THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JANUARY 18, 2002 and JUNE 6, 2002

IN THE

Supreme Court of Nebraska

VOLUME CCLXIII

PEGGY POLACEK

OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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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 262

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Patricia Ann Givens
Jeffrey Lawrence Goodman
Sarah Gordon
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Amber L. Hegarty
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Brandon Hull
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Laird Moore
Laura L. Neesen
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Glen Thomas Parks
Angela J. Parr
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Scott J. Ricketts
Aaron William Rodenburg
Russell E. Rosenthal
Curtis Ruwe
Shannon J. Samuelson
Nathan Schneider
David Michael Sengstock
Ross E. Stubbelfield
Fini Thomas
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Ashlee L. Waring
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Paul G. Wess
Nathan S. Winesett

TIMOTHY WOLLMER
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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-00-548: **1504 Harney Assocs. v. GHMC, Inc**. Affirmed. McCormack, J.

No. S-00-896: **Sherman v. City of Omaha**. Affirmed. Connolly, J.

No. S-00-1184: **Chojolan v. Armour Food Co**. Reversed and remanded with directions. Gerrard, J. Stephan, J., not participating.

No. S-01-080: **Timmons v. Timmons**. Affirmed. Wright, J.

No. S-01-143: **Baker v. Neth**. Appeal dismissed. Stephan, J.

No. S-01-221: **Waite v. Witthoff**. Affirmed. Per Curiam.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-00-437: **State v. Hernandez-Zepeda**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-00-590: **Morello v. City of Omaha**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-00-748: **Vann v. Houston**. Based upon the appellee's suggestion of mootness filed on February 4, 2002, and finding no compelling reason to apply any exception to the mootness doctrine, including the public interest exception, the Supreme Court concludes that the issues raised in the instant appeal are now moot. Appeal dismissed. See rule 7A(2).

No. S-00-854: **State ex rel. NSBA v. Gallner**. Respondent is reinstated to the practice of law in the State of Nebraska.

No. S-00-1325: **State v. Garcia**. Appeal dismissed as moot for the reason that appellant is no longer a prisoner in custody under sentence. See, rule 7A(2); *Green v. Lore*, 263 Neb. 496, 640 N.W.2d 673 (2002); *State v. Eutzy*, 242 Neb. 851, 496 N.W.2d 529 (1993); *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989); Neb. Rev. Stat. § 29-3001 (Reissue 1995).

No. S-01-023: **R & F Hobbies v. Landis**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-01-088: **State ex rel. Counsel for Dis. v. Gallner**. Respondent is reinstated to the practice of law in the State of Nebraska.

Nos. S-01-203, S-01-204: **State v. Garza**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-01-258: **State v. Herman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-01-432: **SapaNajin v. Clarke**. Appeal dismissed pursuant to rule 7B(1), lack of a final, appealable order.

No. S-01-606: **Cole v. Grabenstein-Chandler**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-01-1288: **Cornhusker Cas. Co. v. Farmers Mutual Ins. Co**. Appeal dismissed pursuant to rule 7A(2) for lack of jurisdiction as there is no final, appealable order.

No. S-01-1408: **State ex rel. Counsel for Dis. v. Huston**. Voluntary surrender of license accepted; judgment of disbarment entered.

No. S-02-017: **Hagan v. Upper Republican NRD**. Appeal dismissed. See rule 7A(2).

No. S-02-021: **State v. Anderson**. Upon court's own motion, cause is summarily affirmed; see rule 7A(1)(d).

No. S-02-022: **State v. Hochstein**. Upon court's own motion, cause is summarily affirmed; see rule 7A(1)(d).

No. S-02-043: **Waite v. Irwin**. Motions of appellees for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-086: **State v. Ortiz**. By order of the court, appeal dismissed for failure to file briefs.

No. S-02-110: **State v. Sherrod**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-246: **Waite v. Dawson**. Motions to dismiss of all appellees granted. Appeal dismissed. See rule 7B(1). Motion for attorney fees of appellees Dawson and Brown denied without prejudice. See rule 9F.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-00-170: **Danhauer v. Youth Dev. Ctr. at Kearney**. Petition of appellee for further review overruled on January 16, 2002.

No. A-00-267: **Cole v. Clarke**. Petition of appellant for further review overruled on February 21, 2002.

No. A-00-421: **City of Lincoln v. Nebraska Pub. Power Dist.**, 10 Neb. App. 713 (2001). Petition of appellant for further review overruled on April 24, 2002.

No. S-00-604: **Giron v. Safeway Store of Alliance**. Petition for further review dismissed as having been improvidently granted. Per Curiam.

No. A-00-606: **Detmer v. Bixler**, 10 Neb. App. 899 (2002). Petition of appellee for further review overruled on May 15, 2002.

No. A-00-649: **State v. Marion**. Petition of appellant for further review overruled on January 24, 2002.

No. S-00-698: **State v. Davlin**, 10 Neb. App. 866 (2002). Petition of appellee for further review sustained on April 10, 2002.

No. A-00-701: **Wyman v. Wyman**. Petition of appellant for further review overruled on March 11, 2002.

No. A-00-729: **Lorenz v. Glidden**. Petition of appellant for further review overruled on January 24, 2002.

No. A-00-786: **State v. Armendariz**. Petition of appellee for further review overruled on May 23, 2002.

No. A-00-813: **Spanyers v. Omaha Steaks International**. Petition of appellant for further review overruled on January 16, 2002.

No. S-00-834: **Smeal v. Olson**, 10 Neb. App. 702 (2001). Petition of appellant for further review sustained on February 21, 2002.

No. A-00-835: **Erikson v. Abels**. Petition of appellee for further review overruled on May 23, 2002.

No. A-00-858: **Dohse v. Solid Waste Agency of NW Neb**. Petition of appellee for further review overruled on January 24, 2002.

No. A-00-880: **Bomar v. Pierce Quality Homes**. Petition of appellee for further review overruled on February 27, 2002.

No. A-00-894: **Boren v. Burlington Northern & Santa Fe Ry. Co.**, 10 Neb. App. 766 (2002). Petition of appellant for further review overruled on April 10, 2002.

No. A-00-897: **Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc.**, 10 Neb. App. 948 (2002). Petition of appellee for further review overruled on May 15, 2002.

No. S-00-928: **Day v. Heller**, 10 Neb. App. 886 (2002). Petition of appellee for further review sustained on April 17, 2002.

No. S-00-929: **Rush v. Wilder**. Petition of appellee Douglas County for further review sustained on February 13, 2002.

No. A-00-981: **Majerus v. Majerus**. Petition of appellant for further review overruled on April 24, 2002.

Nos. A-00-1015, A-00-1016: **Andrews Van Lines v. McCampbell**. Petition of appellant for further review overruled on March 27, 2002.

No. A-00-1031: **Omaha Constr. Indus. Pension Plan v. Children's Hosp.**, 11 Neb. App. 35 (2002). Petition of appellee for further review overruled on May 23, 2002.

No. A-00-1056: **Wright v. Preston Resources, Inc.**, 10 Neb. App. 856 (2002). Petition of appellant for further review overruled on March 27, 2002.

No. A-00-1063: **State v. Hauck**. Petition of appellee for further review overruled on May 15, 2002.

No. A-00-1091: **Stoller v. Northwoods Estates**. Petition of appellant for further review overruled on March 13, 2002.

No. A-00-1124: **Shaul v. Brenner**, 10 Neb. App. 732 (2001). Petition of appellant for further review overruled on February 13, 2002.

No. A-00-1142: **Wright v. Wright**. Petition of appellant for further review overruled on March 27, 2002.

No. A-00-1144: **Unick v. Krull**. Petition of appellant for further review overruled on January 24, 2002.

No. A-00-1146: **Robinson v. NABCO, Inc.**, 10 Neb. App. 968 (2002). Petition of appellant for further review overruled on May 8, 2002.

No. A-00-1232: **In re Guardianship of Daniel G**. Petition of appellant for further review overruled on January 24, 2002.

No. A-00-1268: **State v. Spidel**, 10 Neb. App. 605 (2001). Petition of appellant for further review overruled on February 21, 2002.

No. A-00-1292: **State v. Sobey**. Petition of appellant for further review overruled on May 15, 2002.

No. S-00-1293: **State v. Sobey**. Petition of appellee for further review sustained on May 15, 2002.

No. A-00-1328: **State v. Abbott**. Petition of appellant for further review overruled on February 27, 2002.

No. A-01-027: **State v. Barnes**. Petition of appellant for further review overruled on January 16, 2002.

No. A-01-131: **State v. Kissinger**. Petition of appellant for further review overruled on January 24, 2002.

No. A-01-142: **State v. Smith**. Petition of appellant for further review overruled on May 10, 2002.

No. A-01-154: **Smith v. Goodyear Tire & Rubber Co.**, 10 Neb. App. 666 (2001). Petition of appellee for further review overruled on February 13, 2002.

No. A-01-185: **State v. Hendrickson**. Petition of appellant for further review overruled on February 27, 2002.

No. S-01-195: **In re Interest of Brittany W. & Nathan J**. Petition for further review dismissed as having been improvidently granted. Per Curiam.

No. A-01-205: **State on behalf of Dady v. Snelling**, 10 Neb. App. 740 (2001). Petition of appellant for further review overruled on January 30, 2002.

No. A-01-245: **In re Interest of Johnny A**. Petition of appellant for further review overruled on February 13, 2002.

No. A-01-299: **Barner v. Sunflower Carriers**. Petition of appellee for further review overruled on April 17, 2002.

No. A-01-301: **State v. Davis**. Petition of appellant for further review overruled on January 16, 2002.

Nos. A-01-310, A-01-311: **In re Interest of Tyra C**. Petition of appellant for further review overruled on April 10, 2002.

No. A-01-317: **State v. Dupsky**, 10 Neb. App. 650 (2001). Petition of appellee for further review overruled on February 13, 2002.

No. A-01-323: **Retana v. IBP, inc**. Petition of appellant for further review overruled on March 13, 2002.

Nos. A-01-336, A-01-429: **Cole v. Cole**. Petition of appellant for further review overruled on January 22, 2002.

No. A-01-337: **State v. Taubenheim**. Petition of appellee for further review overruled on April 17, 2002.

No. A-01-338: **State v. Roberts**. Petition of appellee for further review overruled on February 13, 2002.

No. A-01-350: **In re Interest of Kenneth S**. Petition of appellant for further review overruled on April 24, 2002.

No. A-01-375: **State v. Brown**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-337: **State v. Taubenheim**. Petition of appellee for further review overruled on April 17, 2002.

No. A-01-389: **State v. Hill**. Petition of appellant for further review overruled on April 17, 2002.

No. A-01-416: **State v. Matson**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-419: **State v. Hill-Brown**. Petition of appellant for further review overruled on May 21, 2002.

No. A-01-430: **Hawthorne v. Ryan**. Petition of appellant for further review overruled on January 24, 2002.

No. A-01-434: **State v. Harvey**. Petition of appellant for further review overruled on May 23, 2002.

No. A-01-443: **State ex rel. Free The Innocent, Inc. v. Scotts Bluff Cty. Sheriff**. Petition of appellant for further review overruled on April 10, 2002.

No. A-01-466: **In re Interest of Angela P. & Willis P**. Petition of appellant for further review overruled on February 27, 2002.

No. A-01-484: **In re Interest of John W**. Petition of appellant for further review overruled on April 17, 2002.

No. A-01-522: **State v. Pestka**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-572: **Cole v. Kenney**. Petition of appellant for further review overruled on February 13, 2002.

No. A-01-574: **State v. Hayes**, 10 Neb. App. 833 (2002). Petition of appellant for further review overruled on April 17, 2002.

No. A-01-596: **State v. Turner**. Petition of appellant for further review overruled on May 23, 2002.

No. A-01-616: **State v. Curlile**, 11 Neb. App. 52 (2002). Petition of appellant for further review overruled on May 15, 2002.

No. A-01-636: **Tyler v. Crosby**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-669: **Skarnulis v. Neth**. Petition of appellant for further review overruled on March 13, 2002.

No. A-01-678: **State v. Johnson**. Petition of appellant for further review overruled on January 16, 2002.

No. A-01-722: **State v. Relford**. Petition of appellant for further review overruled on April 10, 2002.

No. A-01-726: **State v. Daniels**. Petition of appellant for further review overruled on February 13, 2002.

No. A-01-734: **State v. Owens**. Petition of appellant for further review overruled on February 21, 2002.

No. A-01-780: **State v. Nielsen**. Petition of appellant for further review overruled on April 17, 2002.

Nos. A-01-794, A-01-795: **State v. Clancy**. Petition of appellant for further review overruled on February 13, 2002.

No. A-01-816: **State v. Robertson**. Petition of appellant for further review overruled on February 13, 2002.

No. A-01-824: **State v. Brown**. Petition of appellant for further review overruled on March 13, 2002.

Nos. A-01-857, A-01-858: **State v. Trew**. Petition of appellant for further review overruled on March 13, 2002.

No. A-01-921: **In re Interest of Emilio L**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-923: **State v. Prochaska**. Petition of appellant for further review overruled on February 21, 2002.

No. A-01-935: **Nutzman v. Nutzman**. Petition of appellant for further review overruled on March 13, 2002.

No. A-01-948: **State v. Dulitz**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-954: **State v. Dickenson**. Petition of appellant for further review overruled on February 21, 2002.

No. A-01-959: **In re Interest of Stephanie H. et al.**, 10 Neb. App. 908 (2002). Petition of appellee for further review overruled on April 10, 2002.

No. A-01-962: **State v. Patterson**. Petition of appellant for further review overruled on March 13, 2002.

No. A-01-975: **State v. Prescott**. Petition of appellant for further review overruled on March 13, 2002.

No. A-01-977: **Tyler v. Stennis**, 10 Neb. App. 655 (2001). Petition of appellant for further review overruled on March 27, 2002.

No. A-01-983: **State v. Balvin**. Petition of appellant for further review overruled on February 21, 2002.

No. A-01-1020: **Marvin v. City of West Point**. Petition of appellant for further review overruled on April 17, 2002.

No. A-01-1048: **State v. Daniels**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-1049: **State v. Norden**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-1054: **State v. Harper**. Petition of appellant for further review overruled on January 16, 2002.

No. A-01-1062: **Tyler v. Thompson**. Petition of appellant for further review overruled on April 10, 2002.

No. A-01-1064: **State v. Gray**. Petition of appellant for further review overruled on January 30, 2002.

No. A-01-1092: **State v. Dittrich**. Petition of appellant for further review overruled on January 22, 2002.

No. A-01-1157: **Keithley v. Department of Corr. Servs**. Petition of appellant for further review overruled on February 13, 2002.

No. A-01-1170: **In re Estate of Sidles**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-1181: **In re Interest of Emilio L**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-1192: **State v. Salisbury**. Petition of appellant for further review overruled on March 27, 2002.

No. A-01-1248: **State v. Roeder**. Petition of appellant for further review overruled on May 8, 2002.

No. A-01-1259: **Anderson v. Kenney**. Petition of appellant for further review overruled on May 15, 2002.

No. A-01-1303: **State v. Herringer**. Petition of appellant for further review overruled on May 23, 2002.

No. A-02-100: **State v. Brown**. Petition of appellant for further review overruled on May 8, 2002.

