consulting work. Unlike *Sabatka*, Lewis did not initiate proceedings to reduce his child support and nothing in the record indicates that the amount he was obligated to pay impaired the needs of the child.

Under these circumstances, when the needs of the child are not seriously impaired and the career move was made in good faith, the court abused its discretion when it calculated Lewis' child support obligation based on his income at Central States. Accordingly, we reverse, and remand for a recalculation of child support. Because we reverse for a recalculation of support, we do not address Lewis' remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

THE OHIO CASUALTY INSURANCE COMPANY, APPELLEE, V. CARMAN CARTAGE COMPANY, INC., DOING BUSINESS AS CARMAN CARTAGE CO., APPELLANT.

636 N.W.2d 862

Filed December 21, 2001. No. S-00-915.

1. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: 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.
5. **Insurance: Contracts.** The nature of the duty to defend is defined by the insurance policy as a contract.
6. **Insurance: Contracts: Intent: Appeal and Error.** An insurance policy is a contract. In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Insurance: Contracts.** An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law.
8. ____: ____. Because the contract terms of an insurance policy govern the duty to defend, the policy may relieve the insurer of any duty to defend, or give the insurer the right, but not the duty, to defend.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

James Allen Davis and Travis Thorne Bennington, of Davis & Associates, for appellant.

Kevin J. Dostal and Thomas M. Locher, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

STEPHAN, J.

In this declaratory judgment action, the district court for Douglas County determined as a matter of law that under a commercial inland marine insurance policy, the insurer had no duty to defend a property damage claim against its insured and was therefore entitled to summary judgment in its favor. We reach the same conclusion and therefore affirm.

BACKGROUND

Carman Cartage Company, Inc. (Carman Cartage), is a common carrier engaged in the interstate truck transport of cargo within the United States. The Ohio Casualty Insurance Company (Ohio Casualty) issued a commercial inland marine insurance policy insuring Carman Cartage for the period January 1, 1997, to January 1, 1998. The policy included a "Trucker's Motortruck Cargo Coverage Form" which obligated Ohio Casualty to pay for loss to property for which the insured was "liable by law as a common carrier . . . under tariff, bill of lading or shipping receipt" when the loss was caused by one of several occurrences, including fire, explosion, accidental collision, and other perils. This form further provided that "[t]he most we will pay for 'loss' is the applicable Limits of Insurance shown in the Declarations," which state a limit of $100,000 per unit.

On February 6, 1997, Carman Cartage was transporting a cargo of beef under contract with American President Lines (APL) when an accident occurred, resulting in damage to the cargo. APL asserted a cargo loss claim against Carman Cartage in the approximate amount of $140,000. Carman Cartage notified Ohio Casualty of the claim and stated its position that the

loss had a maximum value of $86,999.66. After investigating the loss and attempting unsuccessfully to settle the claim within the policy limit of $100,000, Ohio Casualty paid that amount to APL on behalf of Carman Cartage. Ohio Casualty obtained a receipt for this payment but did not secure a release of claims on behalf of Carman Cartage. Subsequently, APL filed suit against Carman Cartage seeking approximately $40,000 over and above the payment made by Ohio Casualty. Carman Cartage tendered defense of this claim to Ohio Casualty, which rejected the tender based upon a denial that it had a duty to defend under the terms of the policy.

Ohio Casualty then brought this action for a declaratory judgment determining its rights and obligations under the policy. Carman Cartage counterclaimed, alleging negligent failure to secure a waiver of claims, breach of fiduciary duty, and breach of contract. Ohio Casualty moved for summary judgment, which the district court granted based upon its determination that Ohio Casualty had merely a right and not a duty to defend under the plain language of the policy. Carman Cartage perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Carman Cartage assigns that the trial court erred (1) in ruling that Ohio Casualty did not owe Carman Cartage a duty to defend it from the third-party suit, (2) in failing to recognize the common-law principle that an insurer owes its insured a fiduciary duty to secure a release of claims on behalf of its insured when it pays a third-party claim in full, and (3) in granting summary judgment when genuine issues of material fact exist regarding whether Ohio Casualty knowingly overpaid the third-party claim and whether the cargo was a total loss.

STANDARD OF REVIEW

[1,2] The interpretation of an insurance policy is a question of law. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation

to reach its conclusion independently of the conclusion reached by the trial court. *Continental Western Ins. Co. v. Conn, ante* p. 147, 629 N.W.2d 494 (2001).

[3,4] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record 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. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001); *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001). 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. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, ante* p. 387, 631 N.W.2d 510 (2001).

ANALYSIS

The term "inland marine coverage" encompasses a variety of specialized insurance coverages, including coverage for loss or damage to goods while in transit. 11 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 154:3 at 154-11 (rev. ed. 1998). Inland marine insurance "function[s] basically as a form of property insurance, even though the policy may explicitly contemplate that the value of the property will be payable to the owner rather than the insured." 11 Russ & Segalla, *supra*, § 154:5 at 154-14. In this case, it is undisputed that the loss in question was of a type covered under the policy and that the policy limit was $100,000. The issues presented are whether the insurer had either a duty to defend under the policy or a common-law duty to obtain a release of the insured as part of any settlement with the claimant.

Duty to Defend

[5] In construing liability insurance policies, we have held that an insurer's duty to defend is broader than its duty to indemnify. *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). The nature of the duty to defend is defined by the insurance policy as a contract. *Union Ins. Co.*

v. Land and Sky, Inc., 247 Neb. 696, 529 N.W.2d 773 (1995). In this case, however, we are not considering a liability insurance policy, but, rather, an inland marine policy providing trucker's motortruck cargo coverage. The threshold question is not the nature or scope of a duty to defend, but, rather, whether any such duty exists under the policy.

[6,7] An insurance policy is a contract. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001); *Callahan v. Washington Nat. Ins. Co., supra*. An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. 14 Russ & Segalla, *supra*, § 200:5. Thus, we look to the insurance policy itself to determine whether Ohio Casualty undertook a duty to defend Carman Cartage under its commercial inland marine insurance policy.

Carman Cartage asserts that such a duty arises from a portion of the policy conditions entitled "Privilege to Adjust With Owner," which provides:

> In the event of "loss" involving property of others in your care, custody or control, we have the right to:
>
> 1. Settle the "loss" with the owners of the property. A receipt for payment from the owners of that property will satisfy any claim of yours.
>
> 2. Provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost and will not reduce the applicable Limit of Insurance Under this insurance.

Ohio Casualty argues that this language creates a *right* but not a *duty* to defend.

Although we have not had occasion to determine whether this precise policy language creates a duty to defend, we considered similar language in *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986). That case posed the question of whether an excess liability insurer undertook a duty to defend based upon the following policy language:

> "The Insured shall be responsible for the investigation, settlement or defense of any claim made or suit brought or proceeding instituted against the insured *which no underlying insurer is obligated to defend. . . .*
>
> "The company shall have the right and shall be given the opportunity to associate with the insured or its underlying insurers, or both, in the defense and control of any claim, suit or proceeding which involves or appears reasonably likely to involve the company and in which event the insured, such insurers and the company shall cooperate in all things in defense of such claim, suit or proceeding."

(Emphasis in original.) *Id.* at 626-27, 392 N.W.2d at 371-72. We held that "[t]he trial court correctly found that the language . . . 'expressly give[s] Equitable the *right* to defend [but] do[es] not provide an express duty to defend.' " (Emphasis in original.) *Id.* at 627, 392 N.W.2d at 372.

Case law from other jurisdictions is also instructive on the issue. In *B & D Appraisals v. Gaudette Machinery Movers*, 752 F. Supp. 554 (D.R.I. 1990), a machine being shipped by a common carrier was damaged in transit. When the owner brought suit to recover its loss, the carrier notified its insurance company, which refused to participate in its defense. The applicable portion of the policy provided:

> "The Insured shall not voluntarily admit any liability nor settle any claims nor incur any expenses . . . without the specific authority of this Company, nor shall the Insured interfere with any negotiations for settlements carried on between this Company and the owners of the property. *In event of legal action being brought against the Insured in respect to alleged loss or damage which might constitute a claim under this policy, the Insured shall give immediate notice to this Company, and this Company reserves the right at its sole option to defend such action in the name and on behalf of the Insured and will pay all legal expenses incurred by this Company in connection with any action it undertakes to defend . . . .*"

(Emphasis in original.) *Id.* at 556. The court concluded that the unambiguous language of the policy gave the insurer only the

right to exclusive control over potential litigation, and not the duty to defend. *Id.*

Similarly, in *City of Peoria v. Underwriter's at Lloyd's London, Uninc.*, 290 F. Supp. 890, 892 (S.D. Ill. 1968), the court interpreted a policy which provided that the insurer "may, 'if they so desire,' 'take over the conduct . . . of the defense of any claim' covered by the policy provisions." The court concluded that this language was clear and created only the right, and not the obligation, to assume the conduct of defense. See, also, *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976) (holding that right to assume control of defense carries with it no duty to participate in defense).

[8] These cases are illustrative of the general rule that "[s]ince the contract terms govern the duty, an insurance policy may relieve the insurer of any duty to defend, or give the insurer the right, but not the duty, to defend." 14 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 200:5 at 200-18 to 200-21 (rev. ed. 1999). We conclude that the applicable language in the policy under consideration clearly and unambiguously gives Ohio Casualty a right to defend claims against its insured and a right to settle such claims, but does not impose a duty upon it to do either.

Contrary to the assertions of Carman Cartage, the policy does create an obligation on the part of the insurer to pay for loss to covered property which results from a covered cause of loss up to the limits of insurance as stated on the policy declarations. It is this obligation to pay which provides the mutuality of obligation upon which the insurance contract is based. By paying the policy limit of $100,000 to APL, Ohio Casualty satisfied that contractual obligation.

Fiduciary Duty to Secure Release

Alternatively, Carman Cartage argues that "[a]n insurer owes its insured a fiduciary duty to secure a release of claims when it pays a claim, in full, on behalf of their [sic] insured." Brief for appellant at 9. It contends that the district court erred in granting summary judgment because there is a genuine issue of material fact regarding whether Ohio Casualty breached this fiduciary duty when it failed to secure a release from APL. Generally, Carman Cartage argues that by failing to fulfill this fiduciary

duty, Ohio Casualty became obligated to defend Carman in the suit brought by APL.

In support of this argument, Carman Cartage relies extensively upon *Aetna Cas. & Sur. Co. v. Sullivan*, 33 Mass. App. 154, 597 N.E.2d 62 (1992). In that case, a liability insurance carrier tendered the full amount of its coverage to a party asserting a personal injury claim against its insured but did not obtain a release. The carrier then sought a declaratory judgment determining that by virtue of such tender, it was discharged from its duty to defend its insured in a suit brought by the third party. In addressing the issue, the court specifically reasoned that "[s]ince the source of the duty to defend is the contractual agreement, . . . we consider, first, the applicable provision of the insurance policy in effect at the time of the accident." (Citation omitted.) *Id.* at 155, 597 N.E.2d at 63. The language of the paragraph of the policy entitled " 'Our Duty to Defend You and Our Right to Settle' " provided that the insurer had " 'the right and duty to defend any lawsuit' " and that the " 'duty to settle or defend ends when we have paid the maximum limits of coverage under this policy.' " *Id.* The court held that the policy thus made it "absolutely clear" that the insurer had a duty to defend, noting that the right of an insured motorist to have his insurer provide a defense is a great benefit to the insured. *Id.* at 157, 597 N.E.2d at 64. The court reasoned that a fair reading of the language was that the insurer was discharged from its contractual duty to defend only "if it should make a payment equal to the maximum policy limits either to settle a claim against the insured or in total or partial satisfaction of a judgment against the insured upon conclusion of the litigation." *Id.* It then proceeded to the analysis upon which Carman Cartage relies in this case:

> The situation is different, however, when an insurer seeks to pay the full amount of coverage without a judgment and without obtaining a release of the insured from at least one personal injury claimant. Were we to interpret the policy language in that situation as Aetna does, an insurer would be free, regardless of the merits of a personal injury claim, to tender the coverage limits to the claimant and decline to defend further whenever the insurer anticipates that the cost of providing a defense would exceed the amount of

> coverage. The duty to defend generally relied upon by insured motorists would, thus, be significantly nullified in a large number of cases.

Id. at 158, 597 N.E.2d at 65. Employing a similar rationale, the court in *Emcasco Ins. Co. v. Davis*, 753 F. Supp. 1458 (W.D. Ark. 1990), held that a liability insurer could not relieve itself of an express contractual duty to defend by interpleading its policy limits. See, also, *Stanley v. Cobb*, 624 F. Supp. 536 (E.D. Tenn. 1986); *Samply v. Integrity Ins. Co.*, 476 So. 2d 79 (Ala. 1985).

Contrary to the contention of Carman Cartage, none of these cases recognize a common-law fiduciary duty on the part of an insurance carrier to obtain a release of the insured in conjunction with a settlement of claims. In each case, the payment of policy limits without obtaining a release or otherwise effecting a settlement with the claimant was held insufficient to extinguish the insurer's *contractual* duty to defend its insured. Here, for the reasons we have stated, the policy at issue created no such contractual duty. Accordingly, the reasoning of these cases is inapposite to the issues before us.

Carman Cartage also argues that a duty on the part of an insurer to secure a release of claims against its insured as a part of a settlement can be implied from our holdings in *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976), and *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 118 N.W.2d 318 (1962). Both of these cases involved causes of action for a bad faith failure of an insurance company to settle a claim within policy limits. We stated in *Olson*:

> The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit. The weight of authority is to the effect that when the insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no obligation to do so. In the event the insurer elects to resist a claim of liability, or to effect a settlement thereof of such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned.

174 Neb. at 379, 118 N.W.2d at 320-21. Based upon this language, Carman Cartage argues that an insurer has a fiduciary duty to use good faith when it "settles" claims and that "settle" by definition includes securing a release when a claim is paid.

This argument ignores the undisputed fact that Ohio Casualty did not "settle" APL's cargo loss claim. It attempted to do so, but was unsuccessful in that effort. Ohio Casualty then paid the full amount of its insurance limit to APL, thus satisfying its contractual obligation under the policy to pay covered losses. Also, as we have noted, Ohio Casualty had no duty to defend Carman Cartage with respect to the APL claim and therefore could not have an "exclusive right" to settle in the same sense as a liability insurer under the reasoning of *Hadenfeldt* and *Olson*. We conclude that these cases furnish no logical support for the argument that Ohio Casualty had a duty to obtain a release of Carman Cartage when it paid its policy limits to APL.

Alleged Overpayment of Claim

Carman Cartage contends there was a genuine issue of material fact as to whether Ohio Casualty overpaid the APL claim. We fail to see how this issue could be material to the primary question of whether Ohio Casualty owed any duty to Carman Cartage after paying its policy limit. If an overpayment was made, it would inure to the benefit of Carman Cartage which is being sued by APL for the difference between the claimed value of the cargo and the amount paid by Ohio Casualty. If no overpayment was made, Ohio Casualty nevertheless satisfied its contractual obligation by paying out its policy limit. In either circumstance, Ohio Casualty had no contractual or common-law duty to defend APL's claim against Carman Cartage for amounts exceeding its liability limit.

CONCLUSION

For these reasons, we agree with the determination of the district court that under the unambiguous language of the commercial inland marine insurance policy, which it issued to Carman Cartage, Ohio Casualty had a right but not a duty to defend its insured against covered cargo loss claims. It did have a duty, however, to pay such claims up to the stated policy limit of $100,000. Having paid that amount to APL, Ohio Casualty satisfied its

obligation to Carman Cartage under the policy. It had neither a contractual nor a common-law duty to defend Carman Cartage against claims by APL that its cargo loss exceeded the amount paid by Ohio Casualty. Finding no error in the entry of summary judgment in favor of Ohio Casualty, we affirm.

AFFIRMED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM D. TUCKER, APPELLANT.

636 N.W.2d 853

Filed December 21, 2001. No. S-00-1122.

1. **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, will be upheld unless its findings of fact are clearly erroneous. In making this determination, 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. **Search and Seizure.** Voluntariness of consent to search are questions of fact to be determined from all the circumstances.
3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment to the U.S. Constitution is that of objective reasonableness: What would the typical reasonable person have understood by the exchange between the officer and the suspect?
4. **Search and Seizure.** Whether there were any limitations placed on the consent given and whether the search conformed to those limitations is a question of fact to be determined by the totality of the circumstances.
5. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits unless the district court abused its discretion in establishing the sentences.
6. **Constitutional Law: Search and Seizure.** It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions—one being a search undertaken with consent.
7. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
8. **Search and Seizure.** Mere submission to authority is insufficient to establish consent to a search.

9. **Search and Seizure: Police Officers and Sheriffs: Warrants.** In situations where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.
10. ____: ____: ____. A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion.
11. **Search and Seizure.** A search of a home that is made pursuant to consent may not exceed the scope of consent.
12. **Search and Seizure: Police Officers and Sheriffs.** Recitation of magic words is unnecessary to give consent to a search. The key inquiry focuses on what the typical reasonable person would have understood by the exchange between the officer and the suspect.
13. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
14. **Sentences.** 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.
15. ____. In considering a sentence, a 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 observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

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

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Don Stenberg, Attorney General, and Thomas J. Olsen for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The charges in this case arise from a 1997 warrantless search of William D. Tucker's home, wherein certain illegal items were recovered. A hearing was held on Tucker's motion to suppress the items recovered in the search, and the motion was overruled.

After a stipulated trial, Tucker was found guilty of two counts of possession of a controlled substance, both Class IV felonies. Tucker was sentenced to two consecutive prison terms of 15 to 30 months each. Tucker now appeals the findings of the trial court and the sentences imposed by the trial court. We affirm.

BACKGROUND

In November 1997, Lincoln police officer Thomas Ward received a dispatch call around midnight. He was informed that the occupant of an apartment located at 134 South 17th Street in Lincoln was complaining about the odor of marijuana coming from the apartment below. Ward was met by Officers Charles Marti and Michael Bassett, who also responded to the call. Ward was the lead investigator in the case. The uniformed officers determined that the odor was coming from apartment No. 5, which was below the complainant's apartment, and made contact with Tucker, who lived in apartment No. 5.

Ward explained to Tucker that the officers had come to his residence because of a complaint of a marijuana odor. Tucker initially denied that the odor was coming from his apartment, but after Ward repeated why the officers were there, he admitted that he and some others had "smoked a joint." Tucker then pulled a roach clip from his pocket and handed it to Ward. The exchange between Ward and Tucker lasted about a minute and a half. Ward then asked Tucker if the officers could enter his apartment and look for more items. He also told Tucker that if he had any more illegal items, now would be a good time to get rid of them. Tucker told Ward it was not necessary for the officers to enter his apartment because he had no more items. Ward testified that he thought he used the term "search" but could not remember the exact terminology.

Ward continued to tell Tucker that he believed it was necessary for the officers to come in and look for illegal items. Tucker then went into the bedroom of his apartment, grabbed a newspaper, and placed it on a chair. He dumped the contents of a tray into the newspaper, wadded it up, and gave it to the officers. Ward opened up the newspaper and found several leftover joints, ashes, and stems of marijuana. Ward could see into the bedroom from where he was standing in the doorway leading into the

apartment from the hallway. According to Ward, this exchange lasted approximately 2 minutes.

Ward again asked Tucker if the officers could enter the apartment. Tucker refused, stating that the officers would "mess up" his apartment. Ward stated that the officers would leave the apartment the way they had found it. Bassett told Tucker that he would accompany Tucker inside the apartment, staying at his elbow. Marti testified that he believed Tucker may have wanted the officers only to come in and look around to see that there was nothing there, as evidenced by Tucker's gesturing to different areas of the room, claiming there was nothing in the room.

After Tucker was told that an officer would stay by his side, he was asked if the officers had permission to come in. Tucker stepped back and gestured with his arms raised and his hands upward and outward. When asked by Ward if that meant the officers could come in, he said yes. Ward testified that the officers may have also discussed the possibility of obtaining a search warrant during their contact with Tucker. Bassett did not recall any discussion about obtaining a search warrant. Ward testified that had Tucker refused to consent to the search, he would have been cited for drug paraphernalia and would not have been arrested, yet Ward also stated that he considered Tucker to be under arrest and not free to leave.

After Tucker gave the officers permission to enter his apartment, the officers came in and began to search. Ward went into the bedroom and found a silver hand-held scale and a Ziploc bag with screens on it on top of one dresser, and a brass marijuana pipe on top of another dresser. According to all three officers, Tucker at no point requested that they stop searching, nor did he tell the officers that he did not consent to the search of the drawers in his bedroom. Tucker was cooperative and even helped the officers locate a "bong" by opening a kitchen drawer. The officers found 2.67 grams of cocaine and 2.99 grams of amphetamine within the dresser drawers in the bedroom. Tucker was then arrested.

Tucker claims that he was repeatedly harassed by the officers' requests to enter his apartment. He testified that he asked the officers whether the term "search" meant simply to look around and that the officers said yes. The trial court found that Tucker

did not limit his consent to search in spite of his claims that he gave consent to only a limited "visual search." Tucker also testified that the officers agreed that visually looking around the apartment does not mean "opening and closing drawers and such." When the officers began to search through drawers, Tucker claims to have verbally objected to their actions. According to Tucker, the officers did not respond and kept looking through the drawers.

Tucker was charged with count I, possession of a controlled substance with intent to deliver (marijuana), a Class III felony in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995), and counts II and III, possession of a controlled substance (cocaine and amphetamine), Class IV felonies in violation of § 28-416(3). Tucker filed a motion to suppress the evidence seized in the warrantless search of his apartment, and a hearing on the matter was held on May 12, 1998. The trial court overruled Tucker's motion, finding that his consent was freely and voluntarily given and was not the product of coercion, intimidation, or anything promised or threatened in exchange for consent. Tucker also moved to dismiss on speedy trial grounds, but that motion was overruled by the trial court. Tucker appealed that decision, and this court affirmed the denial of the motion. See *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

Tucker waived his right to a jury trial in exchange for dismissal of count I. Tucker then appeared for a stipulated trial on the two remaining counts. The State offered testimony from the suppression hearing. In order to preserve the suppression issue for appeal, Tucker objected to the portions of the testimony which the State elicited regarding the search. Based upon the evidence presented at the stipulated trial, Tucker was found guilty on both counts of possession of a controlled substance.

Tucker was sentenced to prison for 15 to 30 months on both counts, to run consecutively. He was given 17 days' credit for time served.

ASSIGNMENTS OF ERROR

Tucker claims, rephrased, that the trial court erred in (1) overruling his motion to suppress and admitting the results of

the search into evidence at his trial and (2) imposing excessive sentences.

STANDARD OF REVIEW

[1] 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, will be upheld unless its findings of fact are clearly erroneous. In making this determination, 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. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

[2] Voluntariness of consent to search is a question of fact to be determined from all the circumstances. *State v. Chitty*, 253 Neb. 753, 571 N.W.2d 794 (1998), *cert. denied* 525 U.S. 857, 119 S. Ct. 139, 142 L. Ed. 2d 112.

[3] The standard for measuring the scope of a suspect's consent under the Fourth Amendment to the U.S. Constitution is that of objective reasonableness: What would the typical reasonable person have understood by the exchange between the officer and the suspect? *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

[4] Whether there were any limitations placed on the consent given and whether the search conformed to those limitations are questions of fact to be determined by the totality of the circumstances. *U.S. v. Blake*, 888 F.2d 795 (11th Cir. 1989).

[5] An appellate court will not disturb sentences that are within statutory limits unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

ANALYSIS

Tucker's first assignment of error involves two issues: (1) whether Tucker's voluntary and free consent to the search is evident under the totality of the circumstances and (2) whether it was objectively reasonable for the officers to consider the scope

of Tucker's consent to search his apartment to include areas where additional contraband may be hidden.

Consent to Search

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, will be upheld unless its findings of fact are clearly erroneous. In making this determination, 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. Strohl, supra*; *State v. Konfrst, supra*.

[6] It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). One of those specifically established exceptions is a search undertaken with consent. *Id.* See, also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

[7] To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *State v. Chitty, supra*. The determination of whether consent to a search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of consent. *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992). See, also, *State v. Chitty, supra*.

The question is therefore whether, under the totality of the circumstances, the trial court committed clear error in finding that Tucker voluntarily gave consent to the officers to search his home.

According to Tucker, the record establishes that he did not voluntarily consent to a search. He argues that (1) the presence of three uniformed and armed officers at Tucker's door late in the evening, (2) repeated requests by the officers for consent to search his apartment, and (3) statements by the officers that they could obtain a search warrant if consent was not given are factors that demonstrate involuntariness.

[8] While it is true that mere submission to authority is insufficient to establish consent to a search, see *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984), Tucker's actions that evening amounted to more than mere submission. According to *State v. Juhl*, 234 Neb. 33, 42, 449 N.W.2d 202, 209 (1989), a defendant's right to be free from unreasonable search and seizure was not violated when, in response to a question from a police officer as to what he had in his jacket, the defendant raised his right arm and said, " '[C]heck.' " This court noted that those actions by the defendant, in light of the fact that there was no evidence of any physical force used against the defendant, constituted an unequivocal invitation for the police to search the jacket. *Id.*

In the instant case, after a request to search his home, Tucker responded by stepping back and gesturing with his arms raised and his hands outward and upward. He also answered "yes" to the question of whether that meant the officers could search his home. There is no evidence that the officers used force or even threatened force.

The repeated requests by the officers to search Tucker's home prompted Tucker to produce various items of contraband. Tucker denied he possessed drugs, but then produced drugs and drug paraphernalia of his own volition. The consent Tucker gave to enter the apartment was likewise voluntary and was not a product of a will overborne.

[9] Tucker also argues that his consent was not voluntary because the officers threatened to get a search warrant. In *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976), a police officer asked the defendant to open the trunk of his car so the officer could search it. The defendant declined the request, and the officer responded by saying, " 'Okay, I'll get a warrant.' " *Id.* at 489-90, 239 N.W.2d at 256. The defendant then voluntarily assented to the search. The defendant argued that the officer's statement amounted to coercion, but this court did not agree, stating:

> There is no doubt that false assertions that one already *has* a warrant will vitiate a consent to search. . . . However under the facts of the instant case, all the officer said was that he would *get* a warrant. In situations where the searching officer has stated that he could obtain or was in the process of

> getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.

(Emphasis in original.) *Id.* at 490, 239 N.W.2d at 256.

[10] Tucker twice voluntarily supplied the officers with illegal items from his apartment before the search commenced. Based upon this series of events, the officers could have obtained a warrant. A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion. *State v. Rathburn, supra.*

The trial court's finding that consent was freely and voluntarily given and was not the product of coercion, intimidation, or anything promised or threatened in exchange for consent is not clearly erroneous.

Scope of Search

[11] Tucker claims that even if the consent to search was given, the search conducted exceeded the scope of the consent. A search of a home that is made pursuant to consent may not exceed the scope of consent. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

[12] The question thus becomes whether the officers were reasonable in believing that the scope of Tucker's consent included areas in the home where additional contraband may be hidden. Tucker argues that he clearly never consented to a thorough search of his apartment, rather, he consented only to letting the officers come inside and visually look around. However, recitation of magic words is unnecessary to give consent to a search. *U.S. v. Stewart*, 93 F.3d 189 (5th Cir. 1996), citing *U.S. v. Rich*, 992 F.2d 502 (5th Cir. 1993), *cert. denied* 510 U.S. 933, 114 S. Ct. 348, 126 L. Ed. 2d 312. The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, that is, what the typical reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991); *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999). See, also, *U.S. v. Stewart, supra*. The key inquiry focuses on what the typical reasonable person would

have understood by the exchange between the officer and the suspect. Whether any limitations were placed on the consent given and whether the search conformed to those limitations are questions of fact to be determined by the totality of the circumstances. See *U.S. v. Blake*, 888 F.2d 795 (11th Cir. 1989).

In *U.S. v. Stewart, supra*, because the defendant knew the object of the search was drugs, the court held that the police officer's looking in a prescription bottle after being given permission to look at the bottle was objectively reasonable.

In *U.S. v. Coffman*, 148 F.3d 952, 953 (8th Cir. 1998), where the defendant said, " ' "[G]o ahead and look around. You won't find a thing," ' " the court held that a " 'typical reasonable person' " would not have understood the defendant to be permitting only a limited search of his residence.

In the instant case, the officers searching Tucker's apartment had reasonable suspicion that Tucker possessed illegal drugs therein, because they were called to his apartment based on a complaint of marijuana odor and smelled the odor themselves. They specifically indicated to Tucker why they were at his door, so Tucker would reasonably have known that the purpose of any requested search would be to look for illegal drugs, which could be hidden in closed drawers or cabinets. Tucker should, therefore, reasonably have known that any request to search would be a request to have a closer look for illegal drugs and drug paraphernalia rather than a simple visual scan around the apartment. These events would lead a reasonable person to believe that the search of Tucker's apartment was within the scope of consent he gave, despite the fact that Tucker testified that he clearly did not give consent.

Tucker's actions in regard to the scope of the search were not consistent with what he testified he told the officers. He clearly aided the officers by producing contraband from his kitchen, and he did so of his own volition. This is directly at odds with his statement that he gave consent for only a visual search and that he did not consent to the officers' going through his drawers. Additionally, all three officers testified that Tucker did not object or try to stop the officers from continuing the search despite his stated belief that, by the officer's agreeing to stay at his elbow, it meant that the officers would conduct only a visual search.

Thus, under the circumstances present in this case, we conclude that it was objectively reasonable for the officers to determine that the scope of consent given by Tucker covered the drawers, cabinets, and other places where contraband could be hidden. See *U.S. v. Rich*, 992 F.2d 502 (5th Cir. 1993).

Excessive Sentence

[13-15] In his second assignment of error, Tucker argues that the trial court erred by imposing an excessive sentence. According to *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001), an appellate court will not disturb sentences within statutory limits unless the district court abused its discretion in establishing the sentences. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). Additionally:

> 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.

State v. Urbano, 256 Neb. 194, 216, 589 N.W.2d 144, 159 (1999), citing *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997). In considering a sentence, a 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 observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995).

Tucker is 42 years old; has been using marijuana since he was 15 years old, together with other drugs; has had five driving under the influence convictions; and has been in prison three times on five different drug charges. Tucker has been arrested approximately 30 times in his adult life.

We thus conclude that through an assessment of the factors discussed in *State v. Urbano, supra*, the trial court did not abuse

its discretion when it sentenced Tucker to two consecutive prison terms of 15 to 30 months each.

CONCLUSION

Based on the above, we determine that the trial court's decision to overrule Tucker's motion to suppress was correct. We further conclude that the trial court did not abuse its discretion in sentencing Tucker. We thus affirm the ruling of the trial court on the motion to suppress and the sentences imposed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CONNIE ROEDER, APPELLANT.

636 N.W.2d 870

Filed December 21, 2001. No. S-01-292.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. 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.
2. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Attorney and Client: Waiver.** Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege.
5. ____: ____. The party asserting a lawyer-client privilege has impliedly waived it through his or her own affirmative conduct where (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his or her defense.
6. **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.
7. **Pleas: Proof.** The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.

8. **Judges: Sentences: Appeal and Error.** 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. Where a sentence imposed within 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 these factors as well as any applicable legal principles in determining the sentence to be imposed.
9. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Connie Roeder pled guilty and was convicted in the district court for Buffalo County of one count of possession of a controlled substance with intent to deliver and one count of attempted possession of a controlled substance. The district court denied Roeder's subsequent motion to withdraw her pleas. Roeder was sentenced to a term of 6 to 12 years' imprisonment on the possession conviction and a term of 1 year's imprisonment on the attempted possession conviction, to be served concurrently. Roeder appeals the denial of her motion to withdraw pleas and claims that her sentences were excessive. We affirm.

STATEMENT OF FACTS

Background.

On July 25, 2000, Roeder was charged by information in the district court with two counts of possession of a controlled substance with intent to deliver. At the arraignment on August 25, Roeder pled not guilty. Jury trial was set for November 6. As set

forth below, although a jury was summoned on November 6, Roeder initially failed to appear and following her tardy appearance, she entered pleas pursuant to a plea agreement. Roeder subsequently sought to withdraw her pleas. The motion was denied, and Roeder was sentenced.

Entry of Pleas.

On November 6, 2000, pursuant to a plea agreement, the State amended its information to allege one charge of possession of a controlled substance with intent to deliver and one charge of attempted possession of a controlled substance. The State also dismissed five charges which were pending against Roeder in county court. Pursuant to the plea agreement, Roeder pled guilty to both charges in the amended information. The district court determined that Roeder had knowingly, voluntarily, and intelligently entered her pleas. During the allocution, the district court asked Roeder, inter alia, whether anyone had made any promise to her or threats against her which had either coerced or induced her to enter the pleas against her will. Roeder replied, "No." The district court found an adequate factual basis for the pleas, and the district court therefore accepted Roeder's pleas and found her guilty on both counts.

The district court noted on the record that earlier in the day, the case had been scheduled to proceed with a jury trial but that at approximately 10:30 a.m., Roeder had notified the court that she had been detained due to mechanical problems with her car. Although a jury panel had been summoned, the court dismissed the jury panel approximately 20 minutes after Roeder's call. Counsel were excused. The court issued a bench warrant for Roeder due to her failure to appear. Roeder subsequently appeared and entered her pleas as outlined above. Following the entry and acceptance of her pleas, the court required an increase in Roeder's bond before she could be released from custody pending sentencing.

Motion to Withdraw Pleas.

On December 15, 2000, prior to sentencing, Roeder filed a motion to withdraw her pleas. In the motion, Roeder claimed that she "felt she was left with no other alternative but to accept the plea [agreement]" and that "she was coerced into accepting

the plea [agreement] and subjected to duress because of the same." A hearing on the motion was set for December 18. However, the hearing was continued due to Roeder's concerns regarding her counsel and her desire to retain new counsel to argue for withdrawal of her pleas. On January 11, 2001, a hearing on the motion to withdraw pleas was held with Roeder represented by new counsel.

Roeder testified at the hearing regarding the pleas. She testified that on the day set for trial, she was delayed due to automobile problems. She called the court to report that she had been delayed. When she arrived at the courthouse, she was arrested but was allowed to wait at the courthouse for her counsel to return. Roeder testified that counsel told her that if she did not accept the plea agreement offered by the State, she would be held in jail with no bond until trial because of her failure to timely appear. Roeder testified that she entered the pleas of guilty in order to stay out of jail, not because she was guilty.

The State presented evidence including the testimony of a deputy county attorney regarding possible prejudice to the State in the event Roeder were allowed to withdraw her pleas. The State also called the original counsel who had represented Roeder at the time of her pleas as a witness. Counsel testified regarding the events of November 6, 2000. Counsel testified that she had appeared at the time set for trial but was excused by the court after Roeder failed to appear. Counsel returned to her office. Counsel returned to the courthouse after being advised that Roeder had appeared.

When counsel began to testify regarding her interactions with Roeder after Roeder had presented herself at the courthouse, Roeder's new counsel objected on the basis of attorney-client privilege. The district court overruled the objection and treated it as a continuing objection. Counsel testified that she understood that due to Roeder's failure to appear, Roeder was to be arrested and taken to jail. Roeder asked counsel to speak with the court regarding whether bond would be set or revoked. Counsel attempted to do so, but the court referred counsel to the county attorney. Roeder was arrested.

Counsel met with the county attorney. The State offered a plea agreement which counsel conveyed to Roeder. Counsel told

Roeder that the State had agreed that if Roeder would enter pleas pursuant to the plea agreement that day, then the State would not oppose the court's setting a higher bond instead of revoking her bond. Counsel also testified that the court had indicated to her that were the underlying matter to go to trial, it would not release Roeder on bond until after the trial. After counsel and Roeder discussed the features of the plea agreement and potential sentences for convictions pursuant to such pleas, Roeder indicated to counsel that she wanted to accept the plea agreement.

Counsel testified regarding Roeder's demeanor during these conversations and indicated that Roeder initially appeared upset about having been arrested but that she appeared to be asking appropriate questions in order to understand the plea agreement and the effects of entering the pleas. Counsel testified that she and Roeder met again later in the day. In the afternoon, Roeder did not indicate to counsel that she had changed her mind regarding the plea agreement. Counsel testified that Roeder appeared to have calmed down and that Roeder indicated that she understood the plea agreement and still wanted to accept it. During the allocution in connection with entry of the pleas, Roeder appeared to counsel to understand the questions and to know what she was doing.

On January 24, 2001, the district court entered an order denying Roeder's motion to withdraw her pleas. The district court found that "[t]he fact that [Roeder] was required to make hard choices in her own best interest and later may regret her decision is not evidence of coercion and nor [sic] is it evidence that her pleas at the time entered were not intelligently, voluntarily and knowingly made."

Sentences.

On February 16, 2001, Roeder was sentenced to imprisonment for 6 to 12 years on the possession with intent to deliver conviction and 1 year on the attempted possession charge, to be served concurrently. Roeder appeals.

ASSIGNMENTS OF ERROR

Roeder asserts that the district court (1) erred in allowing her attorney to testify at the hearing on her motion to withdraw her

pleas, (2) erred in denying her motion to withdraw her pleas, and (3) abused its discretion by imposing excessive sentences.

STANDARDS OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. 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. Castor, ante* p. 423, 632 N.W.2d 298 (2001).

[2] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman, ante* p. 185, 629 N.W.2d 542 (2001).

ANALYSIS

Testimony of Counsel.

Roeder asserts that the testimony of her counsel should not have been allowed at the hearing on her motion to withdraw her pleas because such testimony breached the lawyer-client privilege embodied in Neb. Rev. Stat. § 27-503 (Reissue 1995). Roeder recognizes that § 27-503(4)(c) excepts from the lawyer-client privilege "a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer," but argues that she did not allege a breach of duty by counsel and therefore any communications between her and her lawyer were within the scope of the lawyer-client privilege.

In response, the State argues, inter alia, that although Roeder did not per se allege a breach of duty by counsel, she waived lawyer-client privilege by putting into issue communications she had had with her counsel. We agree with the State.

In her motion to withdraw pleas, Roeder asserted that withdrawal would be fair and just because at the time she entered her

pleas, she "felt she was left with no alternative but to accept the plea" and that therefore "she was coerced into accepting the plea and subjected to duress because of the same." At the hearing on the motion to withdraw pleas, Roeder testified that counsel told her that if she did not accept the plea agreement offered by the State, she would be held in jail with no bond until trial because of her failure to timely appear. Roeder's testimony at the hearing made clear that the allegations of coercion and duress she asserted to justify withdrawal of her pleas were in material part the result of communications by counsel. By alleging such basis for withdrawal, Roeder made such communications an issue in the hearings, thus impliedly waiving the lawyer-client privilege as to these communications.

In *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985), we found no error by the trial court in admitting into evidence certain communications between the plaintiff and his attorney. *League* involved a suit by a minority shareholder against a corporate president alleging that the president had breached a duty to the plaintiff with respect to various corporate transactions. To avoid the bar of the statute of limitations, the plaintiff alleged, inter alia, that the president had concealed certain facts, thus putting the plaintiff's knowledge of such facts in issue. Over objection, the plaintiff's attorney was permitted to testify regarding conversations he had had with the plaintiff regarding the allegedly concealed facts. We stated in *League* that a party "is not permitted to thrust his lack of knowledge into the litigation as a foundation or condition necessary to sustain his claim . . . while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim." 221 Neb. at 45, 374 N.W.2d at 856.

[4,5] In *League*, this court addressed the issue whether a party had waived the lawyer-client privilege by placing communications between lawyer and client into issue and noted, "Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege." 221 Neb. at 44, 374 N.W.2d at 856. We further noted that in cases where an exception to the privilege existed,

> " 'in each instance, the party asserting the privilege placed information protected by it in issue through some

> affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.' "

Id. (quoting *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420 (S.D.N.Y. 1976), citing and quoting *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)).

Similarly, in the present case, Roeder impliedly waived the lawyer-client privilege as to relevant communications when she affirmatively made such communications a crucial issue to the resolution of her motion. Analyzing the present case in light of the three factors outlined in *League, supra*, we note that (1) Roeder's assertion of the privilege was the result of her affirmative act of filing the motion to withdraw her pleas; (2) by filing the motion to withdraw her pleas, Roeder put at issue communications between herself and counsel which were relevant to the basis she alleged to support her motion to withdraw the pleas; and (3) the application of the lawyer-client privilege would have denied the State access to information vital to its opposition to Roeder's motion to withdraw pleas.

As is evident from the record on the motion to withdraw the pleas, Roeder claimed that she should be allowed to withdraw her pleas because at the time she entered the pleas, she felt coercion and duress as a result of what counsel had told her regarding what would happen if she did not accept the plea agreement. Roeder put the communications with counsel regarding the plea agreement and their impact upon her at issue, and the State would have been denied access to information vital to that issue if it had not been allowed to question counsel as to such communications and counsel's perceptions of Roeder's reactions.

Roeder therefore impliedly waived the lawyer-client privilege as to the communications relative to entry of her guilty pleas.

Our review of the record of the hearing indicates that the substance of the testimony of counsel which the district court allowed into evidence did not go beyond that which was relevant to the issues raised by Roeder. We therefore conclude that the district court did not err in allowing Roeder's counsel to testify at the hearing on the motion to withdraw the pleas, and we reject Roeder's first assignment of error.

Withdrawal of Pleas.

Roeder next asserts that the district court erred in denying her motion to withdraw her pleas. Roeder argues that because she was coerced and subjected to duress at the time she made her pleas, such pleas were not made freely, voluntarily, and intelligently. She further argues that at the hearing on her motion to withdraw pleas, the State failed to prove that substantial prejudice would result if she were allowed to withdraw her pleas.

[6,7] 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. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000). The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *Id.*

The district court in the present case concluded that Roeder had not presented clear and convincing evidence that she had been coerced or was under duress or that her pleas were not intelligently, voluntarily, and knowingly made. The district court noted that the State had offered evidence as to the prejudice it might face if Roeder were allowed to withdraw her pleas, but the district court noted that such evidence related only to "possible prejudice" and that the State had not presented evidence as to "actual prejudice which would occur." The district court, however, found it unnecessary to consider whether the State had shown substantial prejudice because it ultimately concluded that Roeder had failed to show any fair and just reason to withdraw her pleas.

Upon our review of the record, we conclude that the district court did not abuse its discretion in determining that Roeder had failed to present clear and convincing evidence of a fair and just reason to withdraw her pleas. Because Roeder failed to establish a reason for withdrawal, the State's asserted failure to establish substantial prejudice was of no consequence. We therefore reject Roeder's second assignment of error.

Excessive Sentences.

Roeder claims that the district court abused its discretion by imposing excessive sentences. We do not agree.

[8,9] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman, ante* p. 185, 629 N.W.2d 542 (2001). 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. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Where a sentence imposed within 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 these factors as well as any applicable legal principles in determining the sentence to be imposed. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

Roeder was convicted of one count of possession of a controlled substance with intent to deliver, a Class III felony pursuant to Neb. Rev. Stat. § 28-416(1)(a) and (2)(b) (Cum. Supp. 2000), and one count of attempted possession, a Class I misdemeanor pursuant to Neb. Rev. Stat. §§ 28-201(1) and (4)(e) (Cum. Supp. 2000) and 28-416(3). The penalty for a Class III felony is a minimum 1 year's imprisonment, a maximum 20 years' imprisonment, or a $25,000 fine, or both imprisonment and a fine. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). The penalty for a Class I misdemeanor is a maximum 1 year's imprisonment, a $1,000 fine,

or both, with no minimum. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2000). Roeder was sentenced to a term of 6 to 12 years' imprisonment on the possession with intent to deliver conviction and a term of 1 year's imprisonment on the attempted possession conviction, to be served concurrently. Roeder's sentences were therefore within statutory limits.

Roeder argues the sentences were an abuse of discretion because she had a drug addiction problem, she had no prior drug convictions, and alternative or lesser sentences could have better satisfied rehabilitative and punitive goals. The presentence investigation report shows, however, that Roeder had numerous convictions for nondrug charges. The State argues in response that Roeder had engaged in behavior to avoid dealing with her drug problem and that imprisonment would give her an opportunity to obtain treatment, whereas an alternative or lesser sentence would have been futile in addressing the problem. In sentencing Roeder, it is evident that the district court took the factors noted in *Decker* into account, and upon review, we find no abuse of discretion. We reject Roeder's final assignment of error.

CONCLUSION

We conclude that the district court did not err in allowing counsel to testify at the hearing on Roeder's motion to withdraw her pleas nor did it err in denying the motion. We further conclude that the district court did not abuse its discretion in sentencing Roeder. We therefore affirm Roeder's convictions and sentences.

AFFIRMED.

SUSAN CARUSO, FORMERLY KNOWN AS SUSAN SEVENKER, APPELLEE, V. JAMES D. PARKOS, APPELLANT, AND VIRGINIA M. PARKOS, APPELLEE.

637 N.W.2d 351

Filed January 4, 2002. No. S-00-498.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Summary Judgment: Appeal and Error.** The denial of a motion for summary judgment is neither appealable nor reviewable.

3. ____: ____. After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
4. **Equity: Quiet Title.** A quiet title action sounds in equity.
5. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, 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.
6. **Deeds: Proof.** It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
7. **Deeds: Intent.** To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
8. **Deeds.** The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee.
9. **Deeds: Intent.** No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.
10. ____: ____. Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.
11. ____: ____. Where a grantor has conveyed his or her property, he or she cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed.
12. ____: ____. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and making it presently operative as a conveyance of title to the land.
13. **Deeds: Escrow.** The delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery.
14. **Deeds: Undue Influence: Proof.** The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
15. **Contracts: Undue Influence: Proof.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence.
16. **Undue Influence.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; instead, there must be a solid foundation of established facts on which to rest the inference of its existence.

17. **Deeds: Conveyances: Undue Influence.** The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with whether it was the voluntary act of the grantor.
18. **Conveyances: Undue Influence.** It is not mere influence that makes a conveyance unlawful, but undue influence as established in the law.
19. **Real Estate: Vendor and Vendee: Consideration: Notice: Words and Phrases.** A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry.
20. **Real Estate: Vendor and Vendee: Consideration: Notice: Proof.** The burden of proof is upon a litigant who alleges that he or she is a good faith purchaser to prove that he or she purchased the property for value and without notice; this burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed.

Gregory G. Jensen, of the Jensen Law Office, for appellant.

Bradley D. Holtorf, of Sidner, Svodboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee Susan Caruso.

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

GERRARD, J.

FACTUAL BACKGROUND

This is a quiet title action relating to certain real property in Valley County, Nebraska. Prior to June 20, 1997, the property was owned by Virginia M. Parkos and two of her children, Susan Caruso and Carol Nattress. Virginia held an undivided five-sevenths interest in the property, while Carol and Susan each held a one-seventh interest in the property.

In April 1997, Carol approached Virginia about receiving an early inheritance to pay for Carol's medical expenses. The proposal was that Virginia would convey her five-sevenths interest in the property to Carol and Susan and that Susan would then obtain a loan to pay Carol $50,000 for Carol's share of the property, thus providing Carol with the money to pay for needed medical care. Carol and Susan contacted Curtis Sikyta, Virginia's attorney, regarding preparation of a deed. A warranty deed was prepared and signed by Virginia on June 20, and the

deed was provided to Sikyta for recording. Another deed, conveying Carol's interest in the property to Susan, was executed on June 26 and returned to Sikyta for recording. The deeds, however, were not promptly recorded by Sikyta's office.

On October 27, 1997, Virginia executed and delivered a warranty deed to her son James D. Parkos, purporting to convey the same property that was the subject of the June 20 and 26 deeds. The October 27 deed was recorded with the Valley County register of deeds on October 29. Thereafter, Susan contacted the register of deeds regarding her loan application process and was informed that the only deed on file with respect to the subject property was the deed conveying the property from Virginia to James. Susan contacted Sikyta, who, on November 14, recorded the June 20 and 26 deeds.

PROCEDURAL HISTORY

Susan filed a quiet title action in the district court against Virginia and James, alleging that both Virginia and James had been aware of the June 20, 1997, conveyance at the time that the October 27 deed was executed and that there was no consideration given at the execution of the October 27 deed. James denied the allegations and further alleged that the June 20 deed was never delivered, that the June 20 deed was given without consideration and was not intended to be a gift, and that Susan made misrepresentations to Virginia that induced Virginia to sign the June 20 deed.

James filed a motion for summary judgment which was overruled, and the case proceeded to trial. The primary witnesses to testify at trial were Sikyta, Carol, Susan, and James; Virginia neither appeared as a party nor testified. After trial, the district court determined that Virginia was competent when she executed the June 20, 1997, deed, that there was consideration given for the conveyance, and that the deed had been delivered to Sikyta, who was acting as an escrow agent. The district court further determined that James had knowledge of the June 20 deed prior to his receipt and recording of the October 27 deed. Consequently, the district court quieted title to the subject property in Susan. James appeals.

ASSIGNMENTS OF ERROR

James assigns, as consolidated, restated, and reordered, that the district court erred in (1) finding that there was delivery of the June 20, 1997, deed prior to October 29; (2) finding that Sikyta was acting as an escrow agent, as opposed to acting as Virginia's attorney, on June 20 and while he retained the June 20 deed; (3) finding that there was no undue influence exerted on Virginia to sign the June 20 deed; and (4) finding that James had knowledge of the June 20 deed prior to his receipt of the October 27 deed.