No. A-02-268: **Tyler v. Stennis**. Petition of appellant for further review overruled on May 15, 2002.

No. A-02-286: **Anderson Excavating Co. v. Department of Health and Human Servs**. Petition of appellant for further review overruled on May 23, 2002.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

LUKE T. NORTHWALL AND MALCOLM BALLINGER, APPELLANTS, v. STATE OF NEBRASKA, DEPARTMENT OF REVENUE, AND THOMAS J. GILLASPIE, INTERIM TAX COMMISSIONER, APPELLEES.

637 N.W.2d 890

Filed January 18, 2002. No. S-00-392.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
3. **Constitutional Law: Legislature: Immunity.** Under Neb. Const. art. V, § 22, the state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.
4. **Constitutional Law: Immunity: Waiver.** The provision of Neb. Const. art. V, § 22, is not self-executing, and legislative action is necessary to waive the state's sovereign immunity.
5. **Declaratory Judgments: Immunity: Waiver.** The Uniform Declaratory Judgments Act is inoperative as a waiver of sovereign immunity, and a party who seeks declaratory relief against a state must find authorization for such remedy from another source.
6. **Declaratory Judgments: Public Officers and Employees: Statutes: Immunity.** A declaratory judgment action attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity.
7. **Declaratory Judgments.** An action for declaratory judgment does not lie where another equally serviceable remedy is available.
8. ____. One who has failed to pursue a full, adequate, and exclusive statutory remedy is not afforded an additional remedy under the Uniform Declaratory Judgments Act.
9. **Injunction: Taxation.** Injunctive relief is available where a tax is void, that is, where the taxing body does not have jurisdiction or power to impose the tax.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

James B. Cavanagh, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

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

CONNOLLY, J.

Neb. Rev. Stat. § 77-1783 (Reissue 1990) provided for sales tax to be assessed against corporate officers under certain circumstances and required that the tax owed be paid before the assessment could be challenged. The appellants, Luke T. Northwall and Malcolm Ballinger, who were corporate officers of World Radio, Inc., filed a petition in the district court seeking a declaratory judgment that World Radio did not owe sales taxes for 1990 under § 77-1783. In addition, they sought to enjoin the State from collecting any taxes owed. The court inferred from the record that the appellants had not sought review of the demand for payment made by the State of Nebraska, Department of Revenue (Department), under § 77-1783.

In 1995, this court held that § 77-1783 was unconstitutional as applied to the extent that it required any disputed tax to be paid before the assessment could be challenged. *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995).

The appellants claim that the State cannot collect the taxes that it demands because § 77-1783 has been declared unconstitutional. The Department filed a demurrer claiming in part that the district court lacked jurisdiction. The court concluded that it lacked jurisdiction to hear the appellants' claims. We affirm because the district court lacked jurisdiction to hear the appellants' claims for declaratory and injunctive relief and the appellants failed to state a claim for a refund of taxes paid.

ALLEGATIONS

The petition alleged the following: The appellants were officers of World Radio, which was involved in the retail sale of electronic products. By reason of the operation of retail sales outlets, World Radio was obligated to collect and pay sales tax on goods sold. Before January 1989, World Radio collected and paid the appropriate sales tax.

In order to meet its financial obligations, World Radio established a line of credit with a financial institution then known as

Omaha National Bank. World Radio conducted retail sales in January 1989, for which sales tax was due on or before February 25. A check was written to pay for the January sales tax, but before the check was presented for payment, the bank unilaterally terminated World Radio's line of credit. Because of the termination of credit, the check was not honored and World Radio was unable to pay the January sales tax. World Radio also conducted retail sales in February and March, for which sales tax was owed. On March 27, World Radio filed for bankruptcy and alleged that it was prohibited by the automatic stay of the federal Bankruptcy Code from making any payment to the State for any of the sales tax owed for the months of January, February, and March 1989. World Radio has no assets available to pay the tax owed.

On November 26, 1990, the State Tax Commissioner issued a notice and demand for payment asserting that pursuant to § 77-1783, the appellants were each liable for the sales tax, penalty, and interest owed by World Radio. On November 9, 1993, the Department agreed to suspend collection efforts during an appeal of pending litigation by World Radio. In 1995, this court held that § 77-1783 was unconstitutional as applied to the appellants in that case. *Jones v. State, supra*.

On February 18, 1999, the interim State Tax Commissioner served a demand for payment to Northwall seeking recovery of the tax. In March, the Department issued notice of levy to the employer of Northwall and a bank where he maintained financial accounts. The petition does not state that the appellants ever sought to challenge the validity of the tax pursuant to the provisions of § 77-1783.

The appellants alleged that the attempt to levy and collect the tax was illegal and unauthorized because § 77-1783 has been declared unconstitutional and because they were unable to pay the tax due or post a bond at the time of the assessment. They alleged that they were without legal recourse and have no ability to exhaust any administrative remedies before the Department. They alleged that they have paid approximately $19,000 to the State and are entitled to have that money refunded. The petition does not state that the appellants filed a claim for a refund with the Department. They sought a declaration that the tax liability

against them is unconstitutional and void. They further sought a judgment requiring the Department to remove all liens against them and to refund the money they paid. The appellants also sought to enjoin the Department from levying against any of their property or attempting to collect the tax in any manner.

The Department filed a demurrer alleging that the petition showed on its face that the district court lacked jurisdiction, there was a defect of parties defendant, and the petition failed to state a cause of action. The court sustained the demurrer on multiple grounds. The court first determined that the doctrine of sovereign immunity barred the claim and stated that the Uniform Declaratory Judgments Act, Neb Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995 & Cum. Supp. 2000), provides no jurisdictional basis for the suit. Next, the court determined that the facts alleged in the petition demonstrated that the appellants did not attempt to challenge the validity of the tax assessments within 60 days after the demand for payment was issued as required by § 77-1783. The court further noted that the appellants' action had not been brought within 4 years if a more general statute of limitations was applied. Thus, the court determined that the appellants' action was time barred. Finally, the court found that the appellants failed to state a cause of action for injunctive relief and that the court lacked authority to refund amounts paid by the appellants because the petition failed to show that they had timely filed a refund claim with the Department.

The petition was silent regarding whether the appellants filed a claim with the Department within 60 days of receiving the first demand for payment and whether a claim for a refund was ever filed. But, the court stated that it could be inferred from the petition that the claims were never filed. At oral argument, the appellants conceded that the claims had not been filed. The court concluded that the defects in the petition could not be cured and dismissed the petition. The appellants' motion for a new trial was overruled.

ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred in sustaining the demurrer and dismissing their petition.

STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

[2] When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Id.*

ANALYSIS

The appellants contend that under our decision in *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995), the taxes demanded by the Department under § 77-1783 are void and cannot be collected. The district court concluded that it did not have jurisdiction to hear the appellants' action for a declaratory judgment and injunctive relief. The court also determined that it lacked authority to hear the appellants' action seeking a refund.

LEGAL BACKGROUND

Before proceeding, we set forth the following legal background which will be helpful in understanding the issues and resolution of this case. At the time the Department first sought to collect sales taxes from the appellants, § 77-1783 provided:

> (1) Any corporate officer or employee with the duty to collect, account for, or pay over any taxes imposed upon a corporation or with the authority to decide whether the corporation will pay taxes imposed upon a corporation shall be personally liable for the payment of such taxes in the event of willful failure on his or her part to have a corporation perform such act. . . .
>
> (2) Within sixty days after the day on which the notice and demand are made for the payment of such taxes, any corporate officer or employee seeking to challenge the Tax Commissioner's determination as to his or her personal liability for the corporation's unpaid taxes shall:
>
> (a) Pay the full amount of the taxes or the specified minimum amount and post a bond for the remainder; and

(b) File a claim for refund for the amount so paid.

(3) If the requirements prescribed in subsection (2) of this section are satisfied, the Tax Commissioner shall abate collection proceedings and shall grant the corporate officer or employee an oral hearing and give him or her ten days' notice of the time and place of such hearing.

Under Neb. Rev. Stat. § 77-1781 (Reissue 1996), the denial of a claim for refund shall be considered a final action of the Tax Commissioner. The denial may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

In *Jones v. State, supra*, the Department demanded payment of taxes from the Joneses as corporate officers under § 77-1783. The Joneses filed an administrative appeal and demand for hearing with the Department. The Department refused a hearing because the documents stated that the Joneses were unable to pay the taxes. The Joneses then instituted an action for declaratory and injunctive relief. They asserted a violation of due process claiming that § 77-1783(2) and (3) were unconstitutional, both facially and as applied, because the statute required them to pay the taxes as a precondition to a hearing. The district court determined that it did not have jurisdiction to grant the requested relief and dismissed the petition.

On appeal, we held that the district court lacked authority to grant an injunction but that it did have authority to order a declaratory judgment because the Joneses had no equally serviceable remedy provided by law and because a declaratory judgment is an appropriate method to challenge the constitutionality of a statute. We then held that § 77-1783 denied the Joneses due process as applied because it denied a taxpayer who is unable to pay the tax or post bond the opportunity to be heard. But we did not find § 77-1783 to be facially unconstitutional, nor did we decide the constitutionality of § 77-1783(1).

Jurisdiction of District Court to Issue Declaratory Judgment

The district court determined that it lacked subject-matter jurisdiction to consider the appellants' action for a declaratory judgment because there was no statutory waiver of the State's immunity from suit.

[3,4] Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision of the constitution is not self-executing, and legislative action is necessary to waive the state's sovereign immunity. *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998).

[5] We have held in a tax case that the Uniform Declaratory Judgments Act is inoperative as a waiver of sovereign immunity and that a party who seeks declaratory relief against a state must find authorization for such remedy from another source. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997).

In this case, the appellants brought the action against the State and the interim Tax Commissioner. The petition does not state an independent statute under which the State has waived sovereign immunity. We hold that to the extent the appellants seek a declaratory judgment that they do not owe taxes under § 77-1783, the State has not waived sovereign immunity and the district court lacked subject-matter jurisdiction.

Declaratory Judgment Attacking Constitutionality of § 77-1783

[6-8] The appellants next argue that § 77-1783 is unconstitutional and denied them due process. We have held that a declaratory judgment action attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity. *Galyen v. Balka, supra*. But an action for declaratory judgment does not lie where another equally serviceable remedy is available. *Galyen v. Balka, supra*; *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997). One who has failed to pursue a full, adequate, and exclusive statutory remedy is not afforded an additional remedy under the Uniform Declaratory Judgments Act. *Galyen v. Balka, supra*; *Boettcher v. Balka, supra*. In *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995), the Joneses properly brought their action under the exclusive statutory remedy provided by § 77-1783 and the Department refused to afford them a hearing. Thus, the Joneses had no equally serviceable remedy available to them.

Here, the petition is silent regarding whether the appellants filed any action seeking review of the tax assessment under § 77-1783. But at oral argument, the appellants conceded that they did not file a claim under § 77-1783. Had the appellants wished to challenge the tax assessment and the constitutionality of § 77-1783, they were required to file a claim with the Department within 60 days of the demand for payment of the taxes. After a ruling by the Department on the claim or a refusal of the Department to hear the claim, an appeal could be taken through the Administrative Procedure Act, or a declaratory judgment action could be instituted to challenge the constitutionality of § 77-1783. Because the appellants failed to pursue the statutory remedy available to them under § 77-1783, they cannot seek a declaratory judgment.

We hold that the doctrine of sovereign immunity barred the appellants' declaratory judgment action on issues other than the constitutionality of § 77-1783. We further hold that the appellants could not bring a declaratory judgment action on any of the issues raised because they failed to follow the exclusive statutory remedy afforded to them under § 77-1783. Accordingly, the court was correct in determining that it lacked authority to hear the appellants' declaratory judgment action.

Jurisdiction of District Court to Issue Injunction

[9] The court concluded that it lacked jurisdiction to issue an injunction. We have held that injunctive relief is available where a tax is void, that is, where the taxing body does not have jurisdiction or power to impose the tax. *Jones v. State, supra*. See Neb. Rev. Stat. §§ 77-1727 (Reissue 1996) and 77-3908 (Cum. Supp. 2000). Thus, in *Jones*, where it was not argued that the Department lacked power to impose the taxes, we held that the district court did not have authority to grant injunctive relief.

Here, the appellants argue that because we found § 77-1783 unconstitutional in *Jones*, that the tax imposed by the Department is void. We disagree. In *Jones*, we did not determine that § 77-1783 was facially unconstitutional. Instead, we determined that § 77-1783(2) and (3) were unconstitutional as applied to the extent that it denied them an opportunity to be heard. In no manner did *Jones* act to void the tax owed. Indeed, the issue of

the authority of the State to impose a tax under § 77-1783(1) was not raised or addressed in *Jones*. We conclude that the appellants' argument that the *Jones* decision acted to void their tax obligation to be without merit. Accordingly, the district court was without authority to order an injunction.

Request for Refund

The appellants contend that the district court erred in concluding that it lacked authority to order a refund of money they paid toward the tax owed. Neb. Rev. Stat. § 77-2708(2)(b) (Reissue 1996) pertaining to sales tax provides:

> No refund shall be allowed unless a claim therefor is filed with the Tax Commissioner by the person who made the overpayment or his or her attorney, assignee, executor, or administrator within three years from the required filing date following the close of the period for which the overpayment was made, within six months after any determination becomes final under 77-2709, or within six months from the date of overpayment with respect to such determinations, whichever of these three periods expires later, unless the credit relates to a period for which a waiver has been given. Failure to file a claim within the time prescribed in this subsection shall constitute a waiver of any demand against the state on account of overpayment.

Section 77-2708(h) provides: "No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed."

In this case, the appellants have not alleged that they timely filed a claim for a refund. Accordingly, the petition fails to state a cause of action for a refund.

Dismissal Without Leave to Amend

The court dismissed the petition without granting leave to amend. If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). It is clear from the face of the petition that the appellants cannot state a cause of action for injunctive relief and that amendment of the petition

will not cure the defect. It is also clear that if the appellants did not file a claim within 60 days of first receiving a demand for payment from the Department, as required by § 77-1783, the court was without authorization to order a declaratory judgment, and amendment of the petition could not cure the defect. Likewise, if the appellants failed to file a claim for a refund under § 77-2708, the court was without authority to order a refund.

The petition was silent regarding whether the appellants ever filed claims as required by §§ 77-1783 and 77-2708. The court, however, inferred from the petition that the necessary claims had not been filed, and the appellants conceded at oral argument that the claims had not been filed. In our review of a ruling on a demurrer, we accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). We agree that the court was correct when it inferred from the petition that the claims had not been filed. Combined with the appellants' concession at oral argument, we agree that it is clear that no reasonable possibility exists that an amendment will correct the defects in the petition. Accordingly, we conclude that the district court did not err in failing to grant leave to amend.

AFFIRMED.

CORNHUSKER INTERNATIONAL TRUCKS, INC., APPELLANT, v. THOMAS BUILT BUSES, INC., AND OMAHA TRUCK CENTER, INC., APPELLEES.

637 N.W.2d 876

Filed January 18, 2002. No. S-00-441.