[1] James also assigns that the district court erred in finding that there was consideration for the June 20, 1997, deed. This assignment of error, however, was not argued in James' brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Holmes v. Crossroads Joint Venture, ante* p. 98, 629 N.W.2d 511 (2001).

[2,3] James also attempts to assign error to the district court's overruling of James' pretrial motion for summary judgment. The denial of a motion for summary judgment, however, is neither appealable nor reviewable. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment. *Id*. Therefore, we do not consider this assignment of error.

STANDARD OF REVIEW

[4,5] A quiet title action sounds in equity. *Mueller v. Bohannon*, 256 Neb. 286, 589 N.W.2d 852 (1999). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, 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. *Jeffrey Lake Dev. v. Central Neb. Pub. Power, ante* p. 515, 633 N.W.2d 102 (2001).

ANALYSIS

Delivery of June 20 Deed

[6] James first assigns that the district court erred in determining that there had been delivery of the June 20, 1997, deed. It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

[7-10] To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. *Id.* The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee. *Id.* No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Id.* Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. *Id.*

The essential question, then, is whether Virginia, at the June 20, 1997, meeting with Carol, Susan, and Sikyta, intended her execution of the deed and presentation of the deed to Sikyta for recording to presently transfer title of the property. The evidence presented at trial supports the district court's conclusion that Virginia did intend to transfer title on June 20.

Sikyta testified that he discussed the transaction at length with Virginia and that Virginia indicated that she intended to transfer the property so that Carol could obtain needed surgery. Sikyta further testified that the deed was given to him without restrictions and that everyone at the meeting, including Virginia, told him to take the deed and record it. Sikyta testified that he was not instructed to retain the deed for any reason. Carol and Susan's testimony corroborated Sikyta's account of the June 20, 1997, meeting.

[11] Furthermore, Sikyta testified regarding a telephone call on December 3, 1997, in which he spoke to Virginia. Sikyta testified that Virginia told Sikyta that she had wanted to convey the

property on June 20, but that she had since changed her mind and wanted James to have it. Sikyta testified that in a conversation with Virginia in February 1998, Virginia again stated that she had intended to convey the property on June 20, 1997, but later had reservations. However, where a grantor has conveyed his or her property, he or she cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed. See *In re Estate of Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980).

This court addressed a similar situation in *In re Estate of Saathoff, supra*. In that case, the grantor, upset over the death of one of her sons, decided to transfer part of her interest in the decedent's estate to her other son. The grantor directed the decedent's attorney to prepare an assignment of the grantor's interest in the decedent's estate. The assignment was prepared and signed, and the grantor gave the assignment to the attorney's secretary. Later, after the grantor spoke with her daughter, the grantor changed her mind. This court determined, however, that when the grantor executed the assignment, it was delivered to the attorney's secretary with the intent that it be delivered to the grantee and with the further intent that the grantor have nothing more to do with the assignment; thus, this court determined that the delivery was valid and affirmed the trial court's ruling to that effect. *Id.*

[12] Similarly, in the instant case, the delivery of the deed to Sikyta rather than to Carol or Susan does not defeat the delivery, as the evidence indicated that the deed was presented to Sikyta for the specific purpose of having the deed recorded. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and making it presently operative as a conveyance of title to the land. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). Given the undisputed testimony that Sikyta was instructed, at the June 20, 1997, meeting, to take the deed and have it recorded, we conclude, on our de novo review, that Susan met her burden of proving by a preponderance of the evidence that the June 20 deed was validly delivered. See *id.*

[13] James contends that the delivery was not effective because it was conditional on the payment, by Carol and Susan,

of Sikyta's legal fees for the transaction. The delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery. *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 215 N.W.2d 629 (1974). The evidence does indicate that Virginia insisted that Carol and Susan were to pay the legal and filing fees, and a letter from Sikyta to Carol regarding the fees may have implied that both deeds were being held pending payment of those fees.

However, Sikyta testified at the trial that the implication of that letter was a mistake and that retention of the deeds until the fees were paid was not part of the agreement with Virginia, Carol, and Susan. Sikyta testified that the sole reason for the delay in filing the deeds was a clerical error in his office and that he was not instructed to hold the deeds for any reason. Furthermore, the intent of the grantor is the controlling factor, and there is no indication in the record that Virginia intended for the conveyance of the land to be conditional or that Virginia, on June 20, 1997, intended anything other than that the conveyance be immediately effective. James' first assignment of error is without merit.

James' second assignment of error also relates to the delivery of the June 20, 1997, deed. James contends that the delivery was ineffective because Sikyta was Virginia's attorney and thus Virginia's agent, not an "escrow agent" as found by the district court. James argues that Sikyta was incapable of acting as an escrow agent because he was counsel to one of the parties and, thus, could not act as a third party. See *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

However, Sikyta testified that he considered himself to be acting as an agent of Carol and Susan for the limited purpose of filing the deed and thus an "escrow agent" for filing purposes. There is support in our law for an attorney of one party to a transaction being able to act as an escrow agent for that transaction. See *Pike v. Triska*, 165 Neb. 104, 84 N.W.2d 311 (1957). In any event, the issue here is not propriety, but the intent of the grantor. There is no indication in the record that the deed was given to Sikyta in order to permit Virginia to retain control over the deed, and in fact substantial evidence exists to the contrary. As such, we find James' argument, and his second assignment of error, to be without merit.

UNDUE INFLUENCE

[14,15] James argues that the June 20, 1997, deed should be set aside as the result of undue influence on the part of Carol and Susan. The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence. *Bishop v. Hotovy*, 222 Neb. 623, 385 N.W.2d 901 (1986). See, also, *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996); *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994). The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Bishop, supra*; *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983).

In this regard, the testimony of Sikyta regarding the June 20, 1997, meeting is particularly illuminating and representative of the entire record:

> [O]ne of the first responses I had was I had asked [Virginia] if she understood, in transferring this land, that she would be giving up the full use of it and she responded yes. I asked her if she understood that when this land went out of her possession that meant she would no longer have the income off of it. She stated yes. I asked her if she was sure she wanted to transfer it to the girls. Her first response was I think so or something to that effect. And so I persisted about what do you mean by you think so. Well, yes, I do. And, you know, there was several exchanges of that nature. I told her that I think so was not good enough. That I needed to know if she really intended to transfer and she said yes. I asked her if anyone was putting her under any pressure to do that. She said no. I asked her if there was a reason why she wanted to transfer it and she said, yes, it was the only way that Carol could have her surgery, so she wanted to do it for Carol's benefit. There was several other questions of that nature, but generally that's the line it took.

[16] James' argument is that Carol and Susan misled Virginia regarding their motives for proposing the conveyances. However, James presented no evidence that directly supports this argument. Moreover, the record simply would not support a finding that Virginia was mentally incapacitated or otherwise susceptible to undue influence at the time she executed the June 20, 1997, deed. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; instead, there must be a solid foundation of established facts on which to rest the inference of its existence. See, *Westwood, supra*; *Craig, supra.* Our de novo review of the record reveals no such foundation.

[17,18] The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with whether it was the voluntary act of the grantor. *Westwood, supra*; *Bishop, supra*; *Craig, supra*. While the record is clear that Carol and Susan proposed the conveyance and persuaded Virginia to agree to the conveyance, it is not mere influence that makes a conveyance unlawful, but undue influence as established in the law. See, *Westwood, supra*; *Craig, supra*. Although there is evidence that Virginia wavered on her decision months after the transaction, there is simply no clear and convincing evidence that Virginia was subject to undue influence on or around June 20, 1997, the date of the conveyance of the deed. James' third assignment of error is without merit.

Notice to James of June 20 Deed

James' final assignment of error is that the district court erred in determining that James had notice of the June 20, 1997, deed prior to his receipt and recording of the October 27 deed. James argues that he is a subsequent purchaser in good faith without notice entitled to the protection of Neb. Rev. Stat. § 76-238 (Reissue 1996), which provides:

> All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without

> notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided*, that such deeds, mortgages and other instruments shall be valid between the parties.

(Emphasis in original.)

[19,20] A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. *How v. Baker*, 223 Neb. 100, 388 N.W.2d 462 (1986); *Mader v. Kallos*, 219 Neb. 579, 365 N.W.2d 408 (1985). See, also, *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995). The burden of proof is upon a litigant who alleges that he or she is a good faith purchaser to prove that he or she purchased the property for value and without notice. *How, supra*; *Mader, supra*. This burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land. *Mader, supra*.

James testified that he prepared the October 27, 1997, deed and related documents himself, without counsel. James claimed that the October 27 deed was part of a transaction in which he was given title to several of Virginia's real properties in exchange for taking care of Virginia on a daily basis. Leaving aside the question whether James' care was "valuable consideration" for the conveyances, see *id.*, the record is replete with evidence that James had actual notice of the June 20 deed prior to receiving and recording the October 27 deed.

Carol, Susan, and James all testified regarding a "family meeting" that was held in May 1997, which included Virginia and her children Carol, Susan, James, and Tammy Parkos, as well as Tammy's husband. Carol, Susan, and James all agreed that the subject of the meeting was the proposed conveyance that is the subject of this dispute and that Carol and Susan were in favor of the transaction, while James and Tammy opposed it. James' account differs from that of Carol and Susan with respect to Virginia's participation in the meeting. Carol and Susan each testified that at the family meeting, Virginia decided that she wanted to convey the property to Carol and Susan. James

claimed that at the family meeting, Virginia opposed the conveyance to Carol and Susan, but James acknowledged that he had not mentioned this fact in his prior deposition. Nonetheless, James' own testimony regarding this meeting could be held to reveal a notice of suspicious circumstances which would put a prudent person on inquiry regarding the subsequent transaction. See, *Winberg, supra*; *How, supra*; *Mader, supra*.

Beyond that, however, several witnesses testified to conversations with James after June 20, 1997, in which James indicated his awareness of the June 20 conveyance. Sikyta testified regarding a telephone conversation on December 3 in which James admitted that James had known about the June 20 deed prior to recording the October 27 deed. Sikyta testified that in a later meeting, in February 1998, James changed his story and claimed that while he had known in October 1997 of the plan to convey the property to Carol and Susan, he did not know that it had actually been accomplished. Even if the latter conversation reflected James' actual knowledge, however, that would still constitute sufficient notice to place him on inquiry regarding the June 20 transaction. See *id.*

Moreover, Carol testified to a conversation with James in August 1997 in which James allegedly told Carol to "give back" the subject property. Susan testified that she had spoken to James on July 7 and that James had congratulated her on obtaining the property and asked if he could borrow money off the remaining credit for the property. Susan also testified regarding another conversation with James in mid-August, in which James said that Virginia could not afford nursing home care because "you girls have her income, her farm." Susan further testified that James again acknowledged his awareness of the conveyance in a conversation on August 28.

In James' testimony, he asserted simply that he did not know about the June 20, 1997, deed when he received and recorded the October 27 deed. James did not deny the conversations testified to by Sikyta, Carol, and Susan; instead, James merely denied any recollection of any of those conversations.

The overwhelming weight of the evidence supports the district court's conclusion that James was aware of the June 20, 1997, deed prior to the October 27 conveyance. The district

court, which had the opportunity to hear and observe the witnesses, did not accept James' version of the facts, and we consider and give weight to this in our de novo review. See *Jeffrey Lake Dev. v. Central Neb. Pub. Power, ante* p. 515, 633 N.W.2d 102 (2001). After reviewing the record, we conclude, as did the district court, that James did not sustain his burden of proving he was a subsequent purchaser in good faith without notice with respect to the October 27 conveyance. James' final assignment of error is without merit.

CONCLUSION

Susan met her burden of showing a valid delivery of the June 20, 1997, deed, and James did not meet his burden of showing that the June 20 deed was the result of undue influence or that he was a subsequent purchaser in good faith without notice. Thus, title to the subject property passed from Virginia on June 20, and the October 27 deed purporting to convey the same property is a nullity. James' assignments of error having no merit, we affirm the judgment of the district court quieting title to the subject property in Susan.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PHILIP D. FURLONG, RESPONDENT.

637 N.W.2d 361

Filed January 4, 2002. No. S-01-516.

Original action. Judgment of disbarment.

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

PER CURIAM.

Philip D. Furlong, respondent, was admitted to the practice of law in the State of Nebraska on February 14, 1983. He is also admitted to practice law in the State of Iowa. On April 25, 2001, he was indefinitely suspended from the practice of law in Iowa by the Iowa Supreme Court, with no possibility of reinstatement

for 18 months as a result of his actions which violated provisions of the Iowa Code of Professional Responsibility for Lawyers, which actions included engaging in sexual relations with one client, sexually harassing another client, engaging in conduct that adversely reflected on his fitness to practice law, and attempting to dissuade a complaining witness from following through on her complaint with disciplinary authorities.

On May 2, 2001, the Office of the Counsel for Discipline filed a motion for reciprocal discipline against respondent, seeking an order of appropriate discipline, which discipline could include disbarment. On May 9, this court entered an order directing the respondent to show cause why this court should not enter an order of identical discipline, or greater or lesser discipline, including possible disbarment, pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001).

On November 29, 2001, respondent filed with this court a voluntary surrender of his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that he did not challenge or contest the allegations set forth in the motion for reciprocal discipline or the allegations, findings, and order of the Iowa Supreme Court. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

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

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.
>
> (2) A voluntary surrender of license shall not terminate such Grievance, Complaint, or Formal Charge unless an appropriate order is entered by the Court.

Pursuant to rule 15, this court finds that respondent has voluntarily surrendered his license to practice law, admitted in writing that he engaged in conduct in violation of the Code of

Professional Responsibility, consented to the entry of an order of disbarment, and waived all proceedings against him.

Upon due consideration of the pleadings in this matter, the court finds that respondent's admission and waiver are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
JAMES D. CURTRIGHT, APPELLANT.

637 N.W.2d 599

Filed January 4, 2002. No. S-01-521.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Effectiveness of Counsel: Appeal and Error.** Where a defendant has instructed trial counsel not to appeal, such a defendant plainly cannot later complain that, by following his or her instructions, counsel performed deficiently.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Peter K. Blakeslee for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

James D. Curtright appeals the order of the district court for Lancaster County denying his motion for postconviction relief. After an evidentiary hearing, the district court concluded that trial counsel was not ineffective when he did not file a direct appeal because Curtright had instructed trial counsel not to file such appeal. The district court further determined that the remaining issues raised by Curtright in the postconviction motion were waived because they could have been raised on a direct appeal. We affirm the denial of Curtright's motion for postconviction relief.

STATEMENT OF FACTS

Following a jury trial, Curtright was convicted on May 7, 1986, of two counts of murder in the first degree and two counts of use of a weapon to commit a felony. The victims were Curtright's mother and sister. On July 3, Curtright was sentenced to life imprisonment on each murder conviction and 10 years' imprisonment on each weapon conviction. At trial, Curtright was represented by two deputy public defenders, one of whom served as lead trial counsel (trial counsel). No direct appeal was taken from Curtright's convictions and sentences.

On April 9, 1999, Curtright filed a pro se motion for postconviction relief. In the motion, Curtright asserted five claims for which he sought postconviction relief. Curtright asserted that (1) he was provided ineffective assistance of counsel because no direct appeal was filed on his behalf despite several appealable issues which arose at trial, (2) he was provided ineffective assistance of counsel at trial because he is deaf and no interpreter was present during some of his pretrial meetings with counsel, (3) he was provided ineffective assistance of counsel at trial because he was not provided a competent interpreter during trial, (4) certain self-incriminating statements were admitted

into evidence against Curtright in violation of his *Miranda* rights, and (5) testimony of a psychologist who was not licensed to practice in Nebraska was admitted into evidence against Curtright in violation of his right to due process of law and a fair trial. For relief, Curtright sought, inter alia, that his convictions and sentences be set aside and vacated, that he be appointed counsel, and that he be provided such other and further relief as the district court deemed just.

Postconviction counsel was appointed for Curtright, and on July 20, 2000, Curtright filed a motion requesting that the district court direct the preparation of a bill of exceptions of the trial and sentencing proceedings. On July 31, the district court denied the motion, stating that

> [t]he errors alleged by the defendant with respect to pretrial and trial matters are waived if they could have been raised on direct appeal and, therefore, the record is of no assistance unless it is found that the defendant was denied effective assistance of counsel with respect to the decision not to appeal.

The district court stated that the pretrial and trial issues were not relevant "[u]ntil the defendant shows that the failure to appeal was due to ineffective assistance of counsel . . . ."

An evidentiary hearing was held March 21 and April 11, 2001. At the hearing, Curtright waived the attorney-client privilege and trial counsel testified regarding communications he had had with Curtright. Trial counsel testified that during the pretrial stages and trial, he communicated with Curtright through a sign language interpreter as well as through the use of a telecommunications device for the deaf (TDD) designed to assist deaf persons to communicate by telephone, which allowed Curtright to type words and have his words displayed on a screen. Trial counsel also stated that he attempted to learn some sign language, but generally used an interpreter, the TDD, or note writing to discuss trial strategy with Curtright. Trial counsel noted that Curtright knew American Sign Language (ASL) and explained that because ASL was a different language from English, when Curtright wrote or used the TDD to communicate in English, his sentence structure would not always follow standard English form and might appear ungrammatical. Trial coun-

sel testified, however, that he found Curtright to be intelligent and able to understand abstract concepts very well.

Certain of Curtright's writings quoted below were received in evidence at the postconviction hearing. We note that because of Curtright's translation of ASL into English, certain of his writings which are quoted below appear ungrammatical. Because indicating each error in grammar or word use would be distracting and correcting all of the errors poses the risk of altering the meaning of the communications, we have quoted Curtright's written materials in their original form. See *State v. Heitman, ante* p. 185, 629 N.W.2d 542 (2001). See, also, *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000).

Letters dated May 7, 1986, written by Curtright to the trial judge and the trial prosecutors were entered into evidence. Letters to trial counsel were also entered into evidence. In summary, in letters to the trial judge, Curtright initially indicated, inter alia, that he wished to receive the death penalty or otherwise he would appeal, but in subsequent letters and communications with trial counsel, Curtright ultimately indicated he did not want to appeal.

In the May 7, 1986, letter to the prosecutors, Curtright wrote, inter alia, "I want to give you my congratulation for your real great job on my case. I know you really deserve to hear that verdict, however; I do deserved, too." Curtright further wrote, "I hope you will work hard to get a judge put me on death penalty because I believe I deserve to have one, won't you?"

In a letter to the trial judge, Curtright wrote that he wished to receive the death penalty and expressed concern that his attorneys strongly opposed the death penalty. Curtright wrote to the trial judge, "You have the two choices: grant my wish on a death penalty or you will get my appeal . . . . Please think of 2 women was stabbed to die, therefore; you should put me to death." However, in a letter dated May 18, 1986, from Curtright to the trial judge, Curtright apologized for the earlier letter, saying that he understood the sentencing decision was the trial judge's to make and that he would abide by the trial judge's decision. Curtright further indicated that he had told his attorneys they could fight for a life sentence and that he would not press the trial judge to give a death sentence. In a letter written by

Curtright to trial counsel dated May 15, 1986, Curtright wrote, inter alia, "My decision is going to appeal my trial because I am intensely disagreeing the verdict . . . ."

Trial counsel testified that between the conviction on May 7, 1986, and the sentencing on July 3, as well as after sentencing, he had encouraged Curtright to appeal because trial counsel thought there were nonfrivolous appellate issues and that an appeal would be in Curtright's best interests. Trial counsel specifically recalled a conversation he had had with Curtright regarding the filing of an appeal, which conversation was in person using an interpreter on or near July 3, the day of sentencing. Trial counsel testified that he informed Curtright of procedures that would need to be followed to file an appeal, including deadlines and the preparation of an affidavit of poverty. Trial counsel testified that Curtright's responses made it clear that Curtright no longer wanted to appeal, and trial counsel paraphrased Curtright as saying, "I am not willing to appeal. I am guilty. I was wrong. I refuse to allow you to appeal the case. I will not sign an affidavit of poverty or in any other way to do this."

In a letter from Curtright to trial counsel dated July 20, 1986, which date followed sentencing but preceded the running of the time for filing an appeal, Curtright wrote, inter alia, "I have already decided not to file an appeal before the sentence, even though, no matter what I would get a death penalty or life sentence." The letter indicated that Curtright believed trial counsel would disagree with the decision not to appeal, stating, "This will be more harder for you to accept the fact what I'm telling this in response to your wishes of having an appeal." Curtright further stated, "Don't think of me being a nothing person who don't know what to do with the legal matter. I know what I'm doing because I understand what it's going on." Curtright concluded the letter, "Sorry, there won't have an appeal for my rest of life. I'll not be sorry what I decided. I trust God's will more than myself."

Trial counsel also testified regarding a conversation he had had with Curtright using the TDD, which conversation he recalled as taking place near the end of the time to file an appeal. A transcript of the conversation was entered into evidence. In the conversation, Curtright asked what trial counsel planned to

do in response to his letter indicating he did not want to appeal. Trial counsel responded that he would be disappointed but would stop working on the issues. Later in the conversation, trial counsel said, "I think we could debate the issue of the appeal, but when all the arguments are given, I must accept your decision. So I will, although, as you know I very much do not want to." Trial counsel testified that he then presented his reasons why he thought Curtright should appeal. Curtright responded to each of the reasons and concluded that he and trial counsel had different views of the issue. Curtright said, "Please, please, please accept my decision. But please don't think that I don't know what I am doing. I know what I do and talk about. . . . I am very delightful to see my case is in the garbage right now, and my mind is clearing out." Trial counsel responded,

> I want to tell you that I do really believe that you know what you are doing and I accept your decision. Probably I should tell you that under Nebraska law if you do not appeal, you may not be able to change your mind later, which means that you probably cannot bring a motion for post conviction relief and probably that means that you will not be eligible to bring a federal application or a writ of habeas corpus, but I think you understand that your decision is yours to make.

Curtright also testified at the evidentiary hearing. Curtright testified, inter alia, that he did not always understand what trial counsel was telling him about the legal proceedings, that trial counsel was unable to explain the appeal process in terms Curtright could understand, and that Curtright simply indicated that he understood even though he did not. Curtright also testified that prior to trial, he had discussed with trial counsel getting a more experienced lawyer but that nothing was done in that regard. Curtright further testified that after trial, he went back and forth as to whether he wanted to file an appeal and had discussed with trial counsel getting a new lawyer for the appeal because he was dissatisfied with trial counsel's performance. Curtright conceded, however, that he told trial counsel he did not want to file an appeal.

On April 17, 2001, the district court entered an order denying and dismissing Curtright's motion for postconviction relief.

Upon its review of the evidence, the district court found that Curtright directed trial counsel not to appeal. The district court also found that the evidence showed that Curtright was aware of his rights of appeal and that he knowingly directed trial counsel not to appeal. With respect to the absence of an appeal, the district court concluded that Curtright had not received ineffective assistance of counsel because Curtright had instructed trial counsel not to file an appeal. The district court further disposed of all other claims in Curtright's postconviction motion by concluding that because the other claims raised by Curtright in his motion for postconviction relief could have been raised on a direct appeal, such issues were waived and could not be raised in a postconviction action since no appeal had been taken at Curtright's direction. Curtright appeals the district court's denial of his motion for postconviction relief.

ASSIGNMENTS OF ERROR

Curtright asserts, restated, that the district court erred in these postconviction proceedings by (1) determining that trial counsel was not ineffective when he did not file a direct appeal on Curtright's behalf, (2) failing to rule in Curtright's favor on his remaining trial-related claims and by determining that such claims were waived because they were not raised in a direct appeal, and (3) denying Curtright's motion requesting preparation of a bill of exceptions of the trial.

STANDARDS OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Thomas, ante* p. 138, 629 N.W.2d 503 (2001).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Hunt, ante* p. 648, 634 N.W.2d 475 (2001).

ANALYSIS

After the postconviction evidentiary hearing, the district court found that Curtright had directed trial counsel not to file an

appeal and that as a consequence, Curtright had not received ineffective assistance of counsel when trial counsel did not in fact file a direct appeal. Based on the foregoing, the district court concluded that Curtright's remaining trial-related claims were waived because they could have been raised in a direct appeal. The district court also determined that there was no need to order the preparation of a bill of exceptions from the trial and sentencing because such bill of exceptions would relate to trial issues, the appeal of which had been waived, and it would not aid in the determination of any issue properly before the district court.

We first consider Curtright's assignment of error with respect to the district court's determination that trial counsel was not ineffective when he did not file a direct appeal. In arguing that his trial counsel was ineffective by failing to file an appeal, Curtright relies extensively on the U.S. Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Curtright asserts that in order to resolve whether counsel was deficient "for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other," "courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' " 528 U.S. at 477. Based on these statements in *Flores-Ortega*, Curtright claims that the district court erred by failing to address the reasonableness of trial counsel's conduct with respect to taking an appeal. Because we determine that the district court's finding that Curtright told his attorney not to appeal is not clearly erroneous, the district court was not required to engage in the reasonableness analysis urged by Curtright.

With respect to cases where no appeal was taken, the Court noted in *Flores-Ortega* two extremes where effectiveness of counsel is not at issue. The Court first noted that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* The Court then stated, "At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* The Court noted that the question it faced in *Flores-Ortega* concerned

those cases somewhere in the spectrum between these two extremes and stated:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal.

528 U.S. at 478.

[3] Because Curtright expressly directed counsel not to file an appeal, the present case is not one of those circumstances addressed in the discussion in *Flores-Ortega* regarding a defendant who has not clearly conveyed his wishes one way or another but instead is a case at one end of the spectrum where a defendant explicitly tells his attorney not to file an appeal. Where a defendant has instructed trial counsel not to appeal, such a defendant "plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Roe v. Flores-Ortega,* 528 U.S. at 477.

In the present case, the record shows that counsel and Curtright meaningfully consulted about nonfrivolous grounds for an appeal and the district court found that Curtright explicitly informed counsel that he did not want an appeal. Based on the evidence presented at the evidentiary hearing, such finding by the district court was not clearly erroneous and therefore we do not disturb such finding on appeal. See *State v. Thomas, ante* p. 138, 629 N.W.2d 503 (2001).

[4] We have stated that in order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). In the present case, the absence of an appeal was not due to negligence or incompetence of counsel, but instead was due to the express instructions of Curtright directing counsel not to file an appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

We therefore conclude that the district court did not err in its conclusion that Curtright's counsel was not ineffective when he did not file an appeal.

[5] In his second assignment of error, Curtright raises claims involving trial issues which could have been raised on direct appeal had Curtright not instructed counsel to forbear filing a direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Brunzo, ante* p. 598, 634 N.W.2d 767 (2001).

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Hunt, ante* p. 648, 634 N.W.2d 475 (2001). As a matter of law, we conclude that the district court did not err when it determined that consideration of the remaining claims was waived when Curtright instructed trial counsel not to appeal and such claims were thus procedurally barred. See *id*. The assignment of error encompassing purported errors at trial is without merit.

As his final assignment of error, Curtright claims that the district court erred in the postconviction proceedings by refusing to direct preparation of the bill of exceptions. Because the bill of exceptions from the trial would have been useful only to assess claimed trial errors, the evaluation of which were procedurally barred, the district court did not err in these postconviction proceedings in denying Curtright's motion to order the preparation of a bill of exceptions of the trial. This assignment of error is without merit.

CONCLUSION

The district court was not clearly wrong when it found that Curtright had instructed trial counsel not to file an appeal. Thus, we conclude that the district court did not err in its conclusion that Curtright's trial counsel was not ineffective when he did not in fact file an appeal. The issues raised by Curtright in his motion for postconviction relief relating to purported trial errors were waived because they could have been raised in a direct appeal which Curtright directed trial counsel not to file. The dis-

trict court did not err when it concluded consideration of these issues was procedurally barred. The district court did not err in denying Curtright's motion for an order directing the preparation of a bill of exceptions of the trial because such bill of exceptions would have been useful only in the present proceeding to evaluate issues which Curtright waived by not appealing. Having considered and rejected each of Curtright's assigned errors, we conclude that the district court's decision denying postconviction relief was correct and is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
L.T. THOMAS, APPELLANT.

637 N.W.2d 632

Filed January 11, 2002. No. S-00-1070.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **Records: Appeal and Error.** When considering the merits of a new direct appeal, an appellate court is precluded from considering any portion of the record that would not have been included in the record on the original direct appeal.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, errors assigned by a defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment.
5. **Jury Misconduct: New Trial.** In order for jury misconduct to become the basis for a new trial, it must be prejudicial.
6. **Criminal Law: Jury Misconduct: Proof.** Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
7. **Rules of Evidence: Jurors: Testimony.** Under Neb. Rev. Stat. § 27-606(2) (Reissue 1995), a juror is prohibited from testifying about any matter or statement which occurred during the jury's deliberation, with two exceptions: whether extraneous prejudicial information was brought to the jury's attention and whether any outside influence was brought to bear upon any member of the jury.

8. **Rules of Evidence: Jurors: Affidavits.** Neb. Rev. Stat. § 27-606(2) (Reissue 1995) does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.
9. **Criminal Law: Jury Misconduct: Proof.** In a criminal case, jury misconduct must be demonstrated by clear and convincing evidence.
10. **Juries: Notice.** A directive from the court to a deadlocked jury to keep deliberating which is given orally without notice to the parties or their counsel violates Neb. Rev. Stat. §§ 25-1115 and 25-1116 (Reissue 1995) and is improper.
11. **Jury Misconduct: Proof.** The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury.
12. **Constitutional Law: Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
13. **Trial: Juries: Discrimination: Appeal and Error.** A trial court's finding that there was no discrimination in the selection of a jury is not to be reversed on appeal unless clearly erroneous.
14. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
15. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
16. **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 (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
17. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
18. **Criminal Law: Proximate Cause.** An efficient intervening cause is a new and independent cause, itself a proximate cause of a death, which breaks the causal connection between the original illegal act and the death.
19. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
20. **Homicide.** A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.
21. ____. A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.

22. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** Remarks made by a prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
23. **Prosecuting Attorneys: Appeal and Error.** Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
24. **Trial: Juries: Appeal and Error.** The trial court is in a better position to measure the impact a comment has on a jury, and the court's decision will not be overturned unless clearly erroneous.
25. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.
26. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
27. **Trial: Evidence: Waiver: Appeal and Error.** A party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection.
28. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions.
29. ____: ____. The State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence of imprisonment in the first instance.
30. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** Under *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), *overruled on other grounds, Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), when using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel.
31. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
32. **Prior Convictions: Right to Counsel: Waiver: Records: Proof.** A transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction.
33. ____: ____: ____: ____: ____. The use of a defendant's prior convictions to enhance the defendant's sentence absent proof in the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error.
34. **Sentences: Prior Convictions: Double Jeopardy.** Double jeopardy does not attach to habitual criminal enhancement proceedings under Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994).
35. **Effectiveness of Counsel: Appeal and Error.** Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not require dismissal ipso facto.

36. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
37. **Effectiveness of Counsel: Proof.** To prove ineffective assistance of counsel, a defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part sentences vacated and cause remanded with directions.

James Walter Crampton for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

L.T. Thomas was convicted of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. Following his conviction, Thomas filed a motion for new trial and two supplemental motions for new trial, all of which were overruled. Thomas was sentenced as a habitual criminal.

Thomas' direct appeal was dismissed because the poverty affidavit was signed by trial counsel rather than by Thomas. In response to a motion for postconviction relief, Thomas was granted a new direct appeal because trial counsel had provided ineffective assistance in filing the original direct appeal. Thomas' appeal from the postconviction proceedings was dismissed by this court upon the State's motion for summary dismissal. The matter is presently before this court on Thomas' new direct appeal.

II. SCOPE OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for

the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

III. FACTS

On June 17, 1994, Thomas shot two men who were in a car near the Stage II lounge in Omaha, Nebraska. Phillip White, the driver, was shot in the left leg, and Rafael Petitphait, a passenger, was shot in the back, head, and left leg.

Following the shooting, White drove away at a high rate of speed. Shortly thereafter, the car ran over a curb and into a brick building at 24th Street and Patrick Avenue. White died of head injuries sustained in the automobile accident.

Prior to the shooting, Thomas met Demitrius Simpson and Russell Wills at the Stage II lounge. The group left the lounge and were standing near Thomas' car when a fight broke out between two women. Simpson attempted to stop the fight because he knew one of the women. White and Petitphait were among the crowd that gathered in the parking lot outside the lounge. As Petitphait also attempted to stop the fight, he was struck by a man who was later identified as Simpson. Petitphait stopped White from going after Simpson because White had a .22-caliber gun, which he always carried with him. The gun was not operational, Petitphait said.

After the fight, some of the bystanders teased Petitphait about not fighting back. Petitphait approached Simpson, and the two began to fight. Simpson said he was attacked by several of Petitphait's friends. Petitphait testified that he kept hitting Simpson until someone pulled him off. At some point in time, shots were fired into the air, and the crowd began to disperse.

Thomas testified that he was grabbed during the fight between Petitphait and Simpson and that someone pointed a gun at his head. As Thomas ran away, he heard shots fired. Thomas moved

his car out of the parking lot, took his gun out of the trunk, and walked back to the scene of the fight. A car approached, and Thomas heard Petitphait say, "Blood, smoke that nigger." Thomas claimed that the driver waved a gun. Thomas testified that he ducked and then stood up and started shooting in self-defense.

Petitphait testified that as he and White were stopped at the traffic light at 30th and Bedford Streets, they heard gunshots coming from the rear of the car. When White realized Petitphait had been shot, he said he was going to drive to a hospital. As they drove away, White said he had also been shot. Shortly before the crash, White said he could not make it to the hospital. The car hit a curb and then crashed into a building. A gun was found on the floor of the driver's side of White's car. Testimony was presented to establish that White was speeding and that he was intoxicated.

Thomas was charged with first degree murder, first degree assault, and two counts of use of a firearm to commit a felony in the commission of the above felonies. An amended information was filed alleging that Thomas is a habitual criminal.

During jury selection, the State asked the panel if any prospective juror's family had ever been a victim of a violent crime or a crime in general, or if any prospective juror knew anyone (friend, family, or acquaintance) who had been a victim of a homicide. Some of the panel members responded affirmatively and were further interrogated by the State.

Thomas was subsequently convicted of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. After an enhancement hearing, Thomas was found to be a habitual criminal. He was sentenced to prison terms of 20 years to life for second degree murder, 12 to 14 years for use of a firearm to commit second degree murder, 12 to 14 years for first degree assault, and 10 to 12 years for use of a firearm to commit first degree assault. The sentences were ordered to be served consecutively.

Thomas timely filed a motion for new trial. He subsequently filed two supplemental motions for new trial and requested an evidentiary hearing before a neutral judge. The trial judge overruled the first two motions, and a different judge overruled the third motion.

A review of the three motions for new trial is necessary. In the first motion for new trial, Thomas alleged, inter alia, that the proceedings were irregular because no African-Americans were included in the panel from which his jury was selected. He also claimed that the prosecutor made improper remarks in closing arguments when he commented to the jury: "We all should be sick and tired of the shooting, the random shooting that goes on and the violence that's going on. Now you have a chance to do something about it."

Thomas' first supplemental motion for new trial alleged that Thomas had learned from Vincent Evans, a previously unidentified witness, that testimony about the shooting given by William King, Jr., one of the State's witnesses, was not true. Thomas alleged that King's testimony was crucial to the State's case and that King had refused to identify any other witnesses who were present with him. Thomas alleged that Evans' testimony about the shooting would have contradicted King's testimony.

Thomas' second supplemental motion for new trial and request for an evidentiary hearing before a neutral judge alleged that during the second day of deliberations, the jury foreman sent a note to the trial judge stating that the jury was deadlocked. Outside the presence of and without notice to the parties or their counsel, the trial judge told the jury to continue deliberating because it was too soon to abandon the effort to reach a verdict.

At a hearing to consider the first two motions for new trial, Thomas clarified that the supplemental motions were not intended as new motions for new trial but were intended to be considered part of the original motion. The trial judge recused himself on the claim of improper communication with the jury, and the parties proceeded to argue the remaining issues. Thomas asked the trial court to take judicial notice that there were no African-American jurors and that no African-Americans were included in the jury panel. Thomas also alleged juror misconduct based on a letter from one of the jurors, who stated that she wanted to change her vote, and another juror's statement that the jury did not follow the instructions given by the trial court. Thomas offered into evidence sworn statements from these jurors.

In exhibit 105, a jury member (Juror A) stated that while the jury was discussing whether the crime was first or second

degree murder, another jury member (Juror X) was adamant that the crime was first degree murder. Juror X said that he knew in his heart that a person would not return to the area of the shooting unless he was looking to kill someone. Eventually, the jury learned that Juror X had an uncle who had been shot by a relative and that Juror X believed that the relative should have been convicted of first degree murder, rather than second degree murder. When the foreman asked Juror X why he did not disclose this information during jury selection, Juror X stated that he did not believe it was important enough to mention.

Exhibit 106 is a sworn statement from another jury member (Juror B) claiming that the jury did not follow its instructions with regard to reasonable doubt. Exhibit 108 is a letter from Juror B to the trial court stating that the juror wanted to change her vote. The State objected to the exhibits, and the trial court took the matter under advisement. The closing argument at trial was also offered and received into evidence. Thomas offered exhibit 107, which is a sworn statement by Evans, the previously unidentified witness. The State objected to admission of Evans' statement. The record does not indicate whether Evans' statement was received.

The trial court overruled the first two motions for new trial. In its written order, the trial court found that Thomas raised three issues in the motions—newly discovered evidence, recantation of the verdict by two jurors, and improper statements by the prosecutor in closing argument. The trial court noted that the basis of Thomas' claim of newly discovered evidence was an affidavit by Evans, who was with King at the time of the shooting. When King testified during the trial as to his observations of events related to the shooting, King acknowledged that he had a companion at the time but he declined to name the companion, and neither party asked the trial court to require King to identify the companion.

Although Evans' account differed from King's testimony as to the pair's activities prior to and after the shooting, the trial court found that Evans' testimony could have been produced at trial with reasonable diligence and did not provide a basis for new trial.

In addressing the alleged juror misconduct, the trial court reviewed the statement of Juror B, who alleged she wanted to change her vote. The trial court found that the letter concerned

matters occurring during the course of the jury's deliberations, matters influencing the juror to assent to the verdict, and the juror's mental process in connection with the deliberations. The trial court refused to receive Juror B's sworn statement, and its contents were not considered by the court in its rulings on Thomas' motion for new trial and the first supplemental motion.

The trial court noted that a sworn statement from Juror A also alleged factors that influenced the juror to assent to the verdict. The court refused to admit exhibit 105, which recapitulated statements occurring during the jury's deliberations.

The trial court found that Thomas had timely objected to the prosecutor's remark about random shootings and asked for a cautionary instruction or, in the alternative, a mistrial, which the court refused. The trial court had instructed the jury that it should be governed solely by the evidence and should not be influenced by statements of counsel not supported by the evidence. The court paraphrased a witness at trial who had testified that he was sick and tired of the guns and the shooting and that someone had to do something about it. The trial court stated: "In the light of the cautionary instructions given and the testimony at trial, I do not think that the prosecutor's language reached a degree of prejudice which could not be avoided by the usual admonitions to the jury." The trial court overruled Thomas' motion for new trial and the first supplemental motion.

The trial judge then recused himself, and a hearing was held before a different judge to consider whether the trial judge gave the jury an improper *Allen* charge. See *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). Thomas offered the sworn statement of Juror A to demonstrate that communications occurred between the trial court and the jury. The second judge received into evidence part of Juror A's statement, but the judge found no prejudice to Thomas by the conduct alleged in the statement. The second judge found that the trial judge had merely told the jurors to continue deliberating. Thomas' second supplemental motion for a new trial was overruled.

IV. ASSIGNMENTS OF ERROR

Thomas assigns 20 errors, which we have restated. Concerning jury issues, Thomas alleges that he was denied a fair trial by the

misconduct of Juror X, who failed to indicate during voir dire that his uncle had been a victim of a violent crime, and that the jury considered this information during deliberations; by the jury's consideration of facts not in evidence related to Juror X's misconduct; by the jury's failure to follow the instructions as to burden of proof and the order of consideration; and because the jury panel was not reflective of the racial diversity of the community. Thomas also asserts that the trial court erred when it failed to protect his right to a fair trial after the court learned of Juror X's misconduct; when the court instructed the jury to continue deliberations; when the court failed to make a record concerning receipt of a note from the jury; and when the court failed to properly instruct the jury that it could not change its decision after a verdict and failed to properly instruct on proximate cause, manslaughter, and self-defense. The second judge abused his discretion when he improperly overruled Thomas' second supplemental motion for new trial on the ground of jury misconduct.

Thomas alleges several errors related to prosecutorial misconduct. He asserts that he was denied a fair trial when the prosecutor made an agreement with a witness in exchange for testimony helpful to the State and failed to disclose the agreement to the jury, used improper rebuttal to bolster a witness' credibility, made improper statements during closing argument, struck from the jury the only minority member of the jury panel, and presented improper rebuttal evidence on identity when identity was not an element of the defense.

As to evidentiary issues, Thomas asserts that the trial court erred in refusing to allow cross-examination of a witness as to his address after the State asserted that the witness feared retaliation even though no evidence of the alleged fear of retaliation was adduced, in allowing improper rebuttal evidence on identity when identity was not an element of the defense, in admitting expert opinion testimony on "crush measurements" and impact calculations, and in finding Thomas to be a habitual criminal.

Thomas asserts that he received ineffective assistance of counsel when trial counsel failed to call a witness who would have impeached the credibility of other prosecution witnesses, failed to object to expert opinion testimony on crush measurements and impact calculations, failed to file a motion in limine

to exclude testimony related to an injury to White's leg, failed to identify and compel to testify a witness who was with one of the State's witnesses, failed to object to the causation instruction and to prepare an alternate proximate cause instruction, failed to offer a manslaughter instruction, failed to elicit the testimony of the trial judge and bailiff at the hearing on the second supplemental motion for new trial, failed to object to exhibits related to the habitual criminal allegations and to preserve the issue on appeal, and failed to move to strike testimony of witnesses who refused to answer material questions on cross-examination.

The last errors asserted relate to postconviction issues. Thomas alleges that the district court erred in failing to follow appropriate postconviction procedures, in failing to grant an evidentiary hearing, and in failing to find that the convictions were void or voidable.

V. ANALYSIS

1. Issues Before This Court

We must first address the State's assertion that some of the issues raised by Thomas and some portions of the record are not properly before the court in this new direct appeal. The State questions whether exhibits 105 and 106, sworn statements from Jurors A and B, can be considered on direct appeal because the exhibits were not offered at trial, but, rather, were offered during the hearing on Thomas' motion for new trial and the first supplemental motion. The trial court did not receive the exhibits into evidence and overruled those motions. The State seems to argue that the overruling of the motion for new trial and the first supplemental motion was a separate appealable order and that because Thomas did not file an appeal from that order within 30 days as required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994), this court cannot consider the exhibits as a part of the record.

In support of its argument, the State relies on *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995) (*McCracken I*), in which we stated that a party who timely files a motion for new trial may appeal from the overruling of that motion provided that the party complies with the 30-day filing requirement of § 25-1912(1). We stated that the denial of a motion for new trial

is a separate proceeding from an order entering a judgment. "A party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial although he failed to file a timely notice of appeal from the judgment entering the verdict and sentence." *McCracken I*, 248 Neb. at 580, 537 N.W.2d at 505, citing *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994), and *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994). Both *McCracken I* and *McCormick and Hall* dealt with motions for new trial based on claims of newly discovered evidence. In *McCormick and Hall*, the motions for new trial were decided more than 2 months after sentencing. In *McCracken I*, the motion for new trial was based upon errors in sentencing, although McCracken had not yet been sentenced. Thomas' first motion for new trial made no claim concerning newly discovered evidence, but the supplemental motions raised such claims.

[3] We have also held that when considering the merits of a new direct appeal, an appellate court is precluded from considering any portion of the record that would not have been included in the record on the original direct appeal. See *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000) (*McCracken II*).

The State's reliance upon *McCracken I* and *McCracken II* (and the cases from which they were derived, *McCormick and Hall* and *Nash*) is misplaced. In certain circumstances, a motion for new trial based on newly discovered evidence can be separately appealed from the judgment of conviction and sentence because a motion for new trial based on newly discovered evidence need not be filed and ruled upon within 30 days of the sentence. Newly discovered evidence can be the basis of a motion for new trial if it is discovered within 3 years after the verdict. Thus, the ruling on such a motion would necessarily be appealed separately from the conviction and sentence. See Neb. Rev. Stat. § 29-2103 (Reissue 1995).

Section 29-2103, as it relates to newly discovered evidence, is not applicable here. Thomas' original motion for new trial was filed within 10 days of the verdict. The additional motions for new trial supplemented the timely filed original motion for new trial. We therefore conclude that the record made by Thomas at

the hearings on his motions for new trial may be considered by this court on the new direct appeal.

[4] In a criminal case, errors assigned by the defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment. To the extent that *McCracken I*, *McCracken II*, *McCormick and Hall*, and *Nash* could be interpreted to the contrary, such interpretation is expressly disavowed. It would be a waste of judicial resources to require a defendant who has timely filed a motion for new trial within 10 days of the verdict to file two appeals: one from the order overruling the motion for new trial and a second from the judgment which occurs when the sentence is pronounced. In order to provide for one appeal, the trial court should rule on all outstanding motions prior to sentencing. Other than the exceptions stated in § 29-2103, alleged errors in overruling a timely filed motion for new trial should be assigned and considered on direct appeal.

2. Jury Issues

Thomas alleges a number of errors related to the jury, including juror misconduct. Thomas asserts that he was denied a fair trial by the misconduct of Juror X, who failed to disclose during voir dire that his uncle had been the victim of a violent crime, and Thomas alleges that the jury considered facts not in evidence related to Juror X's misconduct.

The State claims Thomas has failed to prove juror misconduct because the sworn statements of two jurors should not be before this court. The issue of juror misconduct was presented to the trial court in the second supplemental motion for new trial. As noted above, that record is properly before us.

[5,6] In order for jury misconduct to become the basis for a new trial, it must be prejudicial. *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

> "When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious

> misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.
>
> "The matter of whether the misconduct occurred is largely a question of fact and the jurors may be questioned as to what happened during their deliberations. The determination as to whether the misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case."

Id. at 95, 430 N.W.2d at 289.

This court has previously considered the parameters under which a juror may testify concerning extraneous information which was improperly brought to the jury's attention during deliberations. No evidence may be received concerning the effect of any statement upon a juror's mind, its influence upon the juror, or the mental processes of a juror. See, *State v. McDonald, supra*; *State v. Roberts*, 227 Neb. 489, 418 N.W.2d 246 (1988); *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). The evidentiary hearing may be conducted as part of a hearing on a motion for new trial. *State v. McDonald, supra*.

The issue of juror misconduct was presented to the trial court in Thomas' second supplemental motion for new trial and was raised at the hearing on the motion. Evidence of the alleged misconduct was offered through the jurors' sworn statements. The trial court declined to consider those exhibits and subsequently overruled Thomas' second supplemental motion for new trial.

In excluding the jurors' statements, the trial court relied upon Neb. Rev. Stat. § 27-606(2) (Reissue 1995), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from

> the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

To resolve this issue, we must interpret § 27-606(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. *In re Guardianship & Conservatorship of Garcia, ante* p. 205, 631 N.W.2d 464 (2001).

[7] Under § 27-606(2), a juror is prohibited from testifying about any matter or statement which occurred during the jury's deliberation, with two exceptions: whether extraneous prejudicial information was brought to the jury's attention and whether any outside influence was brought to bear upon any member of the jury. Section 27-606(2) restricts the evidence that a court can consider in determining whether juror misconduct occurred. The key phrase in the statute is "extraneous prejudicial information," and within that phrase, the crucial word is "extraneous," which means " 'existing or originating outside or beyond: external in origin: coming from the outside . . . brought in, introduced, or added from an external source or point of origin.' " See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 455, 412 N.W.2d 56, 77 (1987), and Webster's Third New International Dictionary, Unabridged 807 (1993).

No evidence was presented in this case which established that any extraneous information was brought to the jury's attention. One of the statements indicated that Juror X had informed the jury that he had an uncle who had been murdered and that the perpetrator had been found guilty of second degree murder. This information was provided by a member of the jury, not by an external source. The second juror statement asserted that the jury did not follow instructions during its deliberations. Again, no outside information was introduced. In *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992), we allowed juror

affidavits only to show that presubmission discussions took place among certain jurors over 5 days of the 7-day trial. Other comments in the affidavits were found to be useless.

[8,9] We conclude that the trial court properly excluded the jurors' statements based upon the court's interpretation of § 27-606(2). None of the jurors brought extraneous information to the jury or obtained extra information about the facts of the case. The allegations in Juror A's sworn statement concerned Juror X's personal feelings about the murder of his uncle and claimed that Juror X was insisting on a verdict of first degree murder. This evidence was not admissible. Section 27-606(2) does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations. *Rahmig v. Mosley Machinery Co., supra*. Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988). In a criminal case, the misconduct must be demonstrated by clear and convincing evidence. See *Hunt v. Methodist Hosp., supra*. Thomas has not sustained his burden of proof that juror misconduct occurred or that the jury considered facts not in evidence related to juror misconduct. This assignment of error is without merit.