1. **Contracts: Arbitration and Award.** Arbitration is purely a matter of contract.
2. **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.
3. **Federal Acts: Arbitration and Award.** The Federal Arbitration Act requires that any doubts regarding the scope of an arbitration clause be resolved in favor of arbitration.
4. **Federal Acts: Arbitration and Award: States: Contracts: Intent.** The Federal Arbitration Act demonstrates the intent of Congress to adopt a national policy favor-

ing arbitration and withdrawing the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

5. **Federal Acts: Arbitration and Award: Contracts.** Only two limitations have been placed on the enforceability of arbitration provisions governed by the Federal Arbitration Act: They must be part of a written maritime contract or a contract evidencing a transaction involving commerce, and such clauses may be revoked upon grounds as exist at law or in equity for the revocation of any contract.
6. **Constitutional Law: States.** The Supremacy Clause of the U.S. Constitution dictates that state law, including state constitutional law, is superseded to the extent that it conflicts with federal law.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Gary J. Nedved and Gary L. Young, of Keating, O'Gara, Davis & Nedved, P.C., for appellant.

Richard L. Rice, of Kinsey, Ridenour, Becker & Kistler, and Jon P. Christiansen, Brian W. McGrath, and Jessica E. Price, of Foley & Lardner, for appellee Thomas Built Buses, Inc.

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

WRIGHT, J.

NATURE OF CASE

Cornhusker International Trucks, Inc. (Cornhusker), appeals from an order of the Lancaster County District Court which confirmed an arbitrator's award. The arbitrator found that Thomas Built Buses, Inc. (Thomas Built), had good cause to terminate its distributor sales agreement (Agreement) with Cornhusker. Cornhusker asserts that termination of the Agreement is controlled by statute and that the matter should not have been arbitrated.

SCOPE OF REVIEW

[1] Arbitration is purely a matter of contract. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

[2] 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).

FACTS

On October 1, 1990, Cornhusker and Thomas Built entered into the Agreement, which authorized Cornhusker to distribute buses produced by Thomas Built. In 1998, Cornhusker was acquired by Navistar, a competitor of Thomas Built in the manufacture of school buses. Thomas Built subsequently sent a letter to Cornhusker notifying it that Thomas Built intended to terminate the Agreement because Cornhusker had been acquired by a competitor. The record indicates that upon termination of Cornhusker's franchise, Omaha Truck Center, Inc. (Omaha Truck), was to begin distributing Thomas Built buses in Nebraska. The matter at issue in this appeal is the arbitration clause of the Agreement between Cornhusker and Thomas Built. Omaha Truck did not file a brief or appear for oral arguments before this court.

Cornhusker filed a petition for equitable relief and a motion for a temporary restraining order in district court, asking the court to enjoin Thomas Built and Omaha Truck from "taking any action to sell, distribute or provide Thomas Built products in the State of Nebraska." Thomas Built filed a motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1994). The district court denied the request for a temporary restraining order and granted Thomas Built's motion to compel arbitration. The parties were directed to take part in arbitration as provided in the Agreement. Cornhusker's subsequent interlocutory appeal to the Nebraska Court of Appeals was summarily dismissed. See *Cornhusker International Trucks v. Thomas Built Buses*, 8 Neb. App. lxiii (case No. A-99-885, Sept. 14, 1999).

The arbitrator found that Thomas Built's termination of the Agreement was based on good cause. Cornhusker filed a motion in district court seeking vacation of the award; however, the district court granted Thomas Built's motion to confirm the award. Cornhusker appealed, 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

Cornhusker's first three assignments of error allege that the district court erred in requiring the parties to arbitrate their dispute

because (1) the statutory rights invoked by Cornhusker were not subject to arbitration; (2) the plain language of the Agreement did not require the parties to arbitrate the dispute; and (3) public policy is violated if the arbitration clause in the Agreement is relied on to permit the parties to avoid regulation under Nebraska's motor vehicle industry licensing statutes, currently found at Neb. Rev. Stat. § 60-1401.01 et seq. (Reissue 1998 & Cum. Supp. 2000). Cornhusker also asserts that the district court erred in failing to enjoin Thomas Built from terminating Cornhusker's franchise until Thomas Built complied with the termination procedures mandated by statute and that the district court erred in confirming and failing to vacate the arbitration award.

ANALYSIS

We first focus on the Agreement, which contains the following pertinent provisions:

> Either party may terminate this Agreement for cause. The Distributor may terminate immediately by written notice stating the effective date of termination. The Company may terminate under the conditions hereinafter provided.
>
> (1) If the Distributor shall fail for a period of 30 days after written notice thereof to correct or remedy, to the satisfaction of the Company, any breach, condition, or deficiency of the following types, the Company may terminate this Agreement by a subsequent written notice advising of the effective date of termination.
>
> . . . .
>
> Any change in the business form, or Ownership, of the Distributorship . . . .

The Agreement also provided:

> Any unresolved dispute arising under this Agreement or in connection with the sale of Equipment or other product by the Company to the Distributor shall be resolved by arbitration in High Point, North Carolina, under the rules of the American Arbitration Association, and judgment upon the award rendered by the Arbiter(s) may be entered in any Court having jurisdiction thereof.

Arbitration is purely a matter of contract. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996). Our review

of the construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. See *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

Cornhusker argues that arbitration should not have been required because its rights related to termination of the franchise arise under state law rather than under the Agreement. The law concerning motor vehicle industry licensing specifies that a franchisor must file an application with the Nebraska Motor Vehicle Industry Licensing Board (Board) in order to terminate a franchise. See § 60-1424. Section 60-1420(1) states:

> Except as provided in subsection (2) of this section, no franchisor shall terminate or refuse to continue any franchise unless the franchisor has first established, in a hearing held pursuant to section 60-1425, that:
>
> (a) The franchisor has good cause for termination or noncontinuance;
>
> (b) Upon termination or noncontinuance, another franchise in the same line-make will become effective in the same community, without diminution of the franchisee's service formerly provided, or that the community cannot be reasonably expected to support such a dealership; and
>
> (c) The franchisor is willing and able to comply with section 60-1430.02.

Thomas Built asserts that because the Agreement provided that any dispute arising under the Agreement would be resolved by arbitration, the dispute as to the termination of the franchise must be resolved by arbitration. Cornhusker argues that its rights are based upon Nebraska's motor vehicle industry licensing statutes, and not upon the Agreement.

In *S & T Motors v. General Motors Corp.*, 203 Neb. 188, 277 N.W.2d 701 (1979), we held that the motor vehicle industry licensing statutes regulate and restrict termination of dealer franchises and create rights in franchisees which would not exist independent of the statutes. The effect of an arbitration clause within the agreement was not before us. The reasoning of the U.S. Court of Appeals for the Seventh Circuit in *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir. 1993), is

more applicable to the case at bar. In *S+L+H S.p.A.*, the Court of Appeals considered a similar claim. The contract between S+L+H S.p.A. (SLH) and Miller-St. Nazianz, Inc. (Miller), provided that any claim or controversy arising out of or relating to the agreement, its execution, or its breach must be settled by arbitration. When SLH failed to renew the agreement, Miller charged that the failure was a violation of the Wisconsin Fair Dealership Law and a breach of contract. SLH filed suit in federal district court to compel Miller to arbitrate the dispute. Miller argued that the dispute over SLH's nonrenewal did not arise out of or relate to the agreement, but, instead, arose out of the provisions of the Fair Dealership Law and, therefore, was not within the coverage of the arbitration clause.

On appeal, the Court of Appeals stated that the existence of an agreement is a predicate for any claim under the state statute. Miller's claim was based upon the agreement, which included an arbitration clause. The arbitration clause encompassed " 'any controversy or claim arising out of or relating to this Agreement.' " *Id.* at 1520. The Court of Appeals concluded that if the dispute arose out of or related to the agreement, it was subject to arbitration. A claim triggered by the termination of an agreement necessarily arises out of and relates to the agreement. This reasoning is equally applicable to the case at bar.

Cornhusker's reliance on *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995), *cert. denied* 516 U.S. 988, 116 S. Ct. 516, 133 L. Ed. 2d 424, is misplaced. In *Chrysler Motors Corp.*, we did not consider whether the FAA preempted § 60-1420. Chrysler's declaratory judgment action challenged the constitutionality of certain provisions of the motor vehicle industry licensing statutes. Arbitration of the dispute between the parties was not before us.

We conclude that Cornhusker's claim as to the termination of the franchise was an unresolved dispute arising under the Agreement. Cornhusker's assertion that the matter is based on statutory rights not subject to arbitration is without merit.

Cornhusker next argues that the plain language of the Agreement did not require arbitration of the dispute. In *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 375, 550 N.W.2d 640, 646 (1996), we stated:

> Arbitration is purely a matter of contract, and a party cannot be required to submit a dispute to arbitration unless he or she has agreed to do so. . . . When considering a motion to stay litigation in favor of arbitration, a court must first determine whether an agreement to arbitrate exists and then decide whether the dispute before it arises under the agreement and is therefore subject to arbitration.

(Citation omitted.)

It is Cornhusker's position that the Agreement did not require that *all* disputes be submitted to arbitration. The arbitration clause states: "Any unresolved dispute arising under this Agreement or in connection with the sale of Equipment or other product by the Company to the Distributor shall be resolved by arbitration . . . ." Cornhusker argues that the phrase "arising under" covers only disputes relating to the interpretation and performance of the Agreement and that, therefore, its claim based upon the motor vehicle industry licensing statutes does not fall within the arbitration clause. We disagree.

[3] The FAA requires that any doubts regarding the scope of an arbitration clause be resolved in favor of arbitration. See *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). In *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), the Court stated that the federal policy favoring arbitration applies just as strongly to claims founded on statutory rights.

The plain language of the Agreement requires arbitration of "[a]ny unresolved dispute arising under this Agreement." The termination of Cornhusker's franchise was an unresolved dispute which arose under the Agreement and was therefore subject to arbitration. Cornhusker's argument is without merit.

Finally, Cornhusker claims that the public policy of the State of Nebraska is violated by requiring the parties to arbitrate their dispute and that it is against public policy to apply the arbitration clause and avoid the requirements of the state motor vehicle industry licensing statutes. In passing the motor vehicle industry licensing statutes, the Legislature declared that

> the distribution and sale of motor vehicles in the state under the franchise system vitally affects commerce, the general

> economy of the state and the welfare of the citizens of the state requiring the exercise of its police power to [e]nsure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest.

§ 60-1401.01.

The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

[4,5] In *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), the Court held that the FAA demonstrated the intent of Congress to adopt a "national policy favoring arbitration and [withdrawing] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." The Court held that only two limitations have been placed on the enforceability of arbitration provisions governed by the FAA: "[T]hey must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' " 465 U.S. at 11. In holding that the California Franchise Investment Law violated the Supremacy Clause, the Court stated that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. at 16.

In Nebraska, the method of terminating a motor vehicle dealership franchise is found solely within the motor vehicle industry licensing statutes. See, § 60-1420; *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995), *cert.*

denied 516 U.S. 988, 116 S. Ct. 516, 133 L. Ed. 2d 424. In *Chrysler Motors Corp.*, Chrysler attempted to bypass the requirements of § 60-1420, and we held that the authority to regulate the franchise rights of automobile manufacturers and dealers in Nebraska was clearly within the power of the Legislature and that the Legislature had authority to require that termination proceedings involving franchises be heard and determined by the Board.

Subsequently, Nebraska adopted the Uniform Arbitration Act. See Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 1995 & Cum. Supp. 2000). In 1991, the provision of the Uniform Arbitration Act which authorized binding arbitration in future disputes was held to be unconstitutional, as were clauses in contracts providing for binding arbitration of future disputes. See *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). In response, the Nebraska Constitution was amended in 1996 to state that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution. See Neb. Const. art. I, § 13.

The Uniform Arbitration Act was amended in 1997 to specifically provide that an arbitration clause is not valid in any agreement between parties covered by the motor vehicle industry licensing statutes. By this act, the Legislature made clear that an arbitration clause is not valid in any motor vehicle franchise agreement.

Thomas Built argues that state law is preempted by 9 U.S.C. § 2 and that any state statute concerning arbitration is preempted by the federal statute. In *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), we recognized the two limitations to the enforceability of arbitration provisions set forth in 9 U.S.C. § 2. An arbitration clause must be part of a contract evidencing a transaction involving commerce, and the arbitration clause may be revoked upon grounds as exist at law or in equity for the revocation of any contract.

We have acknowledged that the FAA created a body of federal substantive law which applies to any arbitration agreement within the coverage of the FAA. The FAA represents a liberal federal policy favoring arbitration agreements notwithstanding any state substantive or procedural policies to the contrary. *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb.

758, 579 N.W.2d 518 (1998), citing *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The U.S. Supreme Court has held that the FAA not only declared a national policy favoring arbitration but withdrew power from the states to require a judicial forum for the resolution of claims which the contracting parties have agreed to resolve by arbitration. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995), citing *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). In *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir. 1993), the dealer also argued that the arbitration agreement was void because it violated the Wisconsin Fair Dealership Law. The Court of Appeals rejected the argument that a state statute could void the choice of private parties to arbitrate a dispute, citing *Southland Corp. v. Keating, supra*. The court stated that the U.S. Supreme Court's decision in *Southland Corp.* foreclosed the argument that disputes involving Fair Dealership Law claims were not arbitrable.

[6] We conclude that the FAA applies to the Agreement before us and that the FAA preempts Nebraska law which conflicts with the FAA. " 'Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.' " *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. at 57, quoting *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). The Supremacy Clause of the U.S. Constitution dictates that state law, including state constitutional law, is superseded to the extent that it conflicts with federal law. *Kelley v. Benchmark Homes, Inc., supra*.

The parties contracted to use arbitration to settle any dispute. The Agreement involves commerce, and we find no grounds at law or in equity for its revocation. We find no merit to any of Cornhusker's assignments of error.

CONCLUSION

The district court was correct in requiring the parties to arbitrate the dispute and in confirming the arbitrator's award. The judgment of the district court is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

RICHARD A. YOUNG, JR., APPELLANT, V. BEVERLY NETH, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

637 N.W.2d 884

Filed January 18, 2002. No. S-00-550.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs.** The sworn report which triggers the administrative license revocation process must be prepared by an arresting peace officer who has validly arrested a driver.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Arrests.** An administrative motor vehicle operator's license revocation order based on an invalid arrest is not proper.

Appeal from the District Court for Richardson County: DANIEL BRYAN, JR., Judge. Reversed and remanded with directions.

Louie M. Ligouri, of Ligouri Law Office, for appellant.

Don Stenberg, Attorney General, and Jodi M. Fenner for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Richard A. Young, Jr., appeals from the order of the district court for Richardson County which affirmed the order of Beverly Neth, director of the Nebraska Department of Motor Vehicles (the Department), which order administratively revoked Young's motor vehicle operator's license. Because we conclude as a

matter of law that the tribal officer lacked authority to arrest Young outside the reservation for conduct outside the reservation, the revocation based on such arrest was improper and the decision of the district court affirming the revocation does not conform to the law. Accordingly, we reverse the order of the district court and remand the cause with directions to the district court to reverse the order of the Department which had revoked Young's motor vehicle operator's license.