Thomas also claims that the jury failed to follow the trial court's instructions as to burden of proof and the order of consideration in deliberations. He relies on the jurors' sworn statements for support. Because we have found that the statements were properly excluded, we find no merit to this assigned error.

Thomas next asserts that the trial court erred and failed to protect Thomas' right to a fair trial when the court instructed the jury to continue deliberations after the court was made aware of Juror X's deception and when it failed to make a record concerning receipt of a note from the jury. Thomas asserted that the directive from the trial court to a deadlocked jury amounted to an improper *Allen* charge (directive from court to deadlocked jury to keep deliberating). See *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993).

[10,11] An *Allen* charge to the jury given orally without notice to the parties or their counsel violates Neb. Rev. Stat.

§§ 25-1115 and 25-1116 (Reissue 1995) and is improper. See *State v. Owen, supra*. The State has the burden to prove that the defendant was not prejudiced by any improper communication between the judge and the jury. *Id.*

At the evidentiary hearing, a different judge received into evidence the juror's statement which described the trial judge's communication directing the jury to continue its deliberations. Thomas argued that if he had known of the jury's note, he would have asked the trial judge to allow the jury to return a hung verdict rather than ordering the jury to proceed. The second judge overruled the second supplemental motion for new trial, finding no prejudice to Thomas and holding that the trial judge had merely directed the jury to continue deliberating.

If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

The record shows that the communication between the trial court and the jury merely directed the jury to continue its deliberations. This direction did not have a tendency to influence the verdict. This assignment of error is without merit.

Thomas' next assertion related to the jury is that he was denied a fair trial because the jury panel was not reflective of the racial diversity of the community. At trial, Thomas' attorney asked for an evidentiary hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), because the sole panel member who was a member of a minority group, a Native American, had been stricken from the panel by the State. The State advised the trial court that it had prosecuted a case the previous summer which involved persons believed to be related to the Native American juror and that it was therefore prudent to strike the juror in this case.

After Thomas moved to disqualify the all-white jury panel, the trial court held an evidentiary hearing. Although Thomas said he was not abandoning his *Batson* challenge, he did not offer any evidence. The clerk of the district court testified that the selection of jury panels is a random process and is not

related to the minority status of the defendant. The trial court overruled the motion to disqualify the panel.

A defendant must satisfy certain criteria in order to establish a prima facie case of discrimination in jury selection. If the defendant establishes such a prima facie case of discrimination, then the burden shifts to the State to articulate a neutral explanation for striking any juror.

[12] In examining whether an entire jury should be stricken due to racial composition, we stated in *State v. Garza*, 241 Neb. 934, 952-53, 492 N.W.2d 32, 45-46 (1992):

> In *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the U.S. Supreme Court observed that in order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
>
> . . . .
>
> We have consistently held that a defendant has no right to a petit jury composed in whole or in part of members of his or her race, *State v. Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990); *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989); *State v. Kitt*, 231 Neb. 52, 434 N.W.2d 543 (1989), and that the absence of members of the defendant's race in the jury, standing alone, does not support a claim of improper racial composition, *State v. Falkner*, 224 Neb. 490, 398 N.W.2d 708 (1987). A defendant cannot, under either a Sixth Amendment or an equal protection challenge, simply allege that no minorities are on the jury, but has the burden of establishing systematic exclusion and purposeful discrimination.

The State established here through cross-examination of the clerk of the district court that permissible racially neutral selection criteria and procedures were used which produced the monochromatic result in Thomas' case. The evidence showed

that at least 6 African-Americans were included in the 144 persons called for jury duty. From that group, the venire panel of 50 to 60 members was selected on a random basis without reference to race or the race of the defendant being tried. Nothing in the record established that the six African-Americans called for jury duty were purposely excluded from the panel from which Thomas' jury was selected.

Thomas claims *Garza* is distinguishable because "the odds . . . are astronomical" that an entire panel will not include any African-Americans. See brief for appellant at 27. In support of his motion to disqualify the jury panel, Thomas offered as evidence an exhibit showing that African-Americans make up 10.94 percent of the Douglas County population and an affidavit stating that he is of African-American descent but that no members of the jury panel were African-American. The clerk of the district court testified about the jury panel selection process and explained that it is random. Prospective jurors' cards are separated into piles for each courtroom holding a jury trial. Although other African-Americans were called for jury service, none were randomly selected for the jury panel which heard Thomas' case. Thomas' evidence did not establish any error in the process by which the panel was selected, and he has not shown that any underrepresentation was due to systematic exclusion.

[13] The trial court's findings that there was no discrimination in the selection of the jury are not to be reversed on appeal unless clearly erroneous. *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989). Thomas has failed to meet his burden of proving that he was denied a fair trial because the jury panel was not reflective of the racial diversity of the community. We find no error by the trial court.

Thomas next claims that the trial court erred in its instructions to the jury. He alleges that the trial court failed to give an appropriate proximate cause or manslaughter instruction or to give a correct self-defense instruction. Thomas also alleges that the trial court should have instructed the members of the jury that they could not change their minds after the verdict was entered.

[14,15] In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected

a substantial right of the appellant. *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999). It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

[16,17] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

The trial court gave the proximate cause instruction requested by Thomas. The instruction stated: "The defendant killed Phillip White if the death of Phillip White occurred in a natural and continuous sequence and without the defendant's act, the death of Phillip White would not have occurred." This instruction is similar to the definition of proximate cause stated in NJI2d Crim. 4.1.

[18] Thomas argues that since the evidence shows that the injury sustained by White in the shooting was not life threatening and the cause of death was head trauma sustained during the car accident, the trial court should have given an instruction defining "efficient intervening cause." Brief for appellant at 30. An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death. *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

The State argues that this case is similar to *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990), in which the defendant was refused an instruction regarding efficient intervening cause. Ruyle claimed that the victim caused his own death by voluntarily reentering a building that had been set on fire by Ruyle. We found no issue of intervening cause and held that the jury was properly instructed. We concluded that a victim's contributory

negligence will not relieve a defendant from criminal responsibility for homicide unless it was the supervening and thus sole cause of death.

[19] Whether jury instructions given by a trial court are correct is a question of law. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). In the present case, the evidence did not warrant an instruction on efficient intervening cause. The fact that White drove away at a high rate of speed was not a new and independent cause which broke the causal connection between the shooting and the death. Any contributory negligence on White's part, if it existed, did not relieve Thomas of criminal responsibility for the homicide unless White's actions were the sole cause of his death. See *State v. Ruyle, supra*.

The evidence established that White was shot by Thomas and that White then drove away at a high rate of speed, heading for a hospital. White said he could not make it to the hospital shortly before the car crashed into a building. White's actions were not the sole cause of his death, and they did not support an efficient intervening cause instruction. The trial court did not err in failing to give that instruction, and the jury was properly instructed on the issue of proximate cause.

[20] Next, Thomas argues that the jury was not given an appropriate manslaughter instruction. Because the record does not suggest that Thomas requested a manslaughter instruction, the question is whether there was any evidence from which a jury could conclude that he committed manslaughter. "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Neb. Rev. Stat. § 28-305(1) (Reissue 1995).

[21] Thomas claims that a jury could have found that he killed White upon a sudden quarrel because both Thomas and another witness testified that words were exchanged between Thomas and the occupants of White's vehicle. A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994). The evidence does not support an inference that Thomas shot at White's car as the result of a sudden quarrel.

Thomas also claims that a jury could have found that he unintentionally killed White while in the commission of an assault on Petitphait. The record includes no evidence from which a jury could infer that Thomas intended to shoot at Petitphait but not at White. The assignment of error regarding the manslaughter instruction has no merit.

Thomas claims that he acted in self-defense and that the trial court erred in its self-defense instructions. The trial court gave two separate self-defense instructions. Thomas argues that a single " 'in concert' " instruction should have been given because the jury could have found that White and Petitphait were acting in concert to threaten Thomas. Brief for appellant at 34. He claims that if the jury believed, for example, that White threatened or attempted to cause Thomas' death and that Thomas had provoked Petitphait or vice versa, the instructions would not permit a finding of self-defense. Thomas testified that he shot at both White and Petitphait because he thought they were trying to kill him and he did not want to die; however, Thomas claimed that he did not want to be the cause of any death.

The jury instructions stated:

> The defendant acted in self-defense as to Phillip White if: One, Phillip White threatened or attempted death or serious bodily harm towards [sic] the defendant. And, two, the defendant did not provoke any such use of force against him with the intent of using deadly force and response. And, three, under the circumstances as they existed at the time, the defendant reasonably believed that his use of deadly force was immediately necessary to protect him against death or serious bodily injury — against death or serious bodily harm. And, four, before using deadly force, the defendant either tried to get away or did not try because he reasonably did not believe he could do so in complete safety.
>
> The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed, and he acted reasonably in response to that belief.
>
> Deadly force means force used with the intent to cause death or serious bodily harm or force used with the knowl-

> edge that its use would create a substantial risk of death or serious bodily harm.

The same instruction was given as to Petitphait.

Thomas claims that he was not trying to hit either White or Petitphait but that he was shooting in their direction because one or two of the car's occupants had a gun. In *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999), the defendant fired shots into a vehicle and one of the occupants was killed. The defendant claimed he was entitled to a self-defense instruction regarding all of the occupants of the vehicle as a group. We stated that the language of Neb. Rev. Stat. § 28-1409(1) (Reissue 1995) makes it clear that the excuse of self-defense applies to the threatening behavior of another person, and not to a generalized group of actors. The self-defense instructions given in this case follow the language of NJI2d Crim. 7.2 and accurately state the law. Thomas' assignment of error as to the self-defense instructions is without merit.

Thomas also argues that he was entitled to an instruction on transferred intent like the one given in *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). In *Duis*, the defendant intended to shoot one person but actually killed another and was charged under a theory of transferred intent. Thomas was not charged under a theory of transferred intent, and therefore, he was not entitled to an instruction on transferred intent.

Thomas further claims that the jury should have been instructed that it could not change its decision. The jury was instructed that its "decision on these facts is final." When the jurors were individually polled following the verdict, each responded that he or she agreed with the verdict. We find no merit to this assignment of error.

3. Prosecutorial Misconduct

Thomas claims that he was denied a fair trial by several acts of prosecutorial misconduct. First, Thomas argues that the prosecutor promised leniency to Aybar Crawford in exchange for his testimony. On cross-examination, Thomas asked Crawford if he had received anything in return for his testimony, and Crawford denied that any promises had been made to him. During a break, the State informed Thomas that Crawford had a felony conviction

for which he had not been sentenced. On recross, Thomas questioned Crawford about leniency and Crawford said he could not benefit because he would be returned to California for probation violation. The State then asked if anyone had made any promises to Crawford, and he again denied that any promises had been made. Thomas argues that prosecutorial misconduct occurred when the prosecutor did not correct Crawford's denial of a deal in exchange for his testimony.

In support of his motion for postconviction relief, Thomas obtained a copy of a transcript that included hearings on Crawford's plea, sentence, and violation of probation. However, those documents are not part of the record before us on direct appeal and will not be considered. See *McCracken II* (appellate court is precluded from considering any portion of record that would not have been included in record on original direct appeal when considering merits of new direct appeal). This assignment of error has no merit.

Thomas also claims he was denied a fair trial because the prosecutor used improper rebuttal to bolster the credibility of Petitphait and the trial court admitted the evidence. Thomas made no timely motion for mistrial on this basis. Therefore, he has waived the right to assert on appeal that the trial court erred in failing to declare a mistrial due to prosecutorial misconduct. See *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993). This assignment of error has no merit.

Thomas next claims that he was denied a fair trial when the prosecutor made an improper argument in closing, when he said: "And now it's in your hands, ladies and gentlemen. We all should be sick and tired of the shooting, the random shooting that goes on and the violence that's going on. Now you have a chance to do something about it. Thank you very much." Thomas objected to the statement that the jury had "a chance to do something about it," and he asked for a cautionary instruction and a mistrial. On appeal, Thomas complains that the argument appealed to the jury to convict him as an expression of the conscience of the community rather than based on his actions.

[22,23] The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.

State v. Fraser, 230 Neb. 157, 430 N.W.2d 512 (1988). Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977). The trial court's refusal to give an admonishing instruction supports the inference that the court did not consider the prosecutor's argument to be of such a nature that it would have a damaging effect. This error has no merit.

[24] The trial court also considered this issue in Thomas' motion for new trial and the first supplemental motion, when it concluded that in light of the cautionary instructions given at trial, the prosecutor's statement did not reach a degree of prejudice that would require a mistrial. The trial court is in a better position to measure the impact a comment has on a jury, and the court's decision will not be overturned unless clearly erroneous. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), *disapproved on other grounds, State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). We find no error in the trial court's determination, and we find no merit to this argument.

Thomas next alleges that it was prosecutorial misconduct to strike the only minority member of the jury panel. As outlined earlier, Thomas did not meet his burden of proving that he was denied a fair trial based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The State's actions in striking a Native American panel member do not rise to the level of prosecutorial misconduct. The prosecutor provided a legitimate reason for striking the panel member. We conclude there is no evidence to sustain Thomas' assignment of error.

Thomas also claims prosecutorial misconduct because the State called Det. Bill Jadlowski as a rebuttal witness and asked him about an out-of-court identification of Thomas made by Roger Tucker, a witness for the State. Thomas objected because he had already testified that he was the shooter. Thomas claims this question violated Canon 7, DR 7-106(C)(2), of the Code of Professional Responsibility, which states that a lawyer shall not "[a]sk any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." There is no showing that the questions asked of Tucker were intended to degrade a witness or other

person. The trial court did not err in allowing this testimony on rebuttal because the testimony was cumulative to Thomas' own testimony and he was not prejudiced by it. Thomas has failed to establish any intentional wrongdoing or any prejudice in the State's questions concerning out-of-court identifications. We find no merit to this assignment of error.

4. Evidence Issues

Concerning the admission of evidence, Thomas first argues that the trial court erred in refusing to allow him to cross-examine a witness as to the witness' address. Outside the presence of the jury, the State explained that the witness was reluctant to provide his address for fear of retaliation. Thomas stated that he did not need a specific address, but he wanted to know in which block the witness lived. The witness then testified that he lived in the area of 24th and Spencer Streets. Thomas apparently wished to establish that the witness lived near White and was associated with a gang. However, Thomas did not allege at trial and has not asserted on appeal any prejudice that resulted from the failure to obtain a specific address from the witness. Nor has Thomas suggested a specific rule of evidence which was violated by the trial court's refusal to require the witness to provide an address.

[25] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where, as here, 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. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999). We find no abuse of discretion by the trial court as to this evidentiary issue.

[26] Next, Thomas asserts that the court erred in admitting expert testimony on crush measurements and impact calculations regarding the damage to White's car. The standard for reviewing the admissibility of expert testimony is abuse of discretion. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[27] The expert witness, David Carlson, an officer with the Omaha Police Department, testified that he has investigated serious personal injury and fatality accidents for 6 to 7 years. He testified that White's car left 24th Street just south of Patrick Avenue, hit a post, traveled through a cinder vacant lot, crashed through the concrete and brick wall of a building, and entered the building, stopping at a point 24 to 27 feet inside the building. Carlson stated that he can determine the speed of a vehicle from the skid marks and scuff marks on the roadway, or lack of such marks, and the "crush," or area on a vehicle that is pushed in from impact. Carlson estimated that the front end of White's automobile was crushed 24 to 30 inches, which equated to an impact speed of 40 to 50 m.p.h. At that time, Thomas did not object or move to strike Carlson's testimony. The State then asked Carlson his opinion of the speed of White's vehicle at the time of impact, and the trial court sustained Thomas' foundational objection. However, Carlson had already expressed his opinion about the speed of White's vehicle with no objection. A party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). This assignment of error has no merit.

5. Habitual Criminal

Thomas asserts that the trial court erred in finding him to be a habitual criminal. He alleges that exhibits concerning convictions in 1984 and 1989 offered by the State do not support the sentence enhancement because the journal entries do not contain the judges' signatures. The State also offered certified copies of records showing (1) that Thomas was committed to the Department of Correctional Services on November 28, 1984, on two counts of second degree assault and was discharged on April 27, 1987, and (2) that Thomas was committed to the department on August 9, 1989, for attempted possession with intent to deliver a controlled substance (cocaine) and was released on May 27, 1993, to be discharged from parole effective June 27, 1994. The copies were certified by the records custodian of the department's central records office.

[28-32] In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior

convictions. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994). The State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence of imprisonment in the first instance. *Id.*, citing *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), *overruled on other grounds, Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). Under *Baldasar*, when using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel. *State v. Ristau, supra*. In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Nelson, ante* p. 896, 636 N.W.2d 620 (2001); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). In most cases, the State will prove a defendant's prior convictions by introducing certified copies of the prior convictions or transcripts of the prior judgments. *State v. Ristau, supra*. A transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction. *Id.* Thomas makes no claim that his pleas and convictions were uncounseled, nor does he assign the admission of the prior convictions as error.

[33] The use of a defendant's prior convictions to enhance the defendant's sentence absent proof in the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error. See *id.*

The record does not show that the trial court ascertained whether Thomas was represented by counsel or waived his right to counsel at the time of the earlier convictions. The journal entries simply show that Thomas was present with counsel at the time of sentencing, but they do not demonstrate whether he was represented by counsel prior to that time. The evidence offered by the State at the enhancement hearing did not establish that Thomas was represented by counsel or had waived the right to

counsel at the time of the prior convictions. We conclude that the evidence was insufficient to prove Thomas' earlier convictions for purposes of sentence enhancement.

[34] Double jeopardy does not attach to habitual criminal enhancement proceedings under Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994). *State v. Nelson, supra*. Because the evidence presented at the enhancement hearing did not establish that Thomas' prior felony convictions were counseled or that he properly waived his right to counsel, it was error for the trial court to find Thomas to be a habitual criminal. We therefore vacate Thomas' sentences and remand the cause to the trial court with directions for a new enhancement hearing and for resentencing following that hearing.

6. Ineffective Assistance of Counsel

[35-37] Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not require dismissal ipso facto. *State v. Dunster, ante* p. 329, 631 N.W.2d 879 (2001). In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *McCracken II*. To prove ineffective assistance of counsel, the defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions. *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

Thomas claims a number of instances in which counsel allegedly failed to provide effective assistance.

(a) Failure to Call Officer Warnock

Thomas claims the testimony of an Officer Warnock would have impeached the credibility of other witnesses for the State and that Thomas' counsel was ineffective in failing to call

Warnock. No reference to Warnock is contained in the trial record, but, rather, it is found in the record of the postconviction hearing. As noted earlier, the only record properly before us is the trial record. Because the record needed to support this assignment of error is not properly before the court, we cannot consider this assignment of error.

(b) Failure to Object to Expert Testimony on Crush Measurements

The accident investigator, Carlson, testified that the crush measurements on White's vehicle translated into an estimated impact speed of 40 to 50 m.p.h. Petitphait testified that he thought White was traveling between 65 and 70 m.p.h. Although the speedometer was stuck at 70 m.p.h., Carlson testified that the speed at which the speedometer stopped is not an accurate indication of the speed at the time of the collision.

This assignment of error is without merit because Thomas has not established any prejudice based on the admission of Carlson's testimony. The exact speed of the vehicle was not a critical fact in Thomas' conviction. Evidence was undisputed that the car jumped a curb and crashed through a brick wall and that White died as a result of head injuries sustained in the crash. The speed at which White was traveling is not a vital element of the case.

(c) Failure to File Motion in Limine to Exclude Testimony of Dr. Bowen Regarding Effect of Injury

The State called Dr. Robert Bowen, who performed an autopsy on White. While Bowen was unable to testify as to the extent of damage to the femoral artery caused by the gunshot, Bowen testified that there would have been significant bleeding if the femoral artery had been damaged. If significant bleeding occurs, the victim can lose consciousness. Thomas claims his counsel should have filed a motion in limine to exclude this testimony. We find this assignment of error to be without merit because Thomas has failed to show that he suffered any prejudice as a result of the testimony.

(d) Failure to Identify Witnesses

Thomas alleges ineffective assistance of counsel because counsel did not ask the trial court to compel King to provide the

name of a companion who was with King when they followed the car in which the shooter left the scene. King had refused to identify his companion. Thomas offered Evans' sworn statement in support of Thomas' first supplemental motion for new trial. In the order denying that motion, the trial court determined that Evans' account differed from King's testimony concerning their activities earlier in the evening, regarding King's position at the time he made his observations of the shooting, and as to events after the shooting.

Evans stated that he and King were drinking beer in the filling station parking lot and were not paying attention to White's car until they heard four or five shots. King testified that he was driving down the street and saw a man run up to a car. Evans testified that King refused to change his statement when Evans challenged him. Evans stated that he and King had consumed between a 6-pack and a 12-pack of beer and possibly a half pint of brandy. Evans also admitted to smoking marijuana but did not recall whether King was smoking marijuana.

We conclude that Thomas has failed to show he was prejudiced by counsel's failure to obtain and offer Evans' testimony at trial. We cannot say that Thomas has demonstrated with a reasonable probability that the result of the proceeding would have been different if counsel had called Evans as a witness. Even if Evans' testimony had been offered at trial, Thomas admitted he was present at the time of the shooting and that he fired into the car four or five times. This error has no merit.

(e) Failure to Object to Causation Instruction and Request Appropriate Intervening Proximate Cause Instruction and Failure to Present Manslaughter Instruction

We have addressed these issues previously and found that the correct instructions were given. Therefore, Thomas has not shown that his counsel was ineffective for failing to object to the instructions given or to request different instructions.

(f) Failure to Elicit Testimony at New Trial Hearing

Thomas complains of his counsel's failure to elicit the testimony of the trial judge and the bailiff at the hearing on the second supplemental motion for new trial. We have found no error in the overruling of this motion for new trial and find no prejudice to

Thomas in his counsel's failure to elicit certain testimony at the hearing on that motion. This assignment of error has no merit.

(g) Failure to Object at Enhancement Hearing

We have concluded that the evidence was insufficient to support a finding that Thomas is a habitual criminal and therefore have vacated the sentences and remanded the cause with directions for a new enhancement hearing and for resentencing. We decline to further consider this assignment of error.

(h) Failure to Move to Strike Testimony of King and Crawford for Refusing to Answer Material Questions on Cross-Examination

We have addressed the issue of King's testimony and will not consider it further as it relates to ineffective assistance of counsel. As to Crawford's testimony, Thomas has not set forth any prejudice as a result of the testimony or any material questions Crawford refused to answer on cross-examination. Crawford repeatedly testified that he could not remember the names of the people who were with him. We conclude that Thomas has failed to prove that he suffered any prejudice from the performance of his attorney in failing to move to strike Crawford's testimony.

7. Postconviction Issues

Thomas asserts three errors by the trial court related to the motion for postconviction relief. On May 9, 2001, this court sustained the State's motion for summary dismissal of Thomas' appeal from the postconviction proceeding, and those issues relating to postconviction are not properly before this court. Thus, they will not be considered.

VI. CONCLUSION

Having found no merit to Thomas' assignments of error except with regard to the sufficiency of the evidence to support a finding that Thomas is a habitual criminal, we affirm the judgment of conviction. However, Thomas' sentences are vacated, and the cause is remanded with directions for a new enhancement hearing and for resentencing.

Affirmed in part, and in part sentences vacated and cause remanded with directions.

McCormack, J., participating on briefs.

CYNTHIA S. PETER, APPELLANT AND CROSS-APPELLEE, V. JAMES B. PETER, APPELLEE AND CROSS-APPELLANT.

637 N.W.2d 865

Filed January 11, 2002. No. S-00-1193.

1. **Modification of Decree: Child Support: Appeal and Error.** 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.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or 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.
3. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
4. **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.
5. **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.
6. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
7. **Child Support.** As a general matter, the parties' current earnings are to be used in calculating child support.
8. **Modification of Decree: Child Support: Appeal and Error.** Normally, the initial determination regarding the retroactive application of a modification order is entrusted to the discretion of the trial court.
9. **Modification of Decree: Child Support: Time.** The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
10. **Child Support.** The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.
11. **Divorce: Modification of Decree: Property Settlement Agreements: Pensions.** Where a party to a divorce action voluntarily executes a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of real and personal property, division of pension benefits, and division of stock will not thereafter be vacated or modified in the absence of fraud or gross inequity.