STATEMENT OF FACTS

The relevant facts are not in dispute. On October 21, 1999, Iowa tribal officer Jeremy M. Goldsberry observed a vehicle stopped on Happy Hollow Road on the Iowa Indian Reservation, which is located, in part, within Richardson County, Nebraska. Goldsberry was employed as a tribal officer with the Iowa Tribal Police Department. Goldsberry was not employed as a police officer by the State of Nebraska or Richardson County. In addition to the vehicle, Goldsberry observed several mailboxes lying in the grass and broken mailbox posts proximate to the vehicle. Goldsberry pulled his cruiser behind the stopped vehicle. As Goldsberry activated his lights, the vehicle sped off.

Goldsberry pursued the vehicle for approximately 8 or 9 miles. During the pursuit, Goldsberry witnessed the driving outside the reservation, which fact gives rise to this case. During the pursuit, Goldsberry observed the vehicle proceed in an erratic pattern, swerve from lane to lane, increase and decrease speed, run stop signs, and narrowly avoid striking a police car. Goldsberry was joined in his pursuit of the vehicle by Sam D'Amico, another tribal officer.

Eventually Goldsberry, D'Amico, and a deputy sheriff from Richardson County stopped the vehicle outside the reservation in Richardson County. After the vehicle was stopped, Goldsberry removed the driver from the car. Goldsberry later identified the driver as Young. According to the record on appeal, Young is not a member of an Indian tribe. Goldsberry noted that Young smelled of alcohol and had difficulty standing. Goldsberry administered two field sobriety tests to Young, which Young failed. The Richardson County deputy sheriff also administered several field sobriety tests to Young. Young failed those tests as

well. Goldsberry asked Young to take a preliminary breath test. Young refused.

Goldsberry testified that he placed Young under "arrest" while Young was in Richardson County but was not on the reservation. From the record provided on appeal, we understand that Young was "arrested" for drunk driving, a Class W misdemeanor, and for reckless driving, which is also a misdemeanor under state law. See Neb. Rev. Stat. §§ 60-6,197, 60-6,216, and 60-6,218 (Reissue 1998 & Supp. 1999). Goldsberry thereafter transported Young to a local hospital in Richardson County. At the hospital, Goldsberry read the postarrest chemical test advisement form to Young and requested that Young submit to a blood test. Young twice refused to submit to the test. Goldsberry prepared a "Notice/Sworn Report/Temporary License" form as described in Neb. Rev. Stat. § 60-6,205(2) (Reissue 1998) (the sworn report) and gave a copy of the sworn report to Young. Young does not contest that he received a copy of the sworn report from Goldsberry.

Following the foregoing events, the parties proceeded through the administrative revocation process described in the statutes and the Nebraska Administrative Code pertaining to the rules of the road. See, § 60-6,205; Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999); 247 Neb. Admin. Code, ch. 1, §§ 001 to 027 (1998). Young contested the revocation and requested a formal rules of evidence hearing pursuant to § 84-914(1), which request was granted.

On January 31, 2000, a hearing was held regarding the administrative revocation of Young's driver's license. Young and Goldsberry testified at the January 31 hearing. Twelve exhibits were received into evidence, including three slightly different versions of the same sworn report prepared, amended, and signed by Goldsberry. These versions of the sworn report are identified as exhibits 2-2, 6-1, and 9-1. Each of the versions was signed by Goldsberry as the "arresting officer," and on each version, Goldsberry listed the "Iowa Tribal Police Dept." as his employing law enforcement agency. None of the versions of the sworn report are signed by a law enforcement official from the State of Nebraska or Richardson County. At the conclusion of the hearing, the hearing officer took the matter under advisement.

On February 4, 2000, the hearing officer issued proposed findings of fact, proposed conclusions of law, and a recommended order of revocation, all of which were adopted as the official and final order by the Department on February 7. As a result of the Department's order, Young's driver's license was revoked for a period of 1 year.

On February 17, 2000, Young appealed the Department's order by filing his petition for review in the district court for Richardson County. Young's petition came on for hearing before the district court on April 25. The district court received the bill of exceptions from the January 31 hearing into evidence. On May 1, the district court entered an order which affirmed the Department's order which had revoked Young's driver's license for 1 year.

Young appeals the district court's order. Additional facts will be set forth below where pertinent to our analysis of Young's assignments of error.

ASSIGNMENTS OF ERROR

On appeal, Young makes five assignments of error, all claiming generally that the district court erred in affirming the Department's order of revocation. Young specifically challenges the authority of tribal officer Goldsberry to arrest him outside the reservation.

STANDARDS OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001); *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Benitez v. Rasmussen, supra*.

ANALYSIS

In the instant appeal, we must decide whether the district court's decision affirming the Department's revocation conforms to the law. See *Benitez v. Rasmussen, supra*. As explained *infra*, we conclude that tribal officer Goldsberry was not authorized to arrest Young for the driving offense which occurred in Richardson County, Nebraska, but was outside the Iowa Indian Reservation. As a consequence of Goldsberry's lack of authority to arrest Young, the subsequent driver's license revocation based on such arrest was not proper as a matter of law. Accordingly, we conclude that the district court's affirmance of the revocation did not conform to the law.

Section 60-6,205(2) provides, in pertinent part, as follows:

> If a person *arrested* pursuant to section 60-6,197 [driving under the influence of alcoholic liquor or drugs] refuses to submit to the chemical test of blood, breath, or urine required by that section . . . [t]he *arresting peace officer* shall within ten days forward to the director a sworn report stating (a) that the person was *validly arrested* pursuant to section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test.

(Emphasis supplied.)

[4] Pursuant to § 60-205(5)(b), once the Department receives the sworn report described in § 60-6,205(2), the Department serves notice to the driver of the administrative license revocation process. It is clear from § 60-6,205(2) that the sworn report which triggers the administrative license revocation process must be prepared by an "arresting peace officer" who has "validly arrested" a driver. Thus, the revocation itself must be based on a valid arrest.

Goldsberry testified that he "arrested" Young, completed the sworn report, and signed the sworn report as the "arresting officer." It is undisputed that Young, a non-Indian, had been driving approximately 8 miles outside the reservation in Richardson County at the time tribal officer Goldsberry effected the "arrest."

In order to determine if his "arrest" of Young was valid, we must determine as a matter of law whether Goldsberry was acting within the limits of his authority as a tribal officer. The U.S.

Supreme Court has noted that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations . . . ." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S. Ct. 1257, 36 L. Ed. 2d 219 (1973). In this regard:

> Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress. United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 717-718, 42 L.Ed.2d 706 (1975); Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, South Dakota, 231 F.2d 89 (8th Cir. 1956). Intrinsic in this sovereignty is the power of a tribe to create and administer a criminal justice system. "An Indian tribe may exercise a complete [criminal] jurisdiction *over its members and within the limits of the reservation* subordinate only to the expressed limitations of federal law." F. Cohen, Handbook of Federal Indian Law 148 (1942 ed. as republished by the University of New Mexico Press).

(Emphasis supplied.) *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). Subsequent to the decision in *Ortiz-Barraza* quoted above, Congress passed "legislation declaring that tribes possess inherent criminal jurisdiction over all Indians. Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991)." *State v. Schmuck*, 121 Wash. 2d 373, 387 n.6, 850 P.2d 1332, 1339 n.6 (1993).

It has been observed that "Indian tribal police forces have long been an integral part of certain tribal criminal justice systems and have often performed their law enforcement duties *to the limits of available jurisdiction.*" (Emphasis supplied.) *Ortiz-Barraza v. United States*, 512 F.2d at 1179. Although a tribe has authority over member and nonmember Indians involving criminal matters, such is not the case as to non-Indians. See, *Duro v. Reina*, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990) (Indian tribes may not assert criminal jurisdiction over nonmember Indians for misdemeanor crimes; superseded by 25 U.S.C. 1301(2) (1994)); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) ("Indian tribes do not have inherent jurisdiction to try and punish non-Indians").

"[T]wice the [U.S.] Supreme Court has stated that a tribe's proper response to a crime committed by a non-Indian on the

reservation is for the tribal police to detain the offender and deliver him or her to the proper authorities." *State v. Schmuck*, 121 Wash. 2d at 387, 850 P.2d at 1339. An individual who commits a crime on the reservation may not violate the law with impunity because

> [t]he tribes . . . possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. . . . Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

Duro v. Reina, 495 U.S. at 696-97.

[5] It is clear that the authority of tribal officers in criminal matters is limited by certain factors, including the boundaries of the reservation and whether the offender is a non-Indian. Because it is settled law that the Indian tribes may not assert criminal jurisdiction over a non-Indian for a misdemeanor crime committed on the reservation, a fortiori, the Indian tribes may not do so outside the reservation. We therefore conclude that given the facts that Young was a non-Indian purportedly arrested for driving under the influence on a roadway outside the reservation and Goldsberry was a tribal officer outside the territorial boundaries of his jurisdiction when he "arrested" Young for misdemeanor drunk driving, Goldsberry did not have the authority to make such arrest. See *State v. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999) (holding that tribal officers from Pine Ridge Indian Reservation located in South Dakota had no common law or statutory authority in Nebraska to arrest misdemeanant drunk driver in Nebraska). In the instant case, Young was not "validly arrested," see § 60-6,205(2), and the subsequent revocation ordered by the Department based on such arrest was not proper. The district court erred in affirming the order of revocation.

CONCLUSION

As a matter of law, Young was not validly arrested by tribal officer Goldsberry. The Department's license revocation based

on such arrest was not proper. The district court's order affirming the Department's revocation order did not conform to the law. The order of the district court is reversed, and the cause is remanded to the district court with directions to reverse the Department's order which revoked Young's license.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., participating on briefs.

TAMARA M. GIBILISCO, APPELLEE AND CROSS-APPELLANT, V. DAVID A. GIBILISCO, APPELLANT AND CROSS-APPELLEE.

637 N.W.2d 898

Filed January 18, 2002. No. S-01-224.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
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. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or impartiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
4. **Judges: Recusal: Case Disapproved: Appeal and Error.** To the extent that prior Nebraska cases hold that a trial court's ruling on a motion to recuse is immaterial under a de novo review, they are hereby disapproved.
5. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
6. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the purpose of a property division is to distribute the marital assets equitably between the parties.
7. ____. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
8. ____. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed in part, and in part reversed and remanded with directions.

Tim J. Kielty for appellant.

Mark J. Milone, of Govier, Milone & Streff, L.L.P., for appellee.

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

CONNOLLY, J.

The trial of this marital dissolution action took place in two separate proceedings. At the first hearing, the parties agreed that the issues to be decided would be limited to the distribution of marital assets and debts because they were still working on parenting and custody issues through mediation. After that hearing, the district court sent a letter to counsel for both parties with its findings of fact and conclusions of law. The court divided the marital assets and debts, and to the surprise of appellant, David A. Gibilisco, the court, without taking evidence on the custody issue, awarded sole custody of the parties' child to appellee, Tamara M. Gibilisco. David then filed a motion to recuse the judge. The judge refused.

At the second hearing, the custody issues were addressed, after which the court again granted Tamara sole physical custody of the parties' child with reasonable visitation for David to be determined by the parties through mediation. We affirm that part of the district court's judgment which divided the marital assets and liabilities. Because the court's premature custody determinations would lead a reasonable person to question the judge's impartiality, we reverse that portion of the decree deciding issues of custody and support and remand the cause with directions to recuse.

ASSIGNMENTS OF ERROR

David assigns that the district court erred in (1) failing to recuse herself, (2) finding that it was in the child's best interests that sole physical custody should be placed with Tamara and not

David, and (3) failing to make an equitable distribution of property and debt.

BACKGROUND

Tamara and David were married on July 22, 1989, and a child was born on August 3, 1993. Both parties worked full time during the marriage. Tamara filed for dissolution in January 1999, alleging that it was in the child's best interests for her to have sole physical custody with reasonable and liberal visitation for David. After a hearing on the parties' motions for temporary orders, however, the court noted that the parties had reached an agreement and entered an order for joint physical custody. Tamara was given exclusive use of the home and was responsible for the mortgage and home equity loan payment, utilities, and maintenance. David was required to make the joint Visa card payments and the payments on his truck, and to maintain the family's health insurance through his employer. The record does not indicate the amount he paid on the Visa account during the separation.

In October 1999, the Douglas County conciliation court filed its disposition report with the district court, which contained the parenting plan that Tamara and David had agreed to through mediation. The plan called for the parties to continue the joint physical custody arrangement but included more details for holidays, special occasions, and vacations. The parties also agreed to enter remediation before seeking a solution in court in the event of future disagreements regarding the parenting plan.

The parties agreed that the only issue to be decided at the first hearing in April 2000 was the distribution of marital assets and debts because they had been referred back to mediation to resolve parenting issues. There was no evidence adduced on the custody or support issues, and neither party requested the court to incorporate the parenting plan into the decree. See Neb. Rev. Stat. § 43-2917 (Reissue 1998).

The evidence showed that the parties earned nearly equal salaries and had retirement accounts that were approximately equal in value. After Tamara filed for divorce in January 1999, David remained in the house until March 25, and Tamara paid for all of the household expenses thereafter. David lived with his

mother from March 1999 until January 2000 and did not pay rent during this time.

The parties had taken out a home equity loan about a year before the divorce, and the balance was paid with the proceeds from the sale of the home. The home equity loan, approximately $15,000, was used to make purchases and pay debts, including the indebtedness on the loan obligation for Tamara's vehicle. Neither party, however, knew how much of the home equity loan had been applied on the balance of Tamara's car loan obligation, and there is no evidence in the record on this issue. Tamara also borrowed $6,500 against her 401K plan in order to pay for household expenses during the parties' separation. The parties agreed that the value of Tamara's vehicle at the time of the hearing was $14,600 and that the value of David's vehicle was $10,050, with an indebtedness of approximately $5,200.

Both parties offered, and the court received, suggestions related to the disposition of the financial issues. In addition, Tamara's suggestions included recommendations for sole custody for Tamara, a visitation schedule, and child support issues. Tamara's counsel, however, stated that the custody and support issues would need to be decided at a later time. Tamara also offered evidence of the parties' incomes, her expenses, and child support calculations based on her having sole physical custody. But her counsel again specified that the exhibits were offered with the understanding that the custody issues had not yet been resolved. On that basis, David's counsel did not object to the exhibits, and although Tamara's child support calculations were received, the court stated that they would not be considered.

After this hearing, the court sent a letter to each party's counsel setting out the court's findings of fact and conclusions of law. The letter included findings and conclusions related to the unsubmitted issues of custody, visitation, and support, and resolved these issues exactly as Tamara had requested in her suggestions to the court. The court found that Tamara should be granted sole physical custody subject to reasonable and liberal visitation by David, ordered David to pay $400 per month in child support, and set out the same visitation schedule that Tamara had submitted. The court also decided all of the financial issues in accordance with Tamara's suggestions. The court determined that the

proceeds from the sale of the house would be used to pay the outstanding debt on the joint Visa card and that the balance of the proceeds would be divided equally. Tamara was also given the escrow refund of $1,100, and David was required to pay Tamara $369, half of the repair costs to prepare the residence for sale. Each party was awarded his or her vehicle, and David was required to pay the remaining loan obligation on his vehicle.

After this letter was sent, David filed a motion requesting that the judge recuse herself from further participation in the matter. He argued that the court's custody determinations deprived him of his right to present evidence on the issue and that the disclosure of the court's predisposition regarding custody interfered with his right to a fair trial. He also argued that the matter could not be resolved in a way that would give him a reasonable expectation of impartiality. At a hearing on the motion in October 2000, the judge explained that the inclusion of the custody award in her conclusions of law was inadvertent and would not keep her from having an open mind regarding the custody issues. The court denied the motion.