12. **Fraud.** What constitutes fraud is a matter of fact in each case.
13. ____. Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.
14. **Divorce: Final Orders: Actions.** A decree of dissolution which does not contain a complete adjudication of property rights of the parties does not operate as an absolute bar to the maintenance of an independent action by either of the parties involving such rights.
15. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995), connotes an improper motive or legal position so wholly without merit as to be ridiculous.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John W. Ballew, Jr., of Ballew, Schneider & Covalt, for appellant.

James E. Gordon, of DeMars, Gordon, Olson, Shively & Zalewski, for appellee.

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

HENDRY, C.J.

I. INTRODUCTION

Cynthia S. Peter and James B. Peter were divorced in June 1998. In October 1999, Cynthia brought an action in Lancaster County District Court to modify the decree of dissolution, requesting an increase in James' child support obligation. In January 2000, James filed his own petition to modify, alleging that Cynthia had fraudulently failed to disclose certain assets at the time their marital estate was divided. The district court denied Cynthia's petition for modification and granted James' petition in part. Cynthia appealed, and James cross-appealed.

While the case was on appeal, James filed with the district court a motion to amend the bill of exceptions. The district court denied the motion. James also appeals the district court's refusal to grant his motion to amend the bill of exceptions.

II. FACTUAL BACKGROUND

Cynthia and James were married in 1974 in Lincoln, Nebraska. The marriage was dissolved on June 10, 1998, when

the Lancaster County District Court entered a decree of dissolution, which incorporated the parties' property settlement, custody, and support agreement. In the decree, the district court granted legal and physical custody of the Peters' two children to Cynthia and ordered James to pay a total of $731 per month in child support.

On October 25, 1999, Cynthia filed a petition for modification of the decree of dissolution in Lancaster County District Court. She requested that the district court increase James' child support obligation and apply it retroactively.

On January 6, 2000, James filed his own petition to modify the decree of dissolution, alleging in part that Cynthia fraudulently failed to disclose a transition account she possessed at the time the parties entered into the property settlement agreement. James claimed the account, which was maintained through Cynthia's employer, Bryan Memorial Hospital, was unknown to him at the time the decree of dissolution was entered. James requested that the district court modify the decree to award him one-half the gross value of the account as of June 10, 1998.

On January 25, 2000, Cynthia filed an answer and cross-petition to James' petition to modify. In her cross-petition, Cynthia asked the district court to strike James' petition and award her attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) on the basis that James filed his petition frivolously in order to harass her.

Since the entry of the decree, the parties have also had an ongoing disagreement over the sharing and exchanging of family photographs. The property settlement agreement specifically provided:

> The parties will cooperate in making photographs available for Husband to duplicate at his expense. To the extent there are some duplicates of these photographs, Husband may have them. Husband is also entitled to utilize photographic proofs for purposes of copying and shall return them to Wife after he has made copies.

On January 4, 2000, James filed a motion requesting the district court to order Cynthia to produce all photographs and negatives in her possession and to award James attorney fees. On January 27, the district court granted James' motion to produce

the photographs and negatives, but withheld any ruling on attorney fees pending the trial on the petitions to modify.

Trial was held on August 8, 2000. At trial, James presented evidence of what he alleged to be a mathematical error in the decree of dissolution and the property settlement agreement. James argued that a "transposition error" had occurred when the district court derived the money judgment designed to equalize the division of the Peters' marital estate from numbers found in appendix 2 of the property settlement agreement and then "carried over" a different, incorrect number into paragraph 11 of the property settlement agreement and paragraph 6 of the decree of dissolution. This error allegedly resulted in an overpayment to Cynthia of $2,256.

James also asserted in support of his petition to modify that he spent a sufficient amount of time with his children to create a joint physical custody arrangement, thereby justifying a reduction in his child support obligation from $731 per month to $120.42 per month.

The district court entered its order on November 13, 2000. With respect to Cynthia's petition to modify, the court found that due to the fluctuations in James' annual income, income averaging was an appropriate method under the Nebraska Child Support Guidelines for determining whether there was a material change in circumstances that would require a modification in child support. Utilizing income averaging, the court found that James' monthly child support obligation would increase from $731 per month to $760.27 per month. Since the variation was less than the "10 percent or more" standard at which a material change of circumstances is presumed under paragraph Q of the guidelines, the court denied Cynthia's petition to modify, finding there was not a material change of circumstances.

Concerning James' petition to modify, the district court found that Cynthia had failed to disclose the transition account maintained by her employer at the time of the division of the marital estate. The court determined that the "Gross Vested Transition Account Amount" at the time of the decree of dissolution was $7,640.94. The court ordered Cynthia to pay James $3,820.47, one-half of the gross amount of $7,640.94, with interest from June 21, 1998.

The district court also agreed with James that there was a mathematical error in the decree of dissolution. The court determined that Cynthia had received an overpayment of $2,256 as a result of the error and therefore ordered Cynthia to pay James that amount with interest from June 21, 1998.

The district court, however, found against James on his remaining claims. The court found that a joint custody arrangement did not exist and determined that both parties would be responsible for their respective attorney fees. Cynthia appealed the district court's order on November 16, 2000, and James cross-appealed.

On April 23, 2001, James filed with the district court a motion to amend the bill of exceptions. In his motion, James asked for leave to add a page to exhibit 7, a document describing Bryan Memorial Hospital's policies regarding transition accounts. Exhibit 7, as offered into evidence at trial, contained only the first and third pages of the document.

On May 11, 2001, the district court held a hearing on whether to amend the bill of exceptions. In its order, the court found that the second page was not part of the exhibit as offered at trial and determined it did not have jurisdiction to expand the trial record. James also appeals this determination.

III. ASSIGNMENTS OF ERROR

Cynthia assigns, rephrased and renumbered, that the district court erred in (1) utilizing income averaging in determining whether a material change in circumstances had occurred, (2) determining that there was not a material change in circumstances and refusing to increase and retroactively apply James' child support obligation, (3) modifying the final decree of dissolution to correct a mathematical error, (4) entering a money judgment against Cynthia based on the finding that her transition account through Bryan Memorial Hospital was an asset that was not disclosed at the time the decree of dissolution was entered, and (5) failing to find under § 25-824 that James' petition for modification was frivolous and brought in bad faith.

In his cross-appeal, James assigns, rephrased and renumbered, that the district court erred in (1) failing to award attorney fees resulting from James' motion to require Cynthia to

produce family photographs, (2) finding that a joint custody arrangement did not exist, and (3) denying James' motion to amend the bill of exceptions.

Finally, James argues in his brief that this court should award him attorney fees on appeal resulting from his motion to amend the bill of exceptions.

IV. STANDARD OF REVIEW

[1] 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. *Wagner v. Wagner, ante* p. 924, 636 N.W.2d 879 (2001).

[2] 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.*

[3] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

V. ANALYSIS

1. Modification of Child Support

(a) Income Averaging

In her petition to modify, Cynthia claimed that a material change of circumstances had occurred with respect to James' income which required an increase in James' child support obligation. Prior to the divorce, James worked as an administrator at the Nebraska Heart Institute, where he received a salary in excess of $90,000 in 1995, and over $100,000 in 1996. In 1997, he began working on commission as a stockbroker. According to James' evidence, his gross annual earnings from commissions were $36,492 in 1997, $30,814.31 in 1998, $62,098.64 in 1999, and $43,470.38 as of July 15, 2000. James' and Cynthia's 1997 earnings were used to calculate James' child support obligation in the decree of dissolution entered June 10, 1998.

At the trial in August 2000, Cynthia contended that the district court should calculate child support based on the current earnings of the parties—either the 1999 actual earnings or the 2000 annualized earnings—in determining whether a modification of child support was warranted and, if so, the amount of any increase. Utilizing these income figures, Cynthia claimed James' child support obligation would increase from $731 per month to either $1,027.09 (1999 earnings) or $1,101.48 per month (2000 annualized earnings). Either calculation would exceed the "10 percent or more" standard at which a material change of circumstances is presumed under paragraph Q of the Nebraska Child Support Guidelines.

James, however, argued that due to fluctuations in his annual and monthly income, income averaging should be used to calculate any modification in child support. He proposed averaging his annual income from 1997, 1998, and 1999 to determine his average annual salary. Under James' calculations, his child support obligation would increase from $731 per month to $760.27 per month. The district court adopted James' calculations.

Paragraph Q of the Nebraska Child Support Guidelines states:

> Modification. Application of the child support guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

Neither party disputes that the district court's use of income averaging led to the court's finding that a variation by 10 percent or more did not exist, and ultimately to the determination that there was not a material change of circumstances. Therefore, in order to determine whether the district court abused its discretion in this finding, it is necessary to determine whether income averaging was appropriate given the facts of this case.

The Nebraska Child Support Guidelines specifically allow for income averaging in certain circumstances. Worksheet 1, the fifth footnote listed (footnote 5), states, "In the event of substantial fluctuations of annual earnings of either party during

the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet."

This case presents the first opportunity for this court to apply the specific language of footnote 5. Under our de novo review, the question is whether James experienced "substantial fluctuations of annual earnings . . . during the immediate past 3 years."

[4] We first note that "[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." (Emphasis supplied.) *Noonan v. Noonan*, 261 Neb. 552, 559, 624 N.W.2d 314, 321 (2001). Accord, *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001); *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). Footnote 5 does not alter this longstanding principle.

The Peters' decree of dissolution was entered in 1998. In determining whether a material change of circumstances occurred subsequent to the decree, the district court considered James' 1997 earnings which had previously been used to calculate child support in the 1998 decree. Since James' 1997 earnings were not subsequent to the entry of the decree, we find the district court abused its discretion in using those earnings to determine whether a material change of circumstances had occurred.

[5] Our determination that the district court abused its discretion in considering James' 1997 earnings requires reversal, so it is not essential that we reach the merits of Cynthia's argument that income averaging was inappropriate on the facts of this case. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). Because the issue of income averaging is likely to recur upon remand, we proceed to address the issue.

According to the evidence provided by James, his income from 1998 to 2000 reveals this pattern: $30,814.31 in 1998; $62,098.64 in 1999; and approximately $80,000 in 2000 (projected estimate based on income as of July 15, 2000). There was

no evidence in the record that suggested James' current rate of earnings would decrease in the remaining months of 2000 or thereafter. In fact, James testified that his current employer had told him that after 5 or 6 years, he might achieve his previous level of compensation at the Nebraska Heart Institute. We find that James' annual earnings show a clear pattern of consistently increasing income.

[6] Other courts have found that the use of income averaging is inappropriate when the obligor's income is consistently increasing. See, e.g., *Schaeffer v. Schaeffer*, 717 N.E.2d 915 (Ind. App. 1999); *Mahoney v. Mahoney*, 538 N.W.2d 189 (N.D. 1995). In *Schaeffer*, the court found that income averaging in such a situation gives the spouse, in this case James, a "windfall that deprives [his children] of 'the same standard of living [they] would have enjoyed had the family remained intact.' " See *id*. at 918 (quoting *Perri v. Perri*, 682 N.E.2d 579 (Ind. App. 1997)). We agree, and determine that it is not in the best interests of the children to allow income averaging when James' income is consistently increasing. "The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child." *Noonan v. Noonan*, 261 Neb. 552, 567, 624 N.W.2d 314, 327 (2001). Accord *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Accordingly, we find that in this case it would be an abuse of discretion for a district court to use income averaging upon remand.

[7] In calculating child support, we have stated that "as a general matter, the parties' current earnings are to be used." *Shiers v. Shiers*, 240 Neb. 856, 860, 485 N.W.2d 574, 577 (1992). We find no reason to deviate from this principle under our de novo review of this record and determine that on remand, the district court should use the parties' current earnings as found in this record in calculating James' child support obligation.

(b) Retroactive Modification

[8] Cynthia also argues that any increase in James' child support obligation should be retroactively applied. Normally, the initial determination regarding the retroactive application of a modification order is entrusted to the discretion of the trial court.

Sears v. Larson, 259 Neb. 760, 612 N.W.2d 474 (2000). However, the district court did not modify the child support obligation in its modification order, so "the determination regarding retroactivity is left to this court based on our de novo review of the record." *Noonan*, 261 Neb. at 567, 624 N.W.2d at 326.

[9] "[T]he rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification." *Id.* at 567, 624 N.W.2d at 326-27. James asserts that the equities of his current situation should prevent application of this rule. Specifically, James contends that retroactive modification would be unfair since he is not delinquent on his child support payments and is not trying to avoid his support obligations. James argues that an order to pay retroactive child support payments in addition to his current obligations would substantially burden his finances.

[10] We view James' current circumstances in light of the best interests of the children.

> The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the children. [Citations omitted.] The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.

Pursley v. Pursley, 261 Neb. 478, 482-83, 623 N.W.2d 651, 654 (2001). In *Riggs v. Riggs*, 261 Neb. 344, 356, 622 N.W.2d 861, 870 (2001), we recognized that "[t]here are circumstances, for example, when a noncustodial parent may not have the ability to pay retroactive support and meet current obligations."

James has been steadily employed since the time of the divorce. His earnings in 1999 exceeded $60,000, and his annualized 2000 earnings are approximately $80,000. Additionally, James testified that his current net worth is "approximately a half a million dollars." Based on our de novo review of the record, we determine that the equities of James' current situation do not warrant a deviation from the general rule enunciated by this court in *Riggs v. Riggs, supra*, and *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). We find that any increase in

James' child support obligation ordered by the district court should be retroactively applied to November 1, 1999, which is the first day of the month following the October 25, 1999, filing date of the application for modification.

2. Modification of Decree for "Mathematical Error"

[11] Cynthia argues in her next assignment of error that the district court erred in modifying the decree of dissolution to correct a mathematical error in the original money judgment designed to equalize the division of the Peters' marital estate. The district court entered the decree of dissolution in 1998, and neither James nor Cynthia appealed.

> [W]here a party to a divorce action voluntarily executes a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of real and personal property, division of pension benefits, and division of stock will not thereafter be vacated or modified in the absence of fraud or gross inequity.

Reinsch v. Reinsch, 259 Neb. 564, 568-69, 611 N.W.2d 86, 90 (2000).

[12,13] James contends the mathematical error was "due to neglect on the part of the parties, counsel, and the court," and constituted fraud or gross inequity. Brief for appellee at 22. This court has previously determined that " 'what constitutes fraud is a matter of fact in each case.' " *Peters v. Woodmen Accident & Life Co.*, 170 Neb. 861, 870, 104 N.W.2d 490, 497 (1960). We have also stated that " '[f]raud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.' " *Pasko v. Trela*, 153 Neb. 759, 762, 46 N.W.2d 139, 143 (1951).

A mathematical error occurring as a result of "neglect on the part of the parties, counsel, and the court" does not, under our de novo review of this record, constitute fraud. James had the opportunity to review the property settlement agreement and divorce decree, and he was represented by counsel throughout. Any alleged error was present in the decree from the outset. Furthermore, assuming the existence of the mathematical error, an error of $2,256 under this record does not constitute gross

inequity when viewed in light of the Peters' combined marital assets that totaled more than $600,000 at the time of the decree. In our de novo review of the record, we determine that James has failed to establish fraud or gross inequity. Having so determined, we find the district court abused its discretion in modifying the decree of dissolution to correct the mathematical error.

3. Transition Account

Cynthia also argues that the district court erred in its findings regarding the transition account maintained by her employer at the time of the Peters' divorce. She asserts that the transition account was disclosed to James at the time of the divorce.

As discussed previously, a property settlement agreement which has become final generally cannot be vacated or modified "in the absence of fraud or gross inequity." *Reinsch*, 259 Neb. at 569, 611 N.W.2d at 90. James contends that the district court was correct in modifying the decree of dissolution and awarding him one-half of the transition account because Cynthia's failure to disclose the account "constitute[d] fraud on her part." Brief for appellee at 21.

Our review of the record, however, shows that the existence of the transition account was not withheld from James. James received copies of Cynthia's pay stubs during pretrial discovery in the original divorce proceedings, and furthermore, Cynthia's pretrial memorandum identified "Current wage stubs" as an exhibit. These pay stubs listed the transition account and its current balance. In our de novo review, we find nothing supporting James' claim that Cynthia purposely tried to hide the existence of the account.

[14] James alternatively argues that even if the transition account was disclosed, it was not a part of the original property settlement that was incorporated into the decree of dissolution. He cites *Buhrmann v. Buhrmann*, 231 Neb. 831, 835, 438 N.W.2d 481, 484 (1989), for the proposition that "a decree of dissolution which does not contain a complete adjudication of property rights of the parties does not operate as an absolute bar to the maintenance of an independent action by either of the parties involving such rights." *Buhrmann* does not apply here. James and Cynthia signed the property settlement agreement

which stated that "wife and husband completely waive all right, claim or interest in property of the other and in the estate of each other . . . and that said waiver was made with full knowledge and fair disclosure of the nature and extent of the respective property in the estate of each party." In our de novo review of the record, we determine the transition account was disclosed to James and covered by the property settlement agreement. Accordingly, we find that the district court abused its discretion in modifying the decree of dissolution to award James $3,820.47 based on the alleged value of the account.

4. Attorney Fees

In her fifth assignment of error, Cynthia contends the trial court erred in failing to award her attorney fees pursuant to § 25-824. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001); *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

[15] Specifically, Cynthia argues that the district court erred in failing to find that James' petition to modify was frivolous under § 25-824(2). The term "frivolous," as used in § 25-824(2), connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999). The fact that the district court found merit in some of James' contentions supports our finding that James' petition was not so wholly without merit as to be ridiculous. See *id.* at 94, 588 N.W.2d at 826 ("Daily's petition in error in the district court was certainly not frivolous. The fact that Daily prevailed in the district court is ample evidence of that fact"). The district court did not abuse its discretion in denying Cynthia's request for attorney fees.

5. James' Cross-Appeal

James argues in his cross-appeal that the district court erred in not awarding attorney fees for expenses he incurred in obtaining the order regarding the production of family photographs. While James prevailed in his motion to produce the photographs, "we note in our de novo review of the record that the road to the . . .

hearing was not entirely smooth on the part of either party." *Riggs*, 261 Neb. at 358, 622 N.W.2d at 870. The record shows that both parties were dissatisfied with the manner in which the photographs were being exchanged. Furthermore, the district court heard and observed the parties at the hearing on James' motion, and we cannot say, based on this record, that the district court abused its discretion in not awarding attorney fees to James. See *id.*

We have also reviewed James' remaining assignments of error regarding the district court's failure to find the existence of a joint custody arrangement and its denial of his motion to amend the bill of exceptions. Upon our de novo review of the record, we determine that these assignments of error are without merit.

Additionally, James requests attorney fees on appeal resulting from his motion to amend the bill of exceptions. Having determined that James' assignment of error regarding the bill of exceptions is without merit, we likewise find that James is not entitled to attorney fees.

VI. CONCLUSION

For the foregoing reasons, the order of the district court modifying the decree of dissolution is affirmed in part, and in part reversed, and remanded for further proceedings consistent with this opinion. In addition, Cynthia filed a motion for attorney fees incurred in this appeal pursuant to Neb. Ct. R. of Prac. 9F (rev. 2001). We grant this motion and award Cynthia attorney fees in the amount of $3,000 together with costs in the sum of $463.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

KIMBERLY VOGEL, APPELLANT AND CROSS-APPELLEE, V. BRADLEY VOGEL, APPELLEE AND CROSS-APPELLANT.

637 N.W.2d 611

Filed January 11, 2002. No. S-01-234.

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 the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
3. **Divorce: Child Custody: Courts.** Pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1998), a district court may in certain circumstances obtain and retain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child.
4. **Child Custody: Courts.** A trial court may properly take temporary custody of a child when it is unsure either parent is fit.
5. **Judgments: Final Orders.** If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. 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.
6. **Parent and Child: Visitation.** A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
7. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
8. **Modification of Decree: Child Custody.** Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. Nevertheless, such a move when considered in conjunction with other evidence may result in a change of circumstances that would warrant a modification of the decree.
9. **Child Custody.** In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child.
10. ____. 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.
11. ____. A move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal.
12. **Child Custody: Visitation.** 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 arrangements.
13. **Child Custody: Appeal and Error.** 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, an appellate court should consider several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the custodial 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 children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.

14. **Child Custody.** While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.
15. **Divorce: Witnesses.** Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to hear their testimony depends upon the circumstances of the case.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, reversed and remanded in part, and in part vacated.

Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Kimberly Vogel appeals, and Bradley Vogel cross-appeals, from the order of the district court for Sarpy County which modified the parties' decree of dissolution. Kimberly, the custodial parent, was granted permission to permanently remove the parties' children from Nebraska to Virginia so that she could accompany her new husband, who was transferred from Offutt Air Force Base in Nebraska to Washington, D.C. The district court denied Bradley's cross-petition for change of custody. In its order, the district court also took legal custody of the parties' children; provided for annual transfer of physical custody of the children between the parties in the event Kimberly's husband, who is in the U.S. Air Force, is transferred overseas; awarded visitation rights to Bradley; required Kimberly to pay all travel expenses for such visitations; and provided for an alternate visitation schedule to take effect in the event Kimberly and Bradley establish residences within 50 miles of one another at any time in the future. We affirm in part, in part reverse and remand, and in part vacate certain portions of the decision of the district court.

II. STATEMENT OF FACTS

Bradley and Kimberly were married in 1988 and were divorced pursuant to a decree of dissolution entered July 25, 1997. Two children were born during the marriage, Brandon, born April 30, 1989, and Chelsea, born September 28, 1991. Prior to the modification proceedings which give rise to this appeal, legal custody and physical possession of the two children were given to Kimberly, subject to reasonable and liberal visitation by Bradley.

Subsequent to the dissolution of the parties' marriage, Kimberly began a relationship with Kent Butler, a master sergeant in the U.S. Air Force. When they began their relationship, Butler was stationed at Offutt Air Force Base. Fourteen months into the relationship, Butler was transferred to Washington, D.C., a transfer which Butler unsuccessfully resisted. Despite Butler's transfer, the relationship continued, and he and Kimberly were married on April 21, 2000.

On March 22, 2000, Kimberly filed an application to modify the decree of dissolution, requesting permission to permanently remove the children from Nebraska so that she and the children could move to Virginia to reside with Butler. On May 2, Bradley answered, denying that removal was in the best interests of the children. Bradley cross-petitioned for a change of custody to him and an order directing Kimberly to pay child support. The district court appointed a guardian ad litem on behalf of the children on May 16.

Trial was held August 23, 2000. At trial, both Kimberly and Bradley presented evidence which they assert supported their respective positions on removal and custody. Kimberly testified that the children got along well with her and were happy living with her. She testified to facts which illustrated her caregiving. She testified that she and Butler could provide a good home and, by combining their incomes, could provide a good standard of living for the children in Virginia. Kimberly also testified that in addition to court-ordered visitation, she and Butler expected to return to Nebraska periodically to visit extended family and that she anticipated that the children would see Bradley on these occasions. Bradley testified that he had exercised frequent visitation with the children since the divorce and that he was actively

involved with them during such visitation. Bradley testified that his extended family, including his two brothers, their children, and his parents lived in the Omaha area and that the children had close relationships with such extended family. Bradley testified to certain incidents which he asserts illustrated Kimberly's improper caregiving. Kimberly disputed this testimony.

The report of the guardian ad litem was also entered into evidence. The guardian ad litem concluded in her report that Kimberly appeared to have a legitimate reason for requesting removal and that "[t]here does not appear to be any strong evidence to suggest why the children should be removed from their mother's care and placed into their father's care at this time." The guardian ad litem also noted in her report that while Kimberly had not voiced complaints to her regarding Bradley, Bradley had multiple complaints with regard to the quality of Kimberly's caregiving. The guardian ad litem testified at trial, and in response to a question regarding such complaints, the guardian ad litem acknowledged that Bradley's objections might have been motivated by hostility and that "[h]e struck me as angry."

The district court entered its order October 2, 2000. The district court denied and dismissed Bradley's application for change of custody and sustained Kimberly's application for leave to remove the children from Nebraska subject to certain conditions, including the following, as listed under paragraph 2 of the court's order:

A. The district court retained continuing jurisdiction over and assumed legal custody of the children, while ordering that Kimberly retain primary possession subject to Bradley's right of reasonable visitation.

B. Kimberly was granted leave to remove the children to Virginia, but could not permanently remove the children to a state other than Virginia or Nebraska or to a location outside the United States without further order of the district court.

C. In the event Butler is ever transferred to a location outside the United States and Kimberly elects to join him at such location, the district court ordered that the following would then apply:

> (1) Kimberly would be required to remain in the United States and keep the children enrolled in their then current schools until they were released from school;

(2) possession of the children would then be transferred to Bradley for a period of 1 year;

(3) possession of the children would then be transferred to Kimberly for a period of 1 year;

(4) possession of the children would then be transferred to Bradley for a period of 1 year;

(5) possession of the children would then be returned to Kimberly.