The second hearing was held in January 2001 to decide the issues of custody, child support, and visitation. David renewed his motion for recusal, which was again overruled. At this hearing, Tamara claimed that joint physical custody was not working because the arrangement was disruptive to the child and the parties were not communicating well. David conceded that the parties were not communicating well, but he claimed that their communication problems could be worked out and that there was not a substantial or material change in circumstance that would warrant a change in custody.

After this hearing, the court granted joint legal custody to the parties, ordered that Tamara would be the primary residential parent subject to reasonable visitation by David, and required the parties to return to mediation to determine the visitation schedule. The distribution of assets and debts was the same as the court's conclusions at the end of the first hearing.

STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine

whether there has been an abuse of discretion by the trial judge. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). 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. *Wagner v. Wagner*, 262 Neb. 924, 636 N.W.2d 879 (2001).

ANALYSIS

Motion for Recusal

David contends that the judge should have sustained his motion as she had demonstrated a bias against him and in favor of Tamara. Tamara counters that the court's denial of the motion was proper because the inclusion of custody issues in its letter after the first hearing was inadvertent and the judge assured the parties that she could keep an open mind. Alternatively, Tamara argues that the denial of David's motion for recusal is immaterial because the standard of review is de novo on the record.

It is correct that we have stated that a ruling of the trial court on a motion to disqualify the trial judge is immaterial on appeal where the case is an action in equity triable de novo. See, e.g., *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999). But our application of this rule has been inconsistent. Of the six cases where we have cited this rule, only one case actually declined to consider the judge's refusal to disqualify himself. See *R.D.N. v. T.N.*, 218 Neb. 830, 359 N.W.2d 777 (1984). In another case, the rule was cited in dicta because there was no motion for recusal and we had already concluded the court acted correctly. See *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974). In an earlier marital dissolution proceeding, we determined that the judge should have recused himself despite our de novo review. *Franks v. Franks*, 181 Neb. 710, 150 N.W.2d 252 (1967). We have also cited this general rule in an appeal from a summary judgment order, in which we determined that the trial judge should have recused himself. See *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). Finally, in two cases, we cited the general rule but also concluded that the court did not

abuse its discretion in overruling the motion. See, *Poll v. Poll, supra*; *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980).

[3,4] Thus, the rule can be more accurately stated that a motion to recuse for bias or impartiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion. We also note that marital dissolution proceedings are no longer reviewed de novo. Rather, these cases are now reviewed de novo on the record for an abuse of discretion, a standard that gives some deference to the trial court's findings and conclusions. See *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998). To the extent that these prior cases hold that a trial court's ruling on a motion to recuse is immaterial under a de novo review, they are hereby disapproved.

In *Franks*, we determined that the trial judge should disqualify himself on remand because of the appearance of impartiality. *Franks* is factually distinguishable from this case. The trial judge in that case had made an independent investigation and then had modified the settlement agreement the parties had reached. But the underlying reasoning is applicable. We noted that the trial court would have continuing jurisdiction over the custody and support of the minor children and determined that the judge's actions made it inappropriate for him to continue in the case. See *id*. We stated:

> "A proper administration of the law demands not only that judges refrain from actual bias but also that they avoid all appearance of unfairness. All doubt or suspicion of bias should be jealously guarded against and, if possible, completely eliminated; and, when the circumstances and conditions surrounding a litigation are of such nature that they might cast doubt on the impartiality of any judgment the judge may pronounce, the judge should certify his disqualification. Thus disqualification of a particular judge for bias or prejudice, although not technically required by the circumstances, is sometimes proper in order to dispel any thought or suspicion that the litigants may not be receiving impartial justice . . . ."

181 Neb. at 715-16, 150 N.W.2d at 256 (quoting 48 C.J.S. *Judges* § 82a (1947)). See, also, *Jim's, Inc. v. Willman, supra* (determining that litigant's perception of trial judge's actions

will sometimes require recusal even when no actual bias is proved and despite summary judgment standard of review).

[5] More recently, we discussed a litigant's burden of proof when seeking to disqualify a judge because of bias or prejudice in *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). Although *Pattno* was an appeal from a criminal sentencing hearing, we relied upon civil cases in arriving at a reasonable person test for determining a judge's bias. Under *Pattno*, a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. This test is consistent with Canon 2 of the Nebraska Code of Judicial Conduct, which requires that a judge avoid impropriety and the appearance of impropriety in all activities, and Canon 3, which requires that a judge perform all duties impartially.

Here, the trial judge's statements at the hearing on the motion for recusal indicated that the inclusion of custody issues in her findings of fact and conclusions of law were unintentional and that she felt she could keep an open mind. But her custody determinations in Tamara's favor when no evidence had been presented on these issues would lead a reasonable person to question her impartiality. After these premature determinations were made, any later decision on the custody issues would be tainted with the appearance of bias. This is particularly true because the court's findings and conclusions so closely followed all of Tamara's suggestions. Under these facts, we are more concerned with how a reasonable person would perceive the trial judge's actions than the judge's actual bias. See, *State v. Pattno, supra*; *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). Therefore, we conclude the cause must be reversed with directions for a new trial on the issues of custody and support. Because David's motion for recusal was directed only at the judge's participation in the second hearing dealing with custody, we now resolve the property division issues.

Property Division

David also claims that the district court failed to make an equitable distribution of property and debt. He argues two points: (1)

that the court erred in failing to order that the proceeds from the sale of the home be used to pay off his car loan and (2) that the court erred in allocating credit card debt to him for a period of time during which both parties resided in the home and made charges to the account. Tamara claims that the division of marital property and debt was equitable because during the year of the parties' separation, she took care of all the family household expenses and David did not pay for child support or household expenses.

[6,7] Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the purpose of a property division is to distribute the marital assets equitably between the parties. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

[8] Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

The record shows that Tamara received $51,924.74 of the total marital assets, which included her half of the household goods and proceeds from the sale of the home, the escrow refund, and the value of her vehicle. She was responsible for $8,661.29 of the marital liabilities, which included half of the joint Visa card balance at the time of the dissolution, the loan obligation against her 401K plan, and half of the home repair costs.

David received $46,173.83 in marital assets and was responsible for approximately $7,383.29 in marital liabilities. His portion of the liabilities included the loan obligation for his vehicle, half of the home repair costs, and half of the joint Visa balance as of the dissolution. The net value of the marital estate was $82,053.99. Of that amount, Tamara received $43,263.45, or 53 percent, and David received $38,790.54, or 47 percent. But David complains that the court unfairly allocated him a

joint Visa card debt for a period of time during which the parties were still living together. He claims that the proceeds of the house should have been used to pay him the balance of the Visa card at the time the parties separated—$6,177.80—before being distributed.

The court ordered the balance of the joint Visa debt as of the time of the dissolution—$3,583.38—to be paid from the house proceeds. David is correct in stating that he was required to make payments toward the Visa debt during the separation, but both parties were allocated a portion of the joint marital liabilities to make payments toward during the separation. Although Tamara had exclusive use of the family home, her payments toward the joint marital liabilities were considerably higher than David's. There is no merit to David's contention.

David next claims that the court erred in not applying the sale proceeds from the home to pay off his indebtedness on his vehicle. He argues that because a portion of the home equity loan was used to pay off the indebtedness on Tamara's vehicle, his vehicle indebtedness should also be paid. Neither party, however, provided evidence establishing what portion of the home equity loan was used to pay off the indebtedness of Tamara's vehicle, and there is no evidence in the record upon which this court can make that determination. Moreover, David was not required to make any contributions toward household expenses during the separation. On this record, the district court did not err in requiring David to be responsible for the loan obligation on his vehicle.

CONCLUSION

We affirm the district court's division of marital assets and liabilities. We conclude, however, that the district court abused its discretion in overruling David's motion for recusal and reverse that portion of the decree dealing with issues of custody and support. Upon remand, the district court is directed to grant the motion for recusal.

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

HENDRY, C.J., not participating.

KERRY KATHERINE CRAWFORD, APPELLANT, V. DAVID BRIAN CRAWFORD, APPELLEE.

638 N.W.2d 505

Filed January 25, 2002. No. S-00-023.

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. **Child Support: Rules of the Supreme Court.** Deviations from the Nebraska Child Support Guidelines are permissible whenever the application of the guidelines in an individual case would be unjust or inappropriate.
4. ____: ____. Deviations from the Nebraska Child Support Guidelines must take into consideration the best interests of the child.
5. **Child Support: Rules of the Supreme Court: Proof.** The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.
6. **Child Support: Rules of the Supreme Court.** In considering whether to deviate from the Nebraska Child Support Guidelines based on an order of support for a subsequent child, the trial court must have before it the calculations and any worksheets used to determine the child support order for the subsequent child.
7. **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.

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 Dawson County, DONALD E. ROWLANDS II, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Kent A. Schroeder and Vikki S. Stamm, of Ross, Schroeder & Romatzke, for appellant.

Barry D. Geweke, of Stowell, Kruml, Geweke & Cullers, P.C., L.L.O., for appellee.

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

HENDRY, C.J.

INTRODUCTION

The Dawson County District Court granted David Brian Crawford's request to decrease his child support obligation. The court decreased David's support obligation for his three children from $950 per month to $750 per month. David's ex-wife, Kerry Katherine Crawford, appealed to the Nebraska Court of Appeals, which affirmed the decision of the district court. Kerry then petitioned for further review, which we granted.

FACTUAL BACKGROUND

David and Kerry were divorced on September 25, 1998, in the district court for Dawson County, Nebraska. In the decree of dissolution, the district court awarded Kerry custody of the three children born to David and Kerry during their marriage: Katherine Marie Crawford, born December 28, 1993; Thomas David Crawford, born September 26, 1995; and Molly Ann Crawford, born December 9, 1996. The court ordered David to pay child support in the amount of $950 per month for the three children.

David is also the father of Emma D., a child born out of wedlock on May 13, 1998. Emma's birth was not noted in David and Kerry's divorce decree, and the record does not reflect when David became aware of Emma's birth or his paternity. However, David does not dispute that he is Emma's father. In August 1999, paternity proceedings were instituted against David on Emma's behalf. The Dawson County District Court ordered David to pay temporary child support of $300 per month, commencing August 1, 1999. The judge who entered the child support order for Emma was not the same judge who entered David and Kerry's decree of dissolution.

On August 25, 1999, David brought an action in Dawson County District Court to modify the decree of dissolution, requesting a decrease in his child support obligation for the three children from his marriage with Kerry. As support for the modification, David submitted to the court the temporary support order of $300 for Emma, but he did not introduce evidence concerning the income of Emma's mother or any of the calculations used to determine the $300 obligation.

The district court granted David's request for modification on December 8, 1999. While the evidence at trial established that both David and Kerry individually were receiving almost the exact amount of income as they had at the time of their divorce, the court found "good cause" for deviating from the Nebraska Child Support Guidelines because of David's additional obligation of $300 per month for Emma. The district court determined, based on Kerry's and David's incomes, that David's support for four children is "approximately $1000.00 per month." Believing that "all four children should be treated essentially equally," the court reduced David's child support obligation for his and Kerry's three children from $950 per month to $750 per month, or $250 per child, effective September 1, 1999. Kerry appealed to the Court of Appeals.

The Court of Appeals affirmed the district court's $200 reduction of David's child support obligation. See *Crawford v. Crawford*, No. A-00-023, 2001 WL 436184 (Neb. App. May 1, 2001) (not designated for permanent publication). The Court of Appeals found the fact that the record was silent regarding the percentage of support provided by Emma's mother did not require reversal because "the burden of proof is Kerry's responsibility." *Crawford*, 2001 WL 436184 at *5. Furthermore, the Court of Appeals stated, "Kerry needed to show that David's $300-per-month child support obligation for Emma did not include consideration of Emma's mother's income, thus skewing the $300-per-month obligation in a way which made it improper for the court in the instant matter to consider that obligation." *Id.* Absent other proof, the court assumed that the trial judge considered Emma's mother's income in determining the $300 child support obligation. The court concluded that Emma and the three children of the marriage were essentially treated equally by the trial court's order.

Kerry petitioned for further review, and we granted her petition.

ASSIGNMENTS OF ERROR

Kerry assigns in her petition for further review, rephrased and renumbered, that the Court of Appeals erred in (1) finding it was Kerry's burden to prove how the district court had calculated

David's child support obligation for Emma, (2) failing to properly calculate child support when a subsequently born child is involved, and (3) finding that the trial court's child support calculation was for a four-child family instead of a three-child family.

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. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[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.*

ANALYSIS

Burden of Proof

Kerry argues the Court of Appeals erred when it found that it was her burden to prove the manner in which the district court calculated David's child support obligation for Emma, his child from a subsequent relationship. Citing this court's opinion in *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001), Kerry contends that providing the calculations used to determine Emma's child support obligation should have been part of David's burden in proving why a deviation from the child support guidelines was necessary in this case.

[3,4] Deviations from the guidelines are permissible whenever the application of the guidelines in an individual case would be unjust or inappropriate. Nebraska Child Support Guidelines, paragraph C. Deviations must take into consideration the best interests of the child. *Id.* In *Brooks*, we discussed the appropriateness of deviations when there are children from a subsequent relationship. We found that "[u]nder certain circumstances, it may be appropriate for a trial court to consider subsequently born children of a party when determining child support," and that "[t]his determination is entrusted to the discretion of the trial court." *Brooks*, 261 Neb. at 293, 622 N.W.2d at 674.

[5] We also addressed in *Brooks* which party bears the burden of proof when deviations from the guidelines are requested due to support obligations for children of a subsequent relationship. We determined that "[t]he party requesting a deviation from the guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship." *Id.* at 292-93, 622 N.W.2d at 673 (citing *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999)). David requested the deviation, so it was his burden to provide the necessary evidence regarding his support obligation to Emma. Kerry contends that David did not meet this burden of proof under *Brooks* since he failed to provide any evidence of the income of Emma's mother, "the other parent of the child . . . of the subsequent relationship." See *id.* at 293, 622 N.W.2d at 673.

Brooks did not present the factual situation now before us. In *Brooks*, evidence of the mother's income was needed to enable the district court to properly calculate the obligation to the subsequent children. In the present case, the subsequent child's obligation has already been determined by the temporary child support order of $300 per month for Emma. Arguably, the income of Emma's mother would be of no additional use to the district court in determining the proper deduction for child support not previously ordered. See, e.g., Nebraska Child Support Guidelines, worksheet 5, entitled "Deviations to Child Support Guidelines" ("[d]eduction computed for child or children of one of the parties but not previously ordered").

However, despite the factual distinctions, the principles we enunciated in *Brooks* regarding factors a trial court must consider before deviating from the guidelines remain the same and apply equally to this situation. We announced in *Brooks* "the basic principle that both families are [to be] treated as fairly as possible." 261 Neb. at 296, 622 N.W.2d at 675. In this case, in order to treat both families as fairly as possible, the trial court needed to consider whether the amount of David's original child support obligation of $950 was utilized as a factor by the other district court judge in setting David's $300 per month obligation to Emma. If David was able to use his original support obligation to decrease

the amount of his subsequent support obligation to Emma, it would be inequitable to allow him to turn around and use that subsequent award as the basis for decreasing the original obligation. It would not be in the best interests of the children to permit David to effectively "play one family against the other" in order to decrease his child support obligation to both. See, e.g., *Brooks*, 261 Neb. 289, 295, 622 N.W.2d 670, 675 (2001) ("one family did not benefit at the expense of the other").

[6] Therefore, we determine that in considering whether to deviate from the child support guidelines based on an order of support for a subsequent child, the trial court must have before it the calculations and any worksheets used to determine the child support order for the subsequent child. Without the actual figures, a court cannot properly determine whether application of the guidelines would be unjust or inappropriate in a given case, nor can it determine the best interests of the children. In this case, David did not introduce any worksheets or calculations used to determine his child support obligation to Emma. It was David's burden as the "party requesting a deviation from the guidelines" to provide sufficient evidence of his subsequent obligation to justify a deviation. See *Brooks*, 261 Neb. at 292, 622 N.W.2d at 673. Since he did not provide such evidence, we accordingly find, under our de novo review of the record, that David failed to meet his burden of proof. Having so found, we determine the district court abused its discretion in reducing David's child support obligation.

Remaining Assignments of Error

[7] Since we find that reversal is required, it is unnecessary to address Kerry's remaining assignments 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. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001).

CONCLUSION

For the foregoing reasons, we reverse the decision and remand the cause to the Court of Appeals with directions to remand the matter to the district court for Dawson County with directions to dismiss. In addition, Kerry 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 Kerry attorney fees in the amount of $1,500.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF DEWAYNE G., JR., AND DEVON G., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DEWAYNE G., SR., APPELLANT.

638 N.W.2d 510

Filed January 25, 2002. No. S-00-1074.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Parental Rights: Evidence: Proof.** An order terminating parental rights must be based on clear and convincing evidence.
3. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Statutes: Appeal and Error.** The interpretation of statutes 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: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
6. **Statutes.** Statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision.
7. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
8. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
9. **Parental Rights: Statutes: Pleadings.** The plain language of Neb. Rev. Stat. § 43-283.01 (Reissue 1998) contains no directive granting a parent or any other party the right to bring a motion requesting a separate hearing on the issue of reasonable efforts to preserve and reunify.
10. **Juvenile Courts: Parental Rights: Statutes: Legislature: Intent.** The Legislature intended that the issue of reasonable efforts required under Neb. Rev. Stat. § 43-283.01

(Reissue 1998) must be reviewed by the juvenile court (1) when removing from the home a juvenile adjudged to be under subsections (3) or (4) of Neb. Rev. Stat. § 43-247 (Reissue 1998) pursuant to Neb. Rev. Stat. § 43-284 (Reissue 1998), (2) when the court continues a juvenile's out-of-home placement pending adjudication pursuant to Neb. Rev. Stat. § 43-254 (Reissue 1998), (3) when the court reviews a juvenile's status and permanency planning pursuant to Neb. Rev. Stat. § 43-1315 (Reissue 1998), and (4) when termination of parental rights to a juvenile is sought by the State under Neb. Rev. Stat. § 43-292(6) (Reissue 1998).

11. **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.
12. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
13. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
14. **Parental Rights: Abandonment.** In a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, DOUGLAS F. JOHNSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jay A. Ferguson for appellant.

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

Thomas K. Harmon, of Respeliers and Harmon, P.C., for guardian ad litem.

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

HENDRY, C.J.

INTRODUCTION

The parental rights of DeWayne G., Sr. (DeWayne), to DeWayne G., Jr. (DeWayne Jr.), and Devon G. were terminated on September 12, 2000, by the separate juvenile court of Douglas County. The court ordered termination upon its finding that the

following conditions existed: abandonment under Neb. Rev. Stat. § 43-292(1) (Reissue 1998); neglect under § 43-292(2); parental unfitness under § 43-292(4); and because the juveniles had been in out-of-home placement for 15 or more months of the most recent 22 months under § 43-292(7). DeWayne appealed. The Nebraska Court of Appeals reversed the juvenile court's decision and remanded the cause for further proceedings. The State petitioned for further review, which we granted.

FACTUAL BACKGROUND

DeWayne Jr. was born on February 14, 1996. On February 16, DeWayne Jr. was placed in the temporary custody of the Department of Social Services, now the Department of Health and Human Services (DHHS), because he was born with cocaine in his system.

At the time of DeWayne Jr.'s birth, DeWayne was married to a woman with whom he had three daughters. DeWayne and DeWayne Jr.'s biological mother were never married.

DeWayne's criminal history consists of felony convictions both before and after DeWayne Jr.'s birth. In 1996, DeWayne was found guilty of possession of crack cocaine in Holt County, Missouri. On February 7, 1996, DeWayne was sentenced by the circuit court for Holt County to 2 years' supervised probation. Almost a year later, in January 1997, DeWayne was sentenced in Douglas County, Nebraska, to intensive supervised probation for two theft convictions related to an incident which occurred in 1996. Later, in June 1997, DeWayne was sentenced in Douglas County, Nebraska, to intensive supervised probation on two additional theft convictions related to a second separate incident which occurred in 1996.

While on probation for these five felony convictions, DeWayne violated the terms of his Nebraska probation. On September 16, 1997, DeWayne's Nebraska probation officer observed DeWayne socializing at a time when his probation order required him to be at work. When DeWayne's probation officer approached him, DeWayne attempted to flee but was apprehended by the officer. DeWayne pled guilty to misdemeanor assault and operation of a vehicle without a license regarding this incident. His probation in Nebraska was revoked.

The incident on September 16, 1997, also resulted in the revocation of DeWayne's probation in Missouri. On October 24, 1997, DeWayne was sentenced to 2 years' incarceration in Missouri.

While incarcerated in Missouri, DeWayne successfully completed a drug and alcohol treatment program. On February 24, 1998, DeWayne was released on parole by the State of Missouri. DeWayne then returned to Omaha, where he was released on bond awaiting sentencing for the convictions pending in Nebraska. On August 18, 1998, DeWayne was sentenced on the four theft convictions. In total, DeWayne was sentenced to a minimum of 4 years 6 months' incarceration and a maximum of 6 years' incarceration. DeWayne was serving this sentence when the State filed for termination of his parental rights in the present action.

Since February 16, 1996, DeWayne Jr. has remained in the custody of DHHS. According to Jennifer Bivens, DeWayne Jr.'s caseworker, her first direct contact from DeWayne occurred approximately 6 months after DeWayne Jr. was born, when DeWayne telephoned and identified himself as DeWayne Jr.'s father.

The caseworker's second contact with DeWayne was in February 1997, when DeWayne Jr. was approximately 1 year old. DeWayne called Bivens and expressed concerns about establishing paternity and the possibility that he would incur child support obligations for DeWayne Jr. In March 1997, DeWayne again contacted Bivens, asking her to approve his visitation of DeWayne Jr. Later that same month, DeWayne and DeWayne Jr.'s biological mother met with Bivens, informing her they were going to have a second child.

Bivens approved DeWayne's visitation of DeWayne Jr., and her records indicate that DeWayne visited DeWayne Jr. on April 9, 11, and 16, 1997. At some point during this period of time, DeWayne also had his name placed on DeWayne Jr.'s birth certificate, identifying him as the father. DeWayne's visit with DeWayne Jr. on April 16 is the last recorded visit until the summer of 2000.

On December 22, 1997, the biological mother's parental rights to DeWayne Jr. were terminated. During that same month, DHHS instituted proceedings to terminate DeWayne's parental rights. This proceeding resulted in the termination of DeWayne's

parental rights to DeWayne Jr. However, this order was later reversed by the Court of Appeals on February 23, 1999, for reasons unrelated to this appeal. *In re Interest of Dewayne G., Jr.*, No. A-98-697, 1999 WL 111322 (Neb. App. Feb. 23, 1999), *modified* 1999 WL 1338327 (Neb. App. July 27, 1999) (not designated for permanent publication).

Devon, DeWayne's second child with DeWayne Jr.'s biological mother, was born on October 23, 1997, 1 day prior to DeWayne's sentencing in Missouri. Devon was placed in the custody of DHHS on October 24 because, like DeWayne Jr., he was born with cocaine in his system. Bivens also served as Devon's caseworker. The biological mother's parental rights to Devon were subsequently terminated on July 16, 1998. While DeWayne was free on bond between June 3 and August 17, 1998, Bivens granted DeWayne visitation with Devon. DeWayne visited Devon five times during this 10-week period.

On April 19, 2000, DHHS filed a petition to continue temporary custody of DeWayne Jr. and Devon with DHHS and to terminate DeWayne's parental rights to both children. The court granted DHHS' motion for temporary custody on April 19. On April 25, the court held a review and permanency planning hearing concerning DeWayne Jr. and Devon, together with a hearing on the State's motion to continue temporary custody with DHHS and to terminate DeWayne's parental rights. DeWayne was present at the hearing and was represented by counsel.

At the hearing, the court found custody of both children should continue with DHHS, noting that because DeWayne was incarcerated, it would not be in the best interests of the children to place them in the parental home. The court further found that DeWayne's incarceration had prevented reasonable attempts to preserve the family prior to the children's current placement with DHHS. The court also granted DeWayne visitation with the children.

On May 16, 2000, DeWayne filed a motion requesting a hearing, inter alia, on whether the State had made reasonable efforts to reunify the children with DeWayne pursuant to Neb. Rev. Stat. § 43-283.01 (Reissue 1998).

The court held a hearing on May 26, 2000, regarding, among other things, DeWayne's request for a hearing pursuant to

§ 43-283.01. The court found it had addressed the issue of reasonable efforts under § 43-283.01 at the April 25 hearing. The court further found that reasonable efforts to reunify were being made in that visitation had been granted at the April 25 hearing. The court observed that because DeWayne was incarcerated, there were limited options regarding reasonable efforts to reunify. The court also noted that the facts of the case had not changed since the April 25 hearing. For these reasons, the court denied DeWayne's motion requesting a separate hearing pursuant to § 43-283.01.

At the termination hearing in August 2000, Bivens testified that DeWayne has had minimal contact with DeWayne Jr. and Devon over the years. According to her records, DeWayne visited DeWayne Jr. three times in April 1997 and visited Devon five times in the summer of 1998. Bivens also testified that DeWayne Jr. suffers from serious behavioral problems due to fetal alcohol syndrome. Nevertheless, Bivens testified that DeWayne Jr. has been in the same placement for 2½ years and that the placement family is interested in providing permanency for DeWayne Jr. She further testified that Devon has been in the same placement since birth and that the placement family is interested in providing permanency for Devon. Devon has not been diagnosed with any disabilities.

DeWayne testified that he had a strong desire to parent DeWayne Jr. and Devon and had taken parenting and job skills classes while incarcerated. He disputed Bivens' testimony that he had visited DeWayne Jr. only three times while DeWayne Jr. was an infant, asserting that he had regularly gone with the biological mother to visit the child from the time of DeWayne Jr.'s birth until April 1997. DeWayne further testified that the children had visited him three times while he was incarcerated in the summer of 2000 and that the visits had gone very well. According to DeWayne, Devon seemed shy and withdrawn, but DeWayne Jr. had been excited and "really surprised that he did have a father." DeWayne testified that he would be paroled in November 2000 and that his release date was July 2001.

On September 12, 2000, the court granted the State's motion terminating DeWayne's parental rights to DeWayne Jr. and Devon, finding that the State had proved all the grounds alleged

in its petition by clear and convincing evidence and that termination was in the children's best interests. The court noted that "the children in interest cannot and should not be suspended in foster care, and be made to wait for uncertain parental maturity." At the time of the termination proceedings, DeWayne Jr. had been in foster care for approximately 4 years 7 months and Devon had been in foster care for approximately 2 years 11 months.

DeWayne appealed. In *In re Interest of DeWayne G. & Devon G.*, 10 Neb. App. 177, 625 N.W.2d 849 (2001), the Court of Appeals reversed the decision and remanded the cause for further proceedings. The basis for the Court of Appeals' reversal was the failure of the juvenile court to grant DeWayne's motion for a separate hearing pursuant to § 43-283.01.

ASSIGNMENTS OF ERROR

The State asserts in its petition for further review that the Court of Appeals erred in (1) finding that § 43-283.01 requires that DHHS must prove reasonable efforts have been made to preserve and reunify the family at a separate hearing prior to termination of parental rights; (2) failing to recognize that a hearing was in fact held in DeWayne's case regarding whether reasonable efforts to reunify the family had been made; (3) failing to recognize that reasonable efforts to reunify are not required pursuant to § 43-283.01(4) when the parent of the child has subjected the child to aggravated circumstances, including abandonment; and (4) reversing the termination of DeWayne's parental rights.

STANDARD OF REVIEW

[1] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001); *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

[2,3] An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of Clifford M. et*

al., supra; *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Clifford M. et al., supra*; *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999).

[4] The interpretation of statutes 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 Interest of Dustin H. et al.*, 259 Neb. 166, 608 N.W.2d 580 (2000); *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

ANALYSIS

Reasonable Efforts to Preserve and Reunify

The State argues the Court of Appeals erred in holding that § 43-283.01 entitled DeWayne to a separate hearing to determine whether the State had made reasonable efforts to preserve and reunify the family prior to the termination of his parental rights. Section 43-283.01, enacted in 1998 as part of L.B. 1041, states:

> (1) In determining whether reasonable efforts have been made to preserve and reunify the family and in making such reasonable efforts, the juvenile's health and safety are the paramount concern.
>
> (2) Except as provided in subsection (4) of this section, reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home.
>
> (3) If continuation of reasonable efforts to preserve and reunify the family is determined to be inconsistent with the permanency plan determined for the juvenile in accordance with a permanency hearing under section 43-1312, efforts shall be made to place the juvenile in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the juvenile.

(4) Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:

(a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;

(b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or

(c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

(5) If reasonable efforts to preserve and reunify the family are not required because of a court determination made under subsection (4) of this section, a permanency hearing, as provided in section 43-1312, shall be held for the juvenile within thirty days after the determination, reasonable efforts shall be made to place the juvenile in a timely manner in accordance with the permanency plan, and whatever steps are necessary to finalize the permanent placement of the juvenile shall be made.

(6) Reasonable efforts to place a juvenile for adoption or with a guardian may be made concurrently with reasonable efforts to preserve and reunify the family, but priority shall be given to preserving and reunifying the family as provided in this section.

In its opinion, the Court of Appeals defined the issue before it as whether § 43-283.01 mandates a separate hearing wherein the State must prove that it is making reasonable efforts to preserve and reunify the family if a parent requests such a separate hearing pursuant to § 43-283.01. The Court of Appeals then focused upon the language that "reasonable efforts *shall* be made to preserve and reunify families" found in subsection (2) of § 43-283.01.

(Emphasis supplied.) See *In re Interest of DeWayne G. & Devon G.*, 10 Neb. App. 177, 625 N.W.2d 849 (2001).