D. While the children were residing in Virginia, a visitation schedule for Bradley was set which included, inter alia, "[t]he summer school break, except for the first and last five days thereof, each year," and Kimberly was required to pay the children's travel expenses associated with visitation.

E. In the event Kimberly and Bradley establish residences within 50 miles of one another at any time in the future, then the visitation schedule set forth in the October 2, 2000, order would become ineffective and the visitation schedule set forth in the district court's prior order of November 23, 1998, would again become effective.

On October 11, 2000, Kimberly moved for a new trial challenging (1) the district court's assumption of legal custody of the children, (2) the provision of the order which becomes effective on the condition that Butler is transferred overseas and she elects to join him, (3) the portion of the visitation schedule which gives Bradley visitation for almost the entire summer school break, and (4) the provision requiring Kimberly to pay all visitation-related travel expenses. In the alternative, Kimberly moved to enter a judgment notwithstanding the verdict (1) deleting the provision under which the district court assumes legal custody of the children, (2) deleting the provision which becomes effective only if Butler is transferred overseas and she elects to join him, (3) modifying the visitation schedule such that Bradley would have visitation during the first half of the summer school break in even-numbered years and during the second half of the summer school break in odd-numbered years, and (4) modifying the provision relating to visitation travel expenses to provide that Bradley be responsible for travel expenses from Virginia to Nebraska and that Kimberly be responsible for travel expenses from Nebraska to Virginia. The

district court overruled Kimberly's motion. Kimberly appealed the order, and Bradley cross-appealed.

III. ASSIGNMENTS OF ERROR

Kimberly asserts in her appeal that the district court erred in (1) taking legal custody of the children from her and placing legal custody of the children in the district court when neither she nor Bradley had been shown to be unfit, (2) providing for an annual transfer of possession which would take effect in the event that Butler is transferred overseas and Kimberly elects to join him, (3) awarding Bradley visitation for almost the entire summer school break, (4) requiring Kimberly to pay all travel expenses associated with visitation, and (5) establishing an alternate visitation schedule in the event Kimberly and Bradley establish residences within 50 miles of one another at any time in the future.

In his cross-appeal, Bradley asserts that the district court erred in (1) failing to change custody from Kimberly to him, (2) permitting Kimberly to remove the children from Nebraska to Virginia, (3) failing to compute reasonable child support to be paid by Kimberly to him, and (4) denying Bradley the right to call the children to the witness stand to testify regarding their preferences.

IV. STANDARD OF REVIEW

[1,2] 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. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

V. ANALYSIS

1. Appeal

(a) District Court Assuming Legal Custody of Children

Kimberly claims that the district court abused its discretion by taking legal custody of the children without a showing that

she or Bradley was unfit. Prior to these modification proceedings, the district court had awarded legal custody to Kimberly.

In its October 2, 2000, order, the district court did not explain its reasons for assuming legal custody of the children. A review of the bill of exceptions shows that at trial, the district court commented that it was going to take legal custody of the children so that "the Uniform Child Custody [Jurisdiction] Act [Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1998)] will not apply" and that "all further proceedings involving these children will take place in this court."

[3] In *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), this court found that pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1998), a district court may in certain circumstances obtain and retain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child. We stated in *Ensrud* that

> "[w]hen the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court . . . .
>
> "It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing."

230 Neb. at 725, 433 N.W.2d at 196 (quoting *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975)).

[4] In *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled in part on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999), this court concluded that the trial court was not required to determine that both parents were unfit before taking custody of a child. Instead, this court concluded in *State ex. rel. Reitz* that "[t]he trial court

properly took temporary custody of the child when it was unsure either parent was fit." 244 Neb. at 983, 510 N.W.2d at 300.

In the present case, the district court neither found both parents to be unfit nor indicated that it was unsure whether either parent was fit. At trial, the district court stated that "it's clear that both of these parents are good parents to some extent, and to some extent they leave a little bit to be desired about the way they're interacting with each other." We do not read this comment to be a finding of unfitness or questionable fitness as required under *State ex rel. Reitz*. The district court further stated at trial that it had some concerns regarding the effect of removal on the children, "plus the fact that the new spouse may be transferred or have an assignment somewhere else where we're going to [be] back in here again."

We conclude that the district court abused its discretion by assuming legal custody of the children in the present case. Our de novo review of the record does not reveal that either parent is unfit or of questionable fitness. Instead, the record shows that the district court assumed legal custody of the children because it was concerned about the effect of removal or the possibility of further moves which may be required by Butler's employment. The record indicates that the district court was concerned that if any further modifications were required, such modifications should be made by it rather than by a court in another jurisdiction. Such concerns about potential issues do not justify the district court's present assumption of legal custody of the children. See *State ex rel. Reitz v. Ringer, supra*. We therefore reverse that portion of the district court's order in which it assumed legal custody of the children and, for the reasons explained *infra*, remand with directions to return legal custody of the children to Kimberly.

(b) Conditional Orders Regarding Physical Possession and Visitation

Kimberly claims that the district court abused its discretion by entering orders which would become effective upon the occurrence of certain conditions. Specifically, the district court (1) ordered a new schedule for physical possession of the children in the event Butler is transferred overseas and Kimberly elects to join him and (2) ordered a new visitation schedule in

the event Kimberly and Bradley establish residences within 50 miles of one another.

[5] We have stated that if a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001). 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. *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000); *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995).

The provision contained in paragraph 2C of the district court's October 2, 2000, order concerns custody matters in the event Butler is transferred overseas and Kimberly elects to join him, and the provision contained in paragraph 2E concerns visitation matters in the event Kimberly and Bradley establish residences within 50 miles of one another. We conclude that such orders are conditional in that they do not "perform in praesenti" and become effective only upon the happening of certain future events which may or may not occur. Whether such orders will ever become effective is speculative. The impact of such potential events on the children's best interests and the proper judicial response to the potential events identified in the orders complained of are better assessed at the time of their occurrence.

The provisions complained of in paragraphs 2C and 2E of the district court's order of October 2, 2000, are void and severable from the valid portion of the order. See *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). We therefore order such portions of the district court's order vacated.

(c) Visitation Schedule and Travel Expenses

Finally, Kimberly claims that the district court abused its discretion in entering certain orders regarding visitation. Specifically, she objects to those portions of the October 2, 2000, order giving Bradley visitation for almost the entire summer school break and requiring her to pay all costs of travel associated with visitation.

In her arguments regarding summer visitation, Kimberly cites to *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), a removal case in which this court found to be reasonable

a visitation schedule which gave the noncustodial parent a 6 weeks' summer visitation. Kimberly asserts that "[a]nything more constitutes an abuse of discretion." Brief for appellant at 11. However, in *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998), we affirmed a visitation schedule which gave the noncustodial parent a summer visitation commencing 1 week after the beginning of the summer break and terminating 1 week before the conclusion of the summer break. In neither *Farnsworth* nor *Bondi* did we state that only a certain mathematical amount of visitation could be considered reasonable, and we decline to do so now. Instead, the determination of reasonableness is to be made on a case-by-case basis.

[6] We have said that generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Farnsworth v. Farnsworth, supra*. Given the facts of this case, we conclude that the visitation schedule is reasonable and that the district court did not abuse its discretion in setting the summer visitation schedule. We therefore affirm that portion of the district court's order.

Regarding the challenged provisions of the October 2, 2000, order requiring Kimberly to pay all travel expenses associated with visitation, Kimberly again cites to *Farnsworth* in which the parties were ordered to split travel expenses for certain visitations and the noncustodial parent was required to pay the remaining expenses associated with visitations. Kimberly argues that in a removal situation, given the reduced visitation with the noncustodial parent, the custodial parent typically bears a greater economic burden in supporting the children and that it is unfair to further impose the entire economic burden of visitation on the custodial parent. Kimberly claims that the order imposing travel expenses on her was meant to "punish the custodial parent for being the one 'who has chosen to move these children' " and that the district court abused its discretion in making such order. Brief for appellant at 13.

As with other visitation determinations, the matter of travel expenses associated with visitation is 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. As with the summer visitation schedule, neither *Farnsworth* nor any other case sets an immutable standard for the allocation of travel expenses, and instead the determination of reasonableness is made on a case-by-case basis.

We have reviewed the record and note that there was evidence regarding the respective incomes of the parties, and the district court could reasonably have concluded that Kimberly could more readily bear the expenses of travel occasioned by her removal of the children. Such a determination is not a punishment but an arrangement which is within the district court's discretion based on the facts of the case. We conclude that the district court did not abuse its discretion in ordering Kimberly to pay all travel expenses associated with visitation.

2. Cross-Appeal

(a) Modification of Custody, Removal, and Child Support

Bradley cross-appeals and assigns error to the portions of the district court's October 2, 2000, order granting Kimberly permission to remove the children from Nebraska to Virginia, denying his motion to modify custody, and failing to order Kimberly to pay child support to him. Because these three issues are related, they will be discussed together.

[7] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). The party seeking modification of child custody bears the burden of showing such a change in circumstances. *Id.*

[8,9] We have stated that removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. *Id.* Nevertheless, such a move when considered in conjunction with other evidence may result in a change of circumstances that would warrant a modification of the decree. *Id.* In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000).

In his motion to modify custody of the children, Bradley does not assert that such modification is required because Kimberly is unfit, but, rather, that the modification is required because Kimberly has indicated her intention to move to Virginia, proximate to Washington, D.C. Essentially, Bradley contends that it would be in the best interests of the children to remain in Nebraska. The resolution of both Kimberly's motion to remove the children and Bradley's motion for a change of custody depends on a consideration of whether the best interests of the children are served by allowing them to remain in Kimberly's custody and move with her to Virginia or by transferring their custody to Bradley and allowing them to stay in Nebraska.

[10] 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. *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Although the district court in its order did not explicitly discuss legitimate reasons or the best interests of the children in deciding these motions, the district court did grant Kimberly permission to remove the children and therefore implicitly found that she had a legitimate reason and that removal was in the best interests of the children.

[11] Kimberly's asserted reason for leaving the state was to reside with Butler who serves in the Air Force and was restationed to Washington, D.C. We have previously held that a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal. See, *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986). We have further stated:

> " 'If there is a legitimate reason for the custodial parent's decision to leave the jurisdiction, the minor child will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the child to continue to live with that parent. . . . Custody is not to be interpreted as a sentence to immobility.' "

Harder, 246 Neb. at 949, 524 N.W.2d at 328 (quoting *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989)). Following our de novo review, we conclude that the district court did not abuse its discretion in determining that Kimberly had satisfied the threshold issue of showing a legitimate reason for leaving the state.

[12,13] 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 arrangements. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth, supra*. In determining the potential that the removal to another jurisdiction holds with respect to the second consideration regarding enhancing the quality of life of the parent seeking removal and of the children, we have previously evaluated several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the custodial 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 children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). We have stated the list of factors should not be misconstrued as setting out a hierarchy, and depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

With respect to the first consideration involving the motive of each parent in seeking or opposing the move, from our de novo review, we see no conclusive evidence that either party was seeking to frustrate the custodial rights of the other party or was otherwise acting in bad faith.

With respect to the second consideration regarding the quality of life for the children and the custodial parent, Kimberly presented evidence generally to the effect that the move to the Washington, D.C., area where she could reside with Butler would result in a good quality of life for the children by providing educational, cultural, and recreational activities. The prime motive asserted for removal was to enable Kimberly, the custodial parent, to reside with Butler. Kimberly did not claim that the quality of life factors were the driving force behind her desire for removal, nor was she required to prove that the quality of life elsewhere was superior to that in Nebraska. Bradley presented evidence which focused on the children's ties to their community, their extended family in Nebraska, and the fact that the children had expressed concerns about moving.

The consideration before the district court was whether it would be in the children's best interests to move with Kimberly, who is their custodial parent, or to modify custody in order to allow the children to stay in Nebraska. From the record in this case, we conclude that although there were legitimate reasons for the children to remain in Nebraska, they were not compelling, and the district court could reasonably have found that the move with the custodial parent was in the children's best interests.

The third factor to be considered is the impact such removal will have on contact between the children and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. In the present case, it is clear that the distance between Virginia and Nebraska will diminish the amount of contact available between the children and their noncustodial parent. The district court awarded Bradley liberal visitation and almost the entire summer school break. The visitations are to be facilitated by requiring Kimberly to pay all travel expenses associated with visitation. It appears that the district court attempted to minimize the negative impact removal would have on contact between Bradley and the children.

In sum, our de novo review of the record indicates that the district court did not abuse its discretion in granting Kimberly, the custodial parent, permission to move the children from Nebraska and in denying Bradley's motion to modify custody.

Because we affirm the district court's order denying Bradley's motion to modify custody, we do not consider Bradley's assignment of error which claimed that the district court erred when it failed to order Kimberly to pay child support to Bradley.

(b) Testimony of Children

In his cross-appeal, Bradley assigns error to the district court's refusal to allow him to call the children as witnesses to testify as to their preferences in regard to custody and removal. Bradley subpoenaed both children to appear and testify on his behalf at trial. Kimberly moved to quash the subpoenas on the basis that it was not in the children's best interests to be required to appear and testify in a case involving their own custody and for the further reason that the children were not identified by Bradley as potential witnesses during discovery.

At trial, the district court determined that it would not allow Bradley to call the children as witnesses, but allowed Bradley to make an offer of proof. Bradley sought to stipulate that the children would testify that they would want to continue living in Nebraska with him rather than moving to Virginia with Kimberly, but Kimberly declined to so stipulate. Ultimately, the parties did stipulate that if called to testify, the children would testify that they would prefer to continue living in Nebraska. Bradley objected to the district court's decision not to allow the children's testimony, and the district court overruled his objection. Bradley made an offer of proof.

[14] In the present case, the children's preferences were relevant because "the children's opinion or preference as to where to live" is one of the factors to be considered in determining whether to allow removal. See *Brown v. Brown*, 260 Neb. 954, 967, 621 N.W.2d 70, 81 (2000). Furthermore, § 42-364(2)(b) provides that in determining custody arrangements, one of the factors the court shall consider is "[t]he desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning." We have held that while the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration. *Miles v. Miles*,

231 Neb. 782, 438 N.W.2d 139 (1989). See, also, *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986); *Boroff v. Boroff*, 197 Neb. 641, 250 N.W.2d 613 (1977). We observe that in those cases where the child's preference was given significant consideration, the child was typically over 10 years old. At the time of the trial in the present case, Brandon was 11 years old and Chelsea was 8 years old.

[15] Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to hear their testimony depends upon the circumstances of the case. *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990); *Murdoch v. Murdoch*, 200 Neb. 429, 264 N.W.2d 183 (1978). This court has previously considered a district court's ruling on a parent's request to present children's testimony in a custody proceeding. In *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984), the trial court denied the father's request for the court to interview the children, ages 4 and 6, in chambers. We affirmed the trial court's decision for a number of reasons, including the questionable value of such interview unless an adequate record were made and the young and impressionable age of the children entitling their expressions of preference to little if any weight. Moreover, any error in regard to the trial court's denial was waived because the father in *Krohn* made no offer of proof as to what the children were expected to testify.

In *Murdoch v. Murdoch, supra*, the wife called two natural daughters of the husband, ages 13 and 11, as her final witnesses and the trial court declined to hear their testimony. We concluded such refusal was not reversible error because the court had already questioned the two children in the presence of counsel for both parties and such unsworn testimony was in the record. We concluded that additional testimony of the children would not have affected the court's determinations and instead could have had a traumatic and disrupting emotional effect on the children and could have harmed the ultimate custodial arrangement and therefore the best interests of the children.

In *Beran v. Beran, supra*, the mother called the parties' 15-year-old daughter as a witness and the trial court did not allow her to testify. We concluded in *Beran* that the trial court had

erred in its ruling. The mother had made an offer of proof as to the daughter's testimony, and the daughter was not being called to testify regarding her custodial preference but to corroborate her mother's testimony that the mother took care of the family and household duties as best she could when she was home. Such testimony was intended to counteract testimony of various witnesses presented by the father to the effect that the mother was no longer taking care of the family or that her family was no longer a priority to her. In *Beran*, we noted that although courts are rightly wary of placing minor children of a divorce proceeding in the traumatic position of testifying, the trial court should have allowed the daughter's testimony in that case. In *Beran*, the daughter was 15 years old at the time of trial and appeared to have a clear understanding of the proceedings. Her testimony had potential probative value in light of the testimony presented by the father. Although the guardian ad litem had expressed the opinion that the daughter should not testify, we found that such opinion was a broad recommendation and that there was no specific statement as to how the daughter might be detrimentally affected by testifying. We therefore concluded the trial court had committed reversible error in not allowing the daughter to testify for the limited purposes stated.

As a general matter, it has been observed that

> [a] child who is a competent witness under the general rules relating to children as witnesses is a competent witness in an action for divorce. . . .
>
> Although calling children to testify against one of their parents in a divorce case is distasteful and should be discouraged, a court may not prohibit a witness from testifying in a divorce case solely because the proposed witness is [a] child of the parties. Strictly speaking, however, if a child of the parties to a divorce action is called as a witness, the court is not warranted in excluding its testimony for reasons other than those warranting its exclusion generally. The rule applies with particular force where the need for calling the child to testify is imperative; public policy and private views of propriety do not justify a refusal to listen to competent testimony of young children where there is a need for such testimony. A divorce court's

> unwarranted refusal to permit the parties' minor children to testify may constitute reversible error.

24 Am. Jur. 2d *Divorce and Separation* § 379 at 538 (1998).

In the present case, the district court decided it would not permit the children's testimony because it found that such testimony would be cumulative and that it was not in the children's best interests to be required to testify. The parties had stipulated to the children's preferences, and the children's guardian ad litem had testified.

With respect to the move, the guardian ad litem testified that the children "had indicated that if they moved they would miss their father a great deal as well as — they're age appropriately nervous about the idea of going to a new school and leaving friends." She further testified that Brandon was "worried" about the prospect of moving and that "he's indicated that he doesn't want to lose his friends, his family contacts. He'd miss his dad." The guardian ad litem's report states that "[b]oth children indicated that, if they moved to D.C., they would miss their father greatly. They also expressed some concerns regarding leaving friends and starting new schools." In her testimony, the guardian ad litem concluded, nevertheless, that "the children appear to be pretty well-adjusted and could handle a move." With respect to the children's testifying, the guardian ad litem recommended in her report that "[d]ue to these children's young ages and their loyalty bonds to both parents, [she] would strongly object to any effort to have these children testify in court."

We conclude that the district court's decision not to permit the children to testify in the present case was not reversible error. The testimony would have been cumulative because, inter alia, the parties stipulated that the children would prefer to stay in Nebraska. Accordingly, the district court was able to consider the factor of the children's preferences in determining whether removal should be permitted, and thus we cannot say that the district court failed to consider their preferences. In light of the record and the valid concerns connected with requiring these young children to testify regarding their custody in a dispute between the parents, the district court did not commit reversible error in disallowing their testimony.

VI. CONCLUSION

We conclude that the district court abused its discretion when it assumed legal custody of the children and when it entered conditional orders. We conclude that Kimberly's remaining assignments of error and Bradley's assignments of error on cross-appeal are without merit.

The district court's order in which it assumed legal custody of the children is reversed, and we remand the cause to the district court with directions to enter an order returning legal custody of the children to Kimberly. Paragraphs 2C and 2E of the district court's October 2, 2000, order, in which it made conditional orders, are void, and we vacate those portions of the order. We affirm the district court's order in all other respects.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART, AND IN PART VACATED.

McCORMACK, J., participating on briefs.

CONNOLLY, J., dissenting.

The majority opinion concludes that the district court implicitly found that removal was in the best interests of the children because it granted Kimberly Vogel permission to remove the children from the state. This is a generous interpretation. Rather than determining that the relocation was in the children's best interests, the trial court found that removal was an insufficient ground for a change in custody and denied Bradley Vogel's application for a modification of the decree. It then summarily granted Kimberly's request for removal. Neither in its order nor in comments from the bench did the court make any findings regarding the children's best interests.

Trial and appellate courts, in parental relocation cases, deal with the tension created by a mobile society and the problems associated with uprooting children from stable environments. As we stated in *Farnsworth v. Farnsworth*, 257 Neb. 242, 248, 597 N.W.2d 592, 597 (1999), these cases are "among the most complicated and troubling" disputes that courts are asked to resolve. The purpose of multifactor tests is to help courts that must struggle with these difficult issues by pointing out the relevant considerations. Because of the nature of the problem, no test can be perfect. But unless a trial court undertakes to analyze these considerations, its judgment is rendered in a vacuum.

Because the trial court failed to follow the applicable law as set out in *Farnsworth*, I conclude that it was an abuse of discretion to allow Kimberly to relocate the children to Virginia.

Whether a custodial parent should be allowed to remove his or her child from the state is a separate question from whether a change in custody is warranted. There is no presumption favoring or disfavoring relocation. See Neb. Rev. Stat. §§ 42-364(1) and (2) and 43-2902 (Reissue 1998). Rather, when a custodial parent has a legitimate reason to move, the issue must be decided on the children's best interests. *Id*. The trial court's order, apparently premised upon whether a change in custody was justified, failed to properly analyze whether the relocation was in the children's best interests. Reviewing the record de novo, I conclude that it was not. Accordingly, I dissent.

I. RELOCATION ANALYSIS

There are three broad considerations for determining whether removal to another jurisdiction is in a child's best interests: (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 arrangements. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

1. Parents' Motives

I agree that Kimberly has not sought to frustrate Bradley's custodial rights or otherwise acted in bad faith or frivolously. But her desire to reside in Virginia with her husband, Kent Butler, is equally balanced by Bradley's legitimate concerns about the effects a relocation of over 1,000 miles will have on his relationship with his children. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). It is the second and third considerations in the best interests analysis which weigh against relocation.

2. Quality of Life Factors

In *Farnsworth*, we set out a number of factors to "assist trial courts in assessing the second consideration regarding the potential for enhancing the quality of life for the child and the custodial parent." 257 Neb. at 250, 597 N.W.2d at 598. We further

stated that courts were not required to give one factor more weight than any other factor in a given case. *Id*. But that statement should not be construed as authorizing courts to disregard any factor.

In determining the quality of life potential for the relocating parent and children, the following factors are pertinent: (1) the emotional, physical, and developmental needs of the children; (2) the children'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 children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown, supra*.

The majority states that Kimberly presented evidence that the move to the Washington, D.C., area would result in a good quality of life for the children by providing educational, cultural, and recreational activities. The majority opinion further states that Kimberly was not required to prove that the quality of life elsewhere was superior to that in Nebraska. I disagree. The factors we set out in *Farnsworth v. Farnsworth*, 257 Neb. 242, 250, 597 N.W.2d 592, 598 (1999), were specifically intended to "assist trial courts in assessing . . . the potential for *enhancing* the quality of life." (Emphasis supplied.) To "enhance" is to "raise to a higher degree; [or] intensify." Webster's Encyclopedic Unabridged Dictionary of the English Language 474 (1989). Therefore, in order to have the quality of life consideration weighed in her favor, Kimberly had to show that the relocation would improve the quality of life for the children and herself when all eight factors are considered as a whole. Although educational, cultural, and recreational activities are not the only factors that a court may consider, Kimberly has failed to demonstrate that their quality of life would be enhanced by the move.

(a) Existence of Educational Advantages

Kimberly stated that she and Butler wished to find a home in Fairfax, Virginia, because she believed that the city has a good

school system. She stated that she had seen the curricula for the schools, but she did not present any evidence to show that the Fairfax schools were superior to the children's current school. In *Farnsworth*, we stated that generalized research is not compelling in determining whether one school system is superior to a Nebraska school system. This factor weighs neither for nor against the relocation. See *id*. See, also, *Brown, supra*.

(b) Improvement of Housing or Living Conditions

(i) Living Conditions

Kimberly testified that she and the children had enjoyed many recreational activities together while in Papillion. The children were also involved in organized sports, dance, and other activities. She stated that, if allowed to move, the children would be close to the ocean, historical sites, and museums. But she did not claim that these opportunities were superior to those available in Nebraska. Rather, the statements were made to support her contention that the recreational and cultural opportunities were not inferior to those available in Nebraska.

We have specifically stated that "the dispositive question is not where the children will have more fun, but where the living conditions will further their best interests. Simply put, the considerations one includes when choosing a vacation destination are not necessarily the same as those included when deciding where to raise a child." *Brown v. Brown*, 260 Neb. 954, 969-70, 621 N.W.2d 70, 82 (2000). Based on the record, cultural and entertainment opportunities do not show that the Washington, D.C., area is a preferable place to live. See *id*.