Based on this "statutory directive" found in § 43-283.01(2), the Court of Appeals held that § 43-283.01 mandates a separate hearing on the issue of reasonable efforts to preserve and reunify under § 43-283.01 whenever the parent has "properly raised" the issue. *In re Interest of DeWayne G. & Devon G.*, 10 Neb. App. at 183, 625 N.W.2d at 853. Accordingly, the Court of Appeals held that "DeWayne was entitled to a hearing on whether reasonable efforts have been made to preserve and reunify the family and allow for the safe return of the children to the home." *Id.* at 184, 625 N.W.2d at 854. Because the juvenile court denied DeWayne's request for a separate hearing on the issue of reasonable efforts to preserve and reunify, the Court of Appeals reversed the termination of DeWayne's parental rights and remanded the cause for further proceedings.

[5-8] This issue presents a question of statutory interpretation. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of Aaron K.*, 250 Neb. 489, 550 N.W.2d 13 (1996). See, also, *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995). Moreover, statutes pertaining to the same subject matter are to be construed together as if they were one law and effect given to every provision. *Id.* The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Id.* See, also, *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001); *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[9] In its opinion, the Court of Appeals held that § 43-283.01 requires a separate hearing on reasonable efforts if requested by

the parent. However, the plain language of § 43-283.01 contains no such directive granting a parent or any other party the right to bring a motion requesting a "separate hearing" on the issue of reasonable efforts to preserve and reunify.

Considering § 43-283.01 in accordance with the plain language of other statutory provisions of the juvenile code, it is clear the Legislature did not intend for § 43-283.01 to grant a party the right to a separate layer of "reasonable efforts" hearings. When § 43-283.01 was adopted, the Legislature at the same time amended selected statutes in the juvenile code to indicate the specific stages within juvenile proceedings during which the juvenile court must consider reasonable efforts to preserve and reunify families pursuant to § 43-283.01.

In particular, the Legislature amended Neb. Rev. Stat. § 43-284 (Reissue 1998), to require that when a juvenile is removed from his or her home based upon Neb. Rev. Stat. § 43-247(3) or (4) (Reissue 1998), the court must make a "written determination" that, among other things, "reasonable efforts to preserve and reunify the family have been made if required under § 43-283.01." Similarly, Neb. Rev. Stat. § 43-254 (Reissue 1998) was amended to state that once a juvenile has been temporarily removed from his or her home, orders continuing such out-of-home placement require the court to make a "written determination" that "reasonable efforts were made to preserve and reunify the family if required under subsections (1) through (4) of section 43-283.01." The Legislature also amended Neb. Rev. Stat. § 43-1315 (Reissue 1998) regarding status and permanency planning reviews. Section 43-1315 states that when ordering a child to continue in placement outside the home, the court must make, among other things, a "written determination" that "reasonable efforts to preserve and reunify the family, if required under section 43-283.01, have been made."

Finally, regarding the termination of parental rights pursuant to § 43-292, the Legislature incorporated § 43-283.01 into only § 43-292(6). Subsection (6) now states that parental rights can be terminated when, "Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have

failed to correct the conditions leading to the determination." Section 43-283.01 is not incorporated into any of the other grounds for seeking termination of parental rights.

We additionally note that the plain language of §§ 43-284, 43-254, 43-1315, and 43-292(6), as amended by the Legislature in 1998, recognizes that determinations regarding reasonable efforts are necessary only "if required" under § 43-283.01. Section 43-283.01 limits situations in which the State is required to provide reasonable efforts to preserve and reunify, by completely eliminating any such requirement in those situations contemplated under § 43-283.01(4)(a), (b), and (c).

[10] Construing this statutory framework in pari materia, we determine that the issue of reasonable efforts if required under § 43-283.01 must be reviewed by the juvenile court (1) when removing from the home a juvenile adjudged to be under subsections (3) or (4) of § 43-247 pursuant to § 43-284, (2) when the court continues a juvenile's out-of-home placement pending adjudication pursuant to § 43-254, (3) when the court reviews a juvenile's status and permanency planning pursuant to § 43-1315, and (4) when termination of parental rights to a juvenile is sought by the State under § 43-292(6).

We recognize that the Court of Appeals' interpretation of § 43-283.01 was further premised on its observation that "[p]rior to the enactment of § 43-283.01, there was no provision in the juvenile code which mandated reasonable efforts to preserve and reunify the family." *In re Interest of DeWayne G. & Devon G.*, 10 Neb. App. 177, 180, 625 N.W.2d 849, 852 (2001). However, reasonable efforts to reunify the family have been an integral part of the juvenile code since 1981. See 1981 Neb. Laws, L.B. 346. As enacted in 1981 and operative July 1, 1982, Neb. Rev. Stat. § 43-246 (Reissue 1984) stated that "sections 43-245 to 43-2,129 *shall* be construed . . . to assure every reasonable effort possible to reunite the juvenile and his or her family." (Emphasis supplied.) The State has often gone to considerable efforts to attempt to achieve reunification. See, e.g., *In re Interest of S.R., D.R., and B.R.*, 239 Neb. 871, 479 N.W.2d 126 (1992).

The changes wrought in 1998 by L.B. 1041, as stated by its introducer, State Senator Gerald E. Matzke, were intended to "[change] the emphasis under our law from reunification of the

family . . . to the primary criteria of the health and safety of the child." Floor Debate, L.B. 1041, 95th Leg., 2d Sess. 11548 (February 12, 1998). This change was mandated by the federal passage of the Adopted and Safe Families Act of 1997. As State Senator Matzke further observed, the 1998 changes to the Nebraska Juvenile Code were intended to help resolve the problem of "children being left too long in foster care, often for many years." *Id.* at 11548.

We determine that the plain language of § 43-283.01, construed in pari materia with other related portions of the juvenile code, does not support the Court of Appeals' determination that § 43-283.01 provided DeWayne with a right to a separate hearing on the issue of reasonable efforts to preserve and reunify the family. DeWayne's motion for a hearing under § 43-283.01 did not occur in the context of proceedings under §§ 43-284, 43-254, 43-1315, or 43-292(6). Instead, DeWayne's motion was filed in conjunction with a pending termination proceeding under § 43-292(1), (2), (4), and (7). His motion thus fell outside the procedural framework of § 43-283.01.

Given our determination that DeWayne was not entitled to a separate independent hearing under § 43-283.01, it is unnecessary to reach the State's second and third assignments of error.

TERMINATION

[11] The State asserts in its fourth assignment of error that the Court of Appeals erred in reversing the termination of DeWayne's parental rights. While the Court of Appeals did not reach the merits of the order terminating DeWayne's parental rights, it is an established rule that upon granting further review which results in the reversal of a decision of the 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. See, *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001); *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998).

In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Our de novo review of the record

shows the State has proved by clear and convincing evidence that both children have been in out-of-home placement for 15 or more months of the last 22 months. Having determined the statutory ground enumerated in § 43-292(7) has been proved, we do not consider issues relating to the sufficiency of the evidence concerning the other statutory provisions identified by the trial court as grounds for termination. See *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

[12,13] The only remaining issue is whether terminating DeWayne's parental rights is in the children's best interests. We have held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*; *In re Interest of Sunshine A.*, 258 Neb. 148, 602 N.W.2d 452 (1999).

Our de novo review of the record shows that after DeWayne Jr. was born, DeWayne did not acknowledge to Bivens or the court that he was DeWayne Jr.'s father until the child was over 6 months old. When DeWayne attended DeWayne Jr.'s dispositional hearing on April 30, 1996, he identified himself merely as a friend of the family. For the first year and 7 months of DeWayne Jr.'s life, when DeWayne was not incarcerated, he had little contact with DeWayne Jr. There were only three recorded visits by DeWayne during this time period, although he claims he visited more frequently than the record indicates. While our review is de novo, we do give weight to the fact that the juvenile court observed the witnesses and accepted Bivens' version of the facts over DeWayne's. See *In re Interest of Clifford M. et al., supra*. Our review of the record shows that while DeWayne was not incarcerated, he made no effort to parent DeWayne Jr., provide a home for him, or provide for him financially.

[14] The record further shows that DeWayne knowingly and deliberately violated his probation. He knew he was on probation for five separate felony convictions and knew the consequence of his actions, if discovered, would lead to revocation of his probation. DeWayne also knew that DeWayne Jr.'s biological mother was expecting another child fathered by DeWayne when he

violated his probation. DeWayne's deliberate probation violation placed him in a position where he was unable to parent DeWayne Jr. or Devon, and could not provide for any of their needs. We have previously noted that in a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). Furthermore, "While incarceration alone is not a basis for termination of parental rights [DeWayne's] incarceration has contributed to the neglect of [his] children." See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 613, 591 N.W.2d 557, 568 (1999).

As we noted in *In re Interest of L.V.*, 240 Neb. 404, 418, 482 N.W.2d 250, 259-60 (1992):

> "Incarceration of a parent, standing alone, does not furnish a ground for automatic termination of parental rights. . . . Incarceration, however, does not insulate an inmate from the termination of his parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent."

Quoting *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986).

DeWayne has not parented DeWayne Jr. or Devon at any time since their births. DeWayne Jr. and Devon have languished in foster care for years as a result of DeWayne's actions. At the time of the termination proceedings, DeWayne Jr. had been in foster care for approximately 4 years 7 months and Devon had been in foster care for approximately 2 years 11 months. It is worth repeating our statement from *In re Interest of Sunshine A.*, 258 Neb. at 158, 602 N.W.2d at 460, that the "concept of permanency is not simply a 'buzzword.' "

In our de novo review of the record, we find that it is in the children's best interests that DeWayne's parental rights be terminated.

CONCLUSION

Based on the foregoing reasons, we reverse the decision of the Court of Appeals and remand the cause with directions that the Court of Appeals affirm the decision of the juvenile court terminating DeWayne's parental rights.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CHARLES KUBIN, APPELLANT.

638 N.W.2d 236

Filed January 25, 2002. No. S-01-099.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Courts: Appeal and Error.** In reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court.
3. **Constitutional Law: Statutes: Pleas: Waiver.** Under Neb. Rev. Stat. § 29-1812 (Reissue 1995), once a defendant has entered a plea, or a plea is entered for the defendant by the court, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.

Appeal from the District Court for Dodge County, F.A. GOSSETT III, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed.

William G. Line 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.

After a bench trial in county court, Charles Kubin was convicted of driving while under the influence of alcoholic liquor (DUI), in violation of Neb. Rev. Stat. § 60-6,196 (Supp. 1999). Kubin appealed to the district court. He claimed that the county court erred in failing to sustain his motion to quash. The motion to quash facially challenged the constitutionality of § 60-6,196(8). That statutory provision mandates the sentencing court to order an alcohol assessment and empowers the court to order the convicted person to complete the assessment recommendations—in addition to any statutory penalty imposed. The district court affirmed Kubin's conviction and sentence, and he appeals.

We affirm because Kubin waived his right to facially challenge the constitutionality of the statute by failing to withdraw the plea entered by the court on his behalf.

BACKGROUND

In June 2000, Kubin was charged with DUI and failing to stop at a red light. At his arraignment in county court, he pled guilty to the charge of violating a traffic signal but stood mute on the DUI charge. His counsel stated that he had filed a motion to quash the complaint on the DUI charge, and the court entered a plea of not guilty on his behalf.

The motion to quash challenged the constitutionality of § 60-6,196(8), alleging the punishment provisions of the statute (1) are vague and give trial judges unlimited discretion in the range of penalties that they can impose, (2) violate the separation of powers clause of the Nebraska Constitution, and (3) violate the proscription against cruel and unusual punishment found in the Eighth Amendment to the U.S. Constitution and in the Nebraska Constitution, article I, §§ 9 (prohibiting excessive fines and cruel and unusual punishment) and 15 (requiring penalties to be proportional to the nature of the offense).

But the record indicates that the motion to quash was not filed until the day after the arraignment hearing, at which hearing the court entered a plea of not guilty for Kubin.

At the trial on the DUI charge, the county court received a stipulation regarding the facts and found Kubin guilty of DUI. At the sentencing hearing, the court ordered that Kubin be placed on probation, pay a fine, complete community service, and complete the alcohol assessment recommendations. Kubin appealed that sentence to the district court, which remanded with instructions for the county court to set out the recommendations that Kubin was required to complete. On remand, the county court then ordered a presentence investigation. After receiving the assessment recommendations and the cost estimates for the treatment plan, the county court resentenced Kubin as before.

Kubin again appealed to the district court. He argued that the county court erred in failing to sustain his motion to quash, and he renewed the constitutional arguments made in that motion. The district court affirmed the judgment.

ASSIGNMENTS OF ERROR

Kubin assigns that both the county court and the district court erred in failing to find that § 60-6,196(8) violates article I, §§ 9 and 15, of the Nebraska Constitution.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (2000).

[2] In reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court. *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998).

ANALYSIS

Kubin contends that § 60-6,196(8) is facially unconstitutional because it gives a court unlimited discretion to impose, or not impose, the costs for a rehabilitative treatment program which constitutes an excessive monetary penalty. The State, however, correctly contends that Kubin's constitutional arguments on appeal are procedurally barred because Kubin's motion to quash was not filed until the day after the court entered a plea of not guilty on his behalf, and, therefore, he has waived any defects alleged in the motion.

[3] Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. See, Neb. Rev. Stat. § 29-1812 (Reissue 1995); *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). Further, "[t]his statute has long been interpreted to include the situation where a plea is entered for the defendant by the court." *State v. Severin*, 250 Neb. 841, 846, 553 N.W.2d 452, 456 (1996). Because Kubin failed to withdraw the plea entered by the court, we conclude that he waived his right to facially challenge the statute.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DIANN M. MANNING, APPELLANT.

638 N.W.2d 231

Filed January 25, 2002. No. S-01-130.

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. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Motions to Suppress: Search and Seizure: Appeal and Error.** In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether there is an initial illegality involved in the search. If there is an initial determination that the search was illegal, then the court must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and David K. Arterburn for appellee.

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

WRIGHT, J.

NATURE OF CASE

Following a bench trial, Diann M. Manning was convicted of possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2000). Manning claims that evidence obtained during a search of her purse while police officers were executing an unrelated search warrant on her house was inadmissible and that the trial court erred in overruling her motions to suppress.

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).

[2] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999).

FACTS

On February 22, 2000, Sgt. Robert Falldorf served a warrant on Manning's residence in Grand Island, Nebraska. The police were searching for stolen property as part of an investigation of which Manning was not the subject.

When the police officers arrived at Manning's residence, only her son was present, but Manning arrived while the search was in progress. Officer Tony Keiper then asked Manning about her use of methamphetamine, and Manning replied that she had quit using the drug months ago. When Manning later asked if she could leave with her son, Keiper told her that she was free to leave, but Keiper asked Manning's permission to search her vehicle before she left. Manning gave Keiper permission to search the vehicle but told Keiper to retrieve her purse from the vehicle because drugs were located in the purse. Keiper then searched the purse in Manning's presence and found three separate quantities of what was later determined to be methamphetamine.

Manning was charged with possession of a controlled substance. Prior to trial, she filed three motions to suppress. One motion alleged that her statements were not voluntarily made. The second motion alleged that the "stop" was not made upon a reasonable and articulable suspicion. The third moved to suppress "the fruits of the arrest and search and seizure made in this case for the reason that the arrest and search and seizure were

made without probable cause or without benefit of a warrant . . . .” The trial court treated all three motions as one motion at a hearing held on September 20, 2000.