Furthermore, because Kimberly had not obtained employment or housing at the time of the hearing, she was unable to say what the children's schedule or childcare needs would be before or after school. She stated that Butler would be able to pick the children up from school on the days that he worked until 2 p.m., but she admitted that he sometimes worked until 6 p.m. and that she was uncertain what the commute time would be for either herself or Butler. In contrast, the children's neighborhood school in Papillion provided before-and-after-school daycare, and Kimberly was able to rely on Bradley's parents to care for the children when they were sick.

(ii) Housing

Kimberly testified that comparable housing was available but would cost approximately $500 to $600 per month more than in Nebraska. Under similar facts, we have held that the fourth factor did not weigh for or against relocation and did not factor into our de novo review. See *id*.

(c) Strength of Children's Ties to Present Community and Extended Family

The majority opinion states that Bradley presented evidence which focused on the children's ties to their community, their extended family in Nebraska, and the fact that the children had expressed concerns about moving. The majority concludes that while there were legitimate reasons for the children to remain in Nebraska, they were not compelling. I disagree.

Bradley testified that the children are very close to his parents and extended family. He usually stopped to visit his parents with the children when he had custody, and the children were with his extended family every holiday. Bradley's mother testified that she saw the children once or twice a week and on every holiday and special occasion and that the children called her at least once a week. Two other witnesses also testified to the children's close relationship with Bradley's parents. Brandon's cousin was also his best friend. Finally, Chelsea and Brandon, who were in the fourth and sixth grades, respectively, at the time of this hearing, had attended the same school in Papillion all of their lives.

In contrast, the children do not have extended family in Virginia or the stability that comes from the long-established social relationships in their school and community. Given the strength of the family and community ties in Nebraska, this factor weighs against relocation.

(d) Children's Opinions or Preferences as to Where to Live

The parties stipulated that if the children were allowed to testify, they would say that they preferred to continue living in Papillion. Although a child's wishes are not controlling, they are relevant and weigh against removal in this case. See *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984) (affirming district court's denial of motion for removal to Colorado in which court strongly considered children's statements made during in camera

interview; children, ages 11, 10, and 9, wished to remain with family and friends in Nebraska).

A child's preference should be given consideration by the court in acting upon a motion for modification of custody when (1) the issue is whether the child will be moved from the community where the child has lived for most of his or her life; (2) an excellent parent who remains in that community wishes to have the child reside with him or her, and (3) the child, for valid reasons, has expressed a preference to remain in the community. *In re Marriage of Rosson*, 178 Cal. App. 3d 1094, 224 Cal. Rptr. 250 (1986), *disapproved on other grounds, In re Marriage of Burgess*, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996).

The children's desires to remain close to the family and friends they had known all their lives were valid reasons for preferring to remain in Nebraska with Bradley. See *Marez, supra*. Further, the children had extensive interactions with both parents and had lived with the custody arrangement for 3 years at the time of this modification hearing. Their preferences should have been given consideration by the court.

I find the support of this extended family and the strength of the children's desires to remain near this family compelling reasons for the children to remain in Nebraska. Moreover, I cannot conclude that the remaining factors weigh in favor of relocation.

(e) Emotional, Physical, and Developmental Needs of Children

The guardian ad litem's interviews indicated that the children were very loyal to both parents, and she believed it would be in their best interests to have "good contact with both parents on an immediate and frequent basis." Given that Kimberly intended to move, however, she believed that it would be in the children's best interests to remain with Kimberly and Butler.

A court should consider that a custodial parent's remarriage can sometimes strengthen and stabilize a postdivorce family unit. See *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996). The guardian ad litem, however, admitted that she had never met Butler, and Kimberly presented no evidence concerning the children's relationship with him. In addition, Kimberly testified that Butler's assignment at the Pentagon

would last only a little over a year and that he had no control over where he would be assigned after that period.

There was also a question as to the emotional effect the move would have on Brandon. Bradley testified that Brandon had told his cousin he would kill himself if he were forced to move. The guardian ad litem did not believe Brandon would act in a harmful manner if he moved, based on Brandon's counselor's reports. She admitted, however, that she had not followed up on Bradley's concerns about Brandon and that she had only briefly interviewed Brandon. She also testified that Brandon's counselor had reported that Brandon was mildly depressed. She believed that the move—especially to a location over 1,000 miles away—could exacerbate Brandon's depression whether he moved with Kimberly or stayed with Bradley because the move would make close contact with both parents impossible.

At best, the guardian ad litem was able to say that the children were well-adjusted enough to "handle" a move. But given the guardian ad litem's concerns that the children should have close contact with both parents and that the move could heighten Brandon's depression and the possibility of future transfers for Butler, the evidence failed to show that the relocation would enhance the children's emotional, physical, and developmental needs.

(f) Enhancement of Custodial Parent's Income or Employment

Kimberly testified that she had received no replies to her job applications to manage apartment rental property. Although she believed her income would be approximately $8,000 more annually than what she earned in Nebraska, she admitted that her estimate might not be accurate. She stated that she believed the standard of living for herself and her children would be improved by combining her household with Butler's household, but the record does not show Butler's income. Further, the evidence showed that any assumed increase in her income would be at least partially offset by increases in housing costs of approximately $500 to $600 per month. On this record, Kimberly did not show that her income or employment would be enhanced. Compare *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000) (Stephan, J., concurring in result).

(g) Quality of Relationship Between Children and Each Parent

The record shows that both Bradley and Kimberly have a close, nurturing relationship with their children. The guardian ad litem's report and testimony indicated that the children are bonded to both parents and experience positive interactions with each. Kimberly admitted that Bradley had custody of the children more than the time ordered in the decree of dissolution. Although Kimberly testified that Bradley had not taken full advantage of his extended summer visitation, she also stated that she had asked him to pick the children up from daycare when she had scheduling conflicts or needed him to babysit for her.

Bradley submitted a calendar on which he had kept track of the dates he had custody for evenings or overnight visitations. Some of the evenings he had custody were only from 5 p.m., after daycare, until between 8 and 9 p.m., but the evidence showed that he had overnight visitation with his children an average of seven nights per month and had some type of visitation with his children an average of 3½ days out of every week. He also frequently called his children on the days he did not have visitation. In addition, the children attended regular, extended family gatherings at his parents' home. While the children's move to Virginia sustains Kimberly's relationship with the children, its effect on their relationship with Bradley is devastating because the distance involved will make frequent contact impossible.

(h) Summary—Quality of Life

"Under Nebraska law, the burden has been placed on the custodial parent to satisfy the court that he or she has a legitimate reason for leaving the state and to demonstrate that it is in the child's best interests to continue living with him or her." *Brown v. Brown*, 260 Neb. 954, 965, 621 N.W.2d 70, 80 (2000). In affirming this relocation, the majority opinion has relied on Kimberly's evidence that the move to the Washington, D.C., area would enhance the quality of life for the children by providing educational, cultural, and recreational activities. But, in other cases, we have found that similar evidence failed to demonstrate that a relocation would enhance the child's quality

of life. See, *id.*; *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

Conversely, the majority has ignored the children's desires to remain in Nebraska where they have a close relationship with Bradley and strong ties to their extended family and community. As to the remaining factors, the evidence was inconclusive at best and required this court to speculate that the children's quality of life would be enhanced. Preserving the custodial relationship should not always come at the cost of a child's bond with a dedicated noncustodial parent. Because Kimberly has failed to carry her burden of proof that the relocation will enhance the quality of life for the children and herself, the issue should turn on the impact of the move on the contact between Bradley and the children. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

3. Impact of Move on Contact Between Bradley and Children

The final consideration is the impact of the relocation on Bradley's ability to maintain a meaningful relationship with his children. See *Brown, supra*. The relocation to the Washington, D.C., area is over 1,000 miles from Bradley's home. It will dramatically affect Bradley's contact with his children and make it impossible for him to maintain the relationship that he had enjoyed. The distance, expense, and time involved in such travel are appropriately considered in evaluating the degree to which the move would affect Bradley's contact and relationship with his children. See *id*. Although Kimberly has been ordered to pay for the children to visit Bradley in the summer and specified school holidays, the evidence showed that Bradley had extensive physical custody of the children and contacted them by telephone on the days he did not see them. Summer and holiday vacations will not compensate him or the children for this daily interaction.

In addition, Bradley petitioned for custody in this case. A noncustodial parent's interest in securing custody as well as the feasibility of a change in custody are factors to be considered in assessing the impact of a move on the noncustodial parent relationship. See *Farnsworth, supra*. The evidence showed that the children's relationship with Bradley was very close, that they in

fact wished to remain with Bradley, and that their ties to the extended family and community were strong. Both Bradley and the children would have considerable support from his parents and stability from their existing relationships within their community. Bradley's mother stated that she and Bradley's father had provided childcare in the past and could continue to do so whenever needed. Thus, transferring custody to Bradley was a realistic alternative to relocating the children to Virginia.

4. Best Interests of Children

As noted, the district court failed to make any findings to indicate that the relocation would be in the children's best interests. But the court did state that based on evidence from the guardian ad litem, it had concerns about the effect the move would have on the children as well as the effects of Butler's future assignments and transfers. Nevertheless, the trial court ignored these concerns and permitted the relocation.

II. CONCLUSION

Reviewing the record de novo, I conclude that the evidence failed to show that the quality of life for these children would be enhanced by the relocation and that any speculation on this issue was significantly outweighed by the detrimental effects the move would have on the children's relationship with Bradley. I would reverse the decision of the district court allowing the removal of the children.

McCormack, J., joins in this dissent.

Frankie Levi Cole, appellant, v.
Kathy Blum et al., appellees.

637 N.W.2d 606

Filed January 11, 2002. No. S-01-295.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Courts.** It is the court's duty to prevent frivolous proceedings in the administration of justice.
3. **Affidavits.** In forma pauperis access to the courts is generally not a matter of right, but a privilege, and abuse of such privilege should not and will not be permitted.

4. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial.
5. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
6. **Declaratory Judgments: Justiciable Issues.** In a declaratory judgment action, when the named defendant or defendants have no power to affect the plaintiff's rights, such an action fails to present a justiciable controversy.
7. **Statutes: Affidavits.** Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Frankie Levi Cole, pro se.

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

HENDRY, C.J.

INTRODUCTION

On February 28, 2001, the Lancaster County District Court denied Frankie Levi Cole's petition to proceed in forma pauperis, finding that the action was frivolous pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2000). Cole appealed.

FACTUAL BACKGROUND

On January 3, 2001, a prison disciplinary committee at the Nebraska State Penitentiary found Cole, an inmate at the facility, guilty of violating 68 Neb. Admin. Code, ch. 5, § 005II[N] (2000) (failure to work). The committee disciplined Cole by imposing 5 days' room restriction. The decision of the committee was affirmed by the Department of Correctional Services Appeals Board (appeals board).

Cole then filed an action in the Lancaster County District Court entitled "Civil Action Alleging Rights Violations Against Prison Employees," naming the four members of the appeals board, the penitentiary warden, and a penitentiary employee individually by name as defendants.

In his petition, Cole asserted that the action of the disciplinary committee was arbitrary and capricious because Cole was medically unable to perform his assigned work duties due to back problems. Cole then asked the district court to either declare that he has a right under Nebraska law to seek redress from the action of the appeals board or find that Neb. Rev. Stat. § 83-4,123 (Reissue 1999) is unconstitutional in that it does not permit appeals from decisions of the appeals board unless the discipline imposed involves loss of good time or disciplinary isolation. See *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994) (§ 83-4,123 authorizes appeal from decision of appeals board involving loss of good time credit or disciplinary isolation). See, also, *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995) (room restriction not disciplinary isolation under § 83-4,123).

With his petition, Cole submitted a request to proceed in forma pauperis and an affidavit showing that he did not possess the resources to pay the filing fees. The application to proceed in forma pauperis is file stamped February 22, 2001, by the clerk of the court. The underlying petition does not contain a file stamp date or any other indication of when it was received.

On February 28, 2001, the district court, on its own motion, denied Cole's in forma pauperis request as frivolous. The court set out its reasons, findings, and conclusion for determining the petition frivolous in a written order as required by § 25-2301.02(1). Cole appealed. His request to proceed in forma pauperis for purposes of appeal was granted pursuant to § 25-2301.02(2).

ASSIGNMENTS OF ERROR

Cole asserts, rephrased and summarized, that the district court erred in (1) finding that his petition was frivolous and (2) failing to grant leave to amend the petition before denying the motion to proceed in forma pauperis.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2).

ANALYSIS

Cole asserts the district court erred in finding that his petition was frivolous. The appeal presents this court with its first opportunity to consider the dismissal of a petition as frivolous under § 25-2301.02, which statute became effective August 28, 1999.

[2,3] As we noted in *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 856, 580 N.W.2d 95, 98 (1998), "It is the court's duty to prevent frivolous proceedings in the administration of justice." In forma pauperis access to the courts is generally not a matter of right, but a privilege, and "abuse of such privilege should not and will not be permitted." *Id.* at 858, 580 N.W.2d at 99. See, also, *Williams v. McKenzie*, 834 F.2d 152 (8th Cir. 1987) (no inherent right to in forma pauperis status).

Section 25-2301.02 states in relevant part:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. . . . An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. . . . In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

[4,5] Except in those cases where the denial of in forma pauperis status "would deny a defendant his or her constitutional right to appeal in a felony case," § 25-2301.02 allows the court "on its own motion" to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue "a written statement of its reasons, findings, and conclusions for denial." A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.

See *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000) (applying Neb. Rev. Stat. § 25-824 (Reissue 1995)). See, also, *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (action is frivolous if it lacks arguable basis either in law or in fact).

[6] Under our de novo review, we construe Cole's petition as seeking declaratory relief. Cole is asking that the district court either declare Cole's right under Nebraska law to seek redress from the action of the appeals board or find that § 83-4,123 unconstitutionally denies him this alleged right. In *Miller v. Stolinski*, 149 Neb. 679, 684, 32 N.W.2d 199, 202 (1948), we noted that in a declaratory judgment action, when the named defendant or defendants have " 'no power to affect the plaintiff's rights,' " such an action fails to present a justiciable controversy. See, also, *Phillips v. Phillips*, 163 Neb. 282, 79 N.W.2d 420 (1956) (court will not render decree in declaratory judgment action which cannot fully adjudicate question presented). As in *Miller, supra*, the defendants named by Cole have no power as individuals to affect Cole's rights insofar as the constitutionality or appeals process under § 83-4,123 is implicated.

In *Miller, supra*, the plaintiffs brought a declaratory judgment action against the Douglas County assessor and Douglas County treasurer, asserting the Nebraska Community Property Act then in effect was unconstitutional. This court found that the plaintiffs' claim failed to present a justiciable issue because the county assessor and county treasurer had " 'no special interest to oppose the complaint [and] no special duties in relation to the matter which would be affected by any eventual judgment.' " *Id.* at 683, 32 N.W.2d at 202. Cole's petition suffers from the same defect which existed in *Miller*. The individual members of the appeals board, the penitentiary warden, and the penitentiary employee named by Cole as defendants have no special interest or special duties related to the constitutionality or appeals process under § 83-4,123. Therefore, we determine that the petition is without rational argument based on the law, in that it fails to name any proper defendants. The district court did not err in finding Cole's petition frivolous.

Cole next asserts the district court erred in failing to grant leave to amend his petition prior to denying his request to proceed in

forma pauperis. Cole argues that he must be granted leave to amend unless it is clear that no reasonable possibility exists that amendment will correct the defect. In making this argument, Cole is treating his petition as if the district court had sustained a demurrer to the petition for failure to state a claim. See Neb. Rev. Stat. §§ 25-806 and 25-854 (Reissue 1995). See, also, *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

[7] However, this case does not involve a demurrer to a petition under the rules of civil procedure; instead, this case involves a request to proceed in forma pauperis. The procedure for granting in forma pauperis status is set out in § 25-2301.02. This statute contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis. In fact, such a requirement would be contrary to the plain language of § 25-2301.02, which authorizes the court to deny a frivolous request to proceed in forma pauperis summarily by written order. This assignment of error is without merit.

While not dispositive of this appeal, we note that the underlying petition in this case contained no indication from the clerk of the district court regarding when it was received by the court. We take the opportunity to point out that it is incumbent upon the clerk of the court, in cases in which an application to proceed in forma pauperis is filed, to indicate upon the face of the underlying petition when the petition is received by the court. This is necessary in order to address any issues which could conceivably arise concerning the timeliness of the underlying petition.

CONCLUSION

The order of the trial court denying Cole's in forma pauperis application as frivolous is affirmed.

AFFIRMED.

HEADNOTES
Contained in this Volume

Actions 38, 98, 282, 515, 622, 701, 746, 838, 1017, 1058
Adoption 775
Affidavits 77, 672, 985, 1058
Aggravating and Mitigating Circumstances 329
Appeal and Error 2, 17, 23, 38, 51, 60, 66, 77, 85, 98, 129, 138, 147, 160, 171, 179, 185, 205, 215, 235, 247, 263, 282, 292, 299, 311, 329, 373, 387, 411, 423, 443, 467, 481, 493, 515, 530, 551, 562, 578, 598, 607, 615, 622, 632, 639, 648, 653, 664, 672, 688, 696, 701, 714, 733, 740, 746, 761, 775, 787, 793, 800, 812, 824, 838, 853, 866, 871, 879, 886, 896, 908, 917, 924, 930, 940, 951, 961, 975, 985, 1017, 1030, 1058
Arbitration and Award 793
Arrests 98, 714
Arson 866
Attorney and Client 247, 653, 951
Attorney Fees 282, 1017
Attorneys at Law 247, 653

Banks and Banking 423

Case Disapproved 98
Child Custody 179, 373, 871, 1030
Child Support 179, 373, 924, 1017
Circumstantial Evidence 185, 423, 896
Claims 247, 387, 775
Class Actions 622
Complaints 664
Conflict of Interest 247, 329
Consideration 961
Conspiracy 23, 185
Constitutional Law 38, 77, 85, 138, 147, 235, 247, 329, 411, 578, 648, 714, 775, 838, 886, 896, 940, 985, 1058
Contracts 129, 515, 530, 746, 908, 930, 961
Conveyances 961
Convictions 138, 185, 411, 423, 672, 787, 866, 896, 985
Corporations 515
Costs 787
Courts 2, 51, 77, 205, 215, 311, 329, 515, 530, 653, 688, 696, 714, 838, 908, 1030, 1058
Criminal Law 38, 77, 185, 247, 311, 329, 411, 423, 443, 598, 639, 672, 761, 812, 866, 985

Damages 98, 387, 530, 701, 866, 908
Death Penalty 311, 329

Debtors and Creditors 160
Decedents' Estates 493, 824, 838
Declaratory Judgments 147, 515, 746, 930, 1058
Deeds 961
Demurrer 733
Directed Verdict 98, 263, 714, 908
Disciplinary Proceedings 85, 299, 481, 562, 632, 653
Discrimination 985
Divorce 924, 1017, 1030
Double Jeopardy 138, 886, 896, 985
Due Process 38, 329, 411, 598, 714, 775
Duress 940

Effectiveness of Counsel 38, 138, 329, 598, 648, 672, 975, 985
Eminent Domain 235, 615
Employer and Employee 2, 387
Entrapment 185
Equal Protection 775
Equity 171, 235, 515, 714, 775, 961
Escrow 961
Estates 51, 205, 282
Estoppel 530
Evidence 98, 160, 185, 205, 263, 329, 411, 423, 443, 493, 607, 615, 639, 672, 701, 714, 886, 896, 985
Expert Witnesses 215, 263, 607, 615, 985

False Imprisonment 98
Final Orders 129, 247, 467, 622, 1017, 1030
Forgery 423
Fraud 423, 886, 1017

Gifts 51
Guardians and Conservators 51, 282, 871

Habitual Criminals 639, 896
Hearsay 423, 615
Homicide 311, 329, 411, 423, 598, 672, 985

Immunity 2, 23
Independent Contractor 2
Indictments and Informations 598, 664
Injunction 235, 515, 701
Insurance 147, 746, 908, 930
Intent 2, 17, 51, 129, 185, 235, 263, 311, 411, 423, 467, 639, 746, 761, 838, 879, 886, 930, 961
Interventions 60, 824
Investigative Stops 672, 940
Invitor-Invitee 387

Judges 85, 98, 179, 215, 263, 423, 607, 672, 761, 924, 951, 985, 1017, 1030
Judgments 2, 17, 38, 51, 66, 77, 98, 138, 160, 205, 247, 263, 282, 292, 329, 387, 411, 493, 515, 530, 578, 598, 622, 639, 648, 664, 672, 688, 696, 701, 714, 812, 824, 853, 871, 917, 975, 1030, 1058
Judicial Construction 838
Judicial Notice 38
Juries 98, 443, 866, 886, 985
Jurisdiction 2, 60, 247, 292, 622, 688, 696, 714, 746, 824, 871
Jurors 985
Jury Instructions 160, 639, 838, 853, 908, 985
Jury Misconduct 985
Justiciable Issues 1058
Juvenile Courts 60, 871

Legislature 2, 17, 129, 147, 185, 235, 292, 311, 411, 467, 639, 761, 838, 853, 879, 886
Lesser-Included Offenses 598, 639
Liability 23, 160, 467
Licensee 387
Limitations of Actions 622

Master and Servant 2
Minors 871
Modification of Decree 373, 924, 1017, 1030
Moot Question 696
Motions for Continuance 688
Motions for Mistrial 838, 985
Motions for New Trial 98, 160, 838, 908, 985
Motions to Dismiss 701
Motions to Suppress 443, 672, 940
Motor Vehicles 147

Negligence 66, 160, 263, 387, 853
New Trial 98, 985
Notice 292, 329, 423, 775, 961, 985

Other Acts 443

Parent and Child 775, 1030
Parental Rights 871
Parties 160, 247, 622, 688, 775, 787, 824
Paternity 60
Pensions 373, 1017
Plea in Abatement 886
Pleadings 60, 160, 171, 622, 639, 688, 696, 714, 733, 824
Pleas 138, 951
Police Officers and Sheriffs 98, 940
Political Subdivisions Tort Claims Act 2, 23, 66, 263, 387
Postconviction 38, 138, 247, 598, 648, 975

Prejudgment Interest 530
Presumptions 138, 235, 247, 373, 481, 493, 578, 800, 838, 879
Pretrial Procedure 812, 838
Principal and Agent 23, 51
Prior Convictions 639, 896, 985
Probable Cause 672, 886, 940
Probation and Parole 761
Proof 23, 38, 85, 98, 138, 185, 215, 247, 299, 329, 387, 423, 443, 481, 493, 562, 578, 598, 632, 648, 653, 664, 672, 701, 714, 793, 838, 866, 896, 917, 924, 951, 961, 975, 985, 1017
Property 235, 387
Property Settlement Agreements 1017
Prosecuting Attorneys 329, 812, 985
Proximate Cause 387, 985
Public Policy 147, 515, 578, 733
Public Utilities 515

Quiet Title 961

Railroads 235
Real Estate 515, 824, 961
Records 38, 329, 639, 714, 729, 896, 985
Restrictive Covenants 701
Right to Counsel 138, 247, 329, 648, 896, 985
Rules of Evidence 215, 263, 423, 443, 607, 615, 714, 951, 985
Rules of the Supreme Court 179, 373, 729, 838, 924

Search and Seizure 940
Search Warrants 77, 672
Sentences 185, 311, 329, 639, 672, 761, 787, 866, 896, 940, 951, 985
Service of Process 688
Sexual Assault 185
Speedy Trial 664, 917
Standing 247, 775
Statutes 2, 17, 23, 38, 129, 147, 160, 185, 205, 235, 292, 311, 329, 411, 467, 493, 515, 622, 639, 664, 688, 714, 740, 761, 775, 800, 824, 838, 853, 871, 879, 886, 1058
Stipulations 467, 740
Summary Judgment 23, 129, 263, 387, 622, 879, 930, 961
Supreme Court 467, 530

Taxation 235, 292, 578
Termination of Employment 733
Testimony 985
Time 160, 292, 664, 672, 1017
Title 824
Trade Secrets 701
Trespass 387
Trial 160, 215, 263, 387, 443, 607, 615, 672, 714, 787, 908, 985
Trusts 205

Undue Influence 961

Valuation 292, 578
Value of Goods 866
Vendor and Vendee 961
Verdicts 98, 443, 615, 853, 886, 908
Visitation 1030

Waiver 2, 23, 138, 247, 329, 443, 688, 701, 729, 824, 896, 951, 985
Warrantless Searches 672, 940
Warrants 672, 940
Wills 493
Witnesses 98, 247, 493, 1030
Words and Phrases 98, 179, 185, 205, 215, 263, 292, 329, 387, 423, 443, 493, 551, 607, 622, 688, 696, 701, 714, 761, 824, 838, 853, 886, 924, 961, 1017, 1030, 1058
Workers' Compensation 387, 467, 551, 740, 800
Wrongful Death 838