At the hearing, the State and Manning entered into an oral stipulation that the only reason the officers were at the residence was to serve and execute the search warrant. The parties stipulated that Manning gave consent to the search of her purse, which was in her vehicle parked in the driveway, and that the purse was retrieved from the vehicle and searched in Manning’s presence.

Two days after the hearing, the State moved to reopen the evidence. The State claimed that prior to the suppression hearing, it was unaware that the basis for the motion to suppress was that the search warrant was invalid. The State’s motion was granted. The State then offered a written stipulation similar to the oral stipulation and called Falldorf to testify about his contact with one of the informants who provided information used to obtain the warrant. Falldorf’s testimony was offered for the limited purpose of determining whether there were misleading facts omitted from the affidavit. Falldorf also testified that he was present when the warrant was served.

The trial court overruled the motions to suppress and made the following findings of fact: On February 22, 2000, a search warrant was issued pursuant to an affidavit and was served on Manning’s residence in Grand Island. While the officers were searching the residence, Manning arrived and spoke with officers. According to the stipulated facts, Manning consented to a search of her purse, which was in her vehicle parked in the driveway. Manning was not in custody or under arrest at the time.

The trial court considered three issues: (1) whether the search warrant was valid; (2) if the warrant was not valid, whether the officers acted in good faith; and (3) if the warrant was not valid, whether the consent given by Manning to search her purse was an intervening circumstance sufficient to attenuate the connection between the execution of the search warrant and the seizure of the drugs found in Manning’s purse.

The trial court noted that an affidavit in support of a search warrant must contain sufficient information to establish the reliability of the informant upon whose information the affidavit relied. Among the ways in which the reliability of an informant

may be established are 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, and (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).

Police had received information concerning stolen property from the victim of a residential burglary, and the victim's information eventually led police to Manning's home. The trial court found that the victim was a citizen informant. The victim relayed information from a second individual regarding the identity and location of the perpetrator. Although the victim's reliability was established, she did not supply any information to establish the reliability of the second individual. Another informant, who shared a cellblock at the Hall County jail with a suspect in the burglary, informed the police of a possible recipient of the stolen property.

The trial court concluded that on its face, the affidavit was insufficient regarding the information provided by the cellmate. The affidavit did not state that the cellmate had given reliable information in the past or that he was a citizen informant, and no information provided by the cellmate was independently verified by Falldorf. Furthermore, certain information given by the cellmate concerning the location of the stolen property had been found to be false. Although Falldorf testified in court that he had received reliable information from the cellmate in the past, the affidavit did not address the cellmate's reliability.

In considering whether there was a good faith exception based upon *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the trial court found that it was unreasonable for the officer to rely on the affidavit because it did not contain any information as to the reliability of the only two individuals who had provided information about the location of the stolen property—the second individual and the cellmate.

The trial court then considered whether exceptions to the exclusion of evidence derived from an illegal warrant should be applied even though Manning consented to the search. The trial

court found that Manning had returned home in the midst of a search and engaged in voluntary conversations with the officers. The officers asked if they could search Manning's purse, which was located in a vehicle that was not included in the search warrant. Manning voluntarily consented to the request, and the trial court concluded that her consent to a search unrelated to the warrant was a sufficient intervening circumstance to purge the taint of the illegal warrant. The trial court overruled the motions to suppress.

At the bench trial, Manning renewed her objection to the evidence obtained when Keiper searched her purse. The objection was overruled, and Manning was found guilty of possession of a controlled substance. She was placed on probation for 24 months.

ASSIGNMENT OF ERROR

Manning's only assignment of error is that the trial court erred in overruling her motions to suppress.

ANALYSIS

In determining whether the trial court erred in overruling her motions to suppress, Manning requests that this court adopt a de novo standard of review in "taint determinations," brief for appellant at 8, which is the same standard applied when an appellate court reviews determinations of reasonable suspicion and probable cause. Manning admits, however, that taint determinations are not included in probable cause and reasonable suspicion determinations.

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. *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001). 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. *Id.*

Manning claims that Nebraska law suggests that taint determinations have been reviewed under a de novo standard since 1996. However, in the cases upon which Manning relies, a de novo standard of review was used only to determine whether

there was probable cause or reasonable suspicion. See, *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998) (clear error in applying good faith exception; lower court did not reach attenuation question); *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997) (no legitimate expectation of privacy); *State v. Runge*, 8 Neb. App. 715, 601 N.W.2d 554 (1999) (determination of probable cause reviewed de novo); *State v. Mays*, 6 Neb. App. 855, 578 N.W.2d 453 (1998) (police lacked reasonable suspicion for stop), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

[3] In considering a trial court's ruling on a motion to suppress evidence obtained by a search, an appellate court first determines whether there is an initial illegality involved in the search. If such determination involves a consideration of whether an officer acted with reasonable suspicion or probable cause, that determination will be reviewed de novo. See, *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). If there is an initial determination that the search was illegal, then the court must determine whether the evidence that the defendant seeks to suppress is sufficiently attenuated from the illegal search. The appellate court reviews this taint analysis for clear error, which is the standard applied in all other rulings on motions to suppress, apart from determinations of probable cause and reasonable suspicion. See *id*.

The trial court determined that Manning's consent was sufficiently attenuated from the invalid search warrant and therefore overruled the motions to suppress. Manning claims this was error because the search of her residence was illegal and her consent to the search of her purse was the fruit of that illegality.

Our analysis of whether the search of Manning's purse was sufficiently attenuated from the illegal search begins with *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). In *Wong Sun*, the Court stated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to

> which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

371 U.S. at 487-88.

In *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989), we found that the evidence was tainted. We stated:

> "In the typical case in which the defendant was present when incriminating evidence was found in an illegal search or in which the defendant was confronted by the police with evidence they had illegally seized, it is apparent that there has been an 'exploitation of that illegality' when the police subsequently question the defendant about that evidence or the crime to which it relates. This is because 'the realization that the "cat is out of the bag" plays a significant role in encouraging the suspect to speak.' . . ."

Id. at 945, 434 N.W.2d at 327.

The case at bar does not involve a confession obtained by police after confronting Manning with evidence of the crime for which she was subsequently convicted. The search for stolen property was completely unrelated to the search of Manning's purse. Manning was not the subject of the original investigation, and she was not confronted with any illegally obtained evidence against her. No evidence indicated that she was threatened or coerced in any manner, and it was stipulated that Manning consented to the search of her purse.

Manning argues that the only reason the officers were at her residence was to serve the illegal search warrant and that if the officers had not been there, her purse would not have been searched. She argues that the officers took advantage of a bad warrant to convince her to consent. Her argument that officers exploited the initial illegality is based only on the premise that the officers would not have asked to search her purse had they not been at her residence during the invalid search. This "but for" test was rejected in both *Wong Sun* and *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

At the suppression hearing, the written stipulation indicated that Manning was free to leave. There was no claim that Manning's consent to the search was involuntary. In fact, the

record indicates that her permission to search the purse was voluntary. The initial illegality was not exploited in obtaining Manning's consent to search her vehicle and her purse. Thus, the trial court was not clearly erroneous in concluding that the search of Manning's purse was sufficiently attenuated from the illegal search due to her voluntary consent.

CONCLUSION

The trial court did not err in overruling Manning's motions to suppress. The judgment of conviction and sentence are affirmed.

AFFIRMED.

HOWARD S. FACKLER AND PATRICIA A. FACKLER,
HUSBAND AND WIFE, APPELLANTS, V.
ROGER M. GENETZKY, APPELLEE.

638 N.W.2d 521

Filed February 1, 2002. No. S-00-758.

1. **Directed Verdict.** The party against whom a verdict is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Negligence: Proof: Proximate Cause.** In an action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized professional standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries.
4. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
5. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that a physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
6. **Expert Witnesses.** Where the character of an alleged injury is not objective, but, rather, subjective, the cause and extent of the injury must be established by expert medical testimony.
7. ____. Subjective injuries may be inferred only from their symptoms and, consequently, require medical expert testimony to determine the cause and extent thereof.

8. **Malpractice: Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.
9. ____: ____: ____: ____. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.
10. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled.
11. **Trial: Evidence.** A party who objects to evidence and causes it to be excluded cannot complain that the trial court erred in excluding the evidence.

Appeal from the District Court for Dakota County: MAURICE REDMOND, Judge. Affirmed.

Dorothy A. Schinzel for appellants.

Charles T. Patterson and Patrick L. Sealey, of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Howard S. Fackler and Patricia A. Fackler sued Roger M. Genetzky, D.V.M., for alleged professional negligence that resulted in the deaths of two horses owned by the Facklers. In *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999), we reversed the trial court's decision to grant summary judgment on the professional negligence claims and remanded the cause for further proceedings. At the close of the Facklers' evidence, the trial court directed a verdict in favor of Dr. Genetzky, and the Facklers appeal.

SCOPE OF REVIEW

[1] The party against whom a verdict is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001), *modified* 262 Neb. 1, 626 N.W.2d 224.

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996).

FACTS

In June 1995, the Facklers owned horses named "Indian Magic" and "Patricia Gold." Both horses were kept at Atokad racetrack, where Dr. Genetzky was the practicing veterinarian.

Dr. Genetzky has been a licensed veterinarian for more than 28 years. He received his doctor of veterinary medicine degree from Kansas State University in 1972. In June 1995, he was licensed in both Nebraska and South Dakota. His practice involved mostly large animals, with an emphasis on equine species.

In their petition, the Facklers alleged that on June 17, 1995, they had requested that Dr. Genetzky give Indian Magic an injection of Lasix and an injection of "Bute," two commonly used equine medicines. On June 19, Howard Fackler noticed that the horse had swelling in its neck. The horse died during the night of June 19. The Facklers alleged that the death of Indian Magic was caused by an infection and that the infection was the result of Dr. Genetzky's practice of nonsterile procedures while giving the injections.

By videotape deposition, Vickie Cooper, D.V.M., stated that she had performed a necropsy on Indian Magic and that at the time, the horse was in an advanced state of decomposition. Dr. Cooper did not find any evidence in the major organs that could have caused the death. Her report stated that clostridial myositis (bacterial infection) was found in the neck area where the injections had been given. She opined that the bacterial infection could possibly have resulted from the contamination of a wound. She noted that clostridial bacteria are found in a horse's gastrointestinal tract, are ubiquitous within a horse's environment, and proliferate throughout the body during decomposition.

Dr. Cooper could not state that the death of Indian Magic was caused by the injections or a bacterial infection, but that a number of factors could have caused the horse's death. The degree of decomposition masked any changes that could have led to a more distinctive diagnosis.

The Facklers further alleged they requested that Dr. Genetzky administer a lubricating injection to one of Patricia Gold's knees. On June 4, 1995, Dr. Genetzky administered a substance called Vetalog, which the Facklers claimed is not a lubricant, but, instead, acts to "freeze" an animal's joint. The Facklers claim they were not told of the possible side effects of Vetalog.

Howard Fackler claimed that Patricia Gold was not having any trouble using her knee but that it was "just warm." He stated that the leg "supposedly shattered" when the horse raced 2 or 3 days after the injection was administered. After the injury, Patricia Gold was confined to a small area in an attempt to facilitate healing of the knee. However, in November 1995, the horse escaped from the confined area and while running "snapped the leg clean off." The following day, the Facklers had the horse destroyed.

A jury trial began on June 14, 2000, and at the close of the Facklers' evidence, Dr. Genetzky's motion for directed verdict was sustained by the trial court.

ASSIGNMENTS OF ERROR

The Facklers assign as error that the trial court erred in (1) granting a directed verdict to Dr. Genetzky, (2) failing to permit the Facklers to prepare and submit as evidence charts regarding the expected earnings of the horses, and (3) "not permitting [them] to submit all of the report Witness Dan Sweetwood had with him."

ANALYSIS

[3-7] In an action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized professional standard of care, that there was a deviation from that standard by the defendant, and that the deviation was the proximate cause of the plaintiff's alleged injuries. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999). A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately

contributed to them. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.* Where the character of an alleged injury is not objective, but, rather, subjective, the cause and extent of the injury must be established by expert medical testimony. *Id.* Subjective injuries may be inferred only from their symptoms and, consequently, require medical expert testimony to determine the cause and extent thereof. *Id.*

The party against whom a verdict is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001), *modified* 262 Neb. 1, 626 N.W.2d 224. In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996).

At trial, the Facklers asserted that Dr. Genetzky was negligent because he failed to have Indian Magic held properly while the injections were administered and either failed to clean the area of the neck where the injections were given or failed to use a new needle.

Dr. Cooper and Harald Boschult, D.V.M., testified regarding the standard of care for administering an injection to a horse. Dr. Boschult stated that the area should be cleaned of debris as much as possible and that it would be advisable to have someone restrain the horse while the injection is given. Dr. Boschult noted that the State Racing Commission requires veterinarians to use single-use disposable needles.

Dr. Cooper testified that if she were to give an injection, she would make sure there was not excessive gross contamination at the site of the injection. Dr. Cooper stated that reusing a needle could increase the potential for contamination of that needle.

Giving the Facklers the benefit of all reasonable inferences from such testimony, we conclude that the testimonies of Drs. Boschult and Cooper were sufficient to establish the generally recognized medical standard of care required for giving a horse an injection.

Next, the Facklers were required to prove that Dr. Genetzky deviated from this standard. John Loghry, a horse owner, testified that when Dr. Genetzky gave injections to Loghry's horses, he did not wipe down the area. Another horse owner, Ron Brockert, testified that he had seen Dr. Genetzky use the same needle on more than one horse and that on one occasion, he witnessed Dr. Genetzky wash his equipment with a garden hose.

Patricia Fackler was present when Dr. Genetzky administered the injection of Lasix to Indian Magic. Although she saw Dr. Genetzky grab a syringe from his pocket, she turned away because she does not like needles. She did not see Dr. Genetzky brush or clear the area prior to removing the syringe from his pocket. Howard Fackler testified that he held Indian Magic when Dr. Genetzky administered the injection of Bute. Howard Fackler said that Dr. Genetzky placed his finger on the horse's neck, the vein popped up, and the injection was administered. After he pulled out the needle, Dr. Genetzky wiped his hand over Indian Magic's neck.

Dr. Genetzky testified that when he administers an injection, he pushes on the vein until it becomes distended. With his right hand, he injects the needle into the vein. After the injection, he wipes off the skin.

We cannot say that the evidence presented was sufficient to establish that Dr. Genetzky deviated from the standard of care set forth by Drs. Boschult and Cooper. No evidence was presented to establish that the area where the injections were administered was unclean or that the needle had been reused. On cross-examination, Dr. Boschult could not say that Dr. Genetzky had acted outside the standard of care.

The Facklers assert that the death of Indian Magic was most likely caused by toxic poisoning. The necropsy report stated: "Gross and histopathological changes are consistent with clostridial myositis possibly resulting from contamination of a wound area. . . . Often, animals will die within 24 hour[s] after

onset of local signs as a result of toxin production from bacterial agents as well as degenerating cell components."

In her videotaped deposition, Dr. Cooper was asked: "From your having examined the horse and with your knowledge of having a veterinary degree and even a Ph.D. in this area, would you say that this — the death of this horse could have been caused by something happening when the Bute shot was given?" Dr. Cooper answered: "I cannot say that, no." Dr. Cooper was then asked: "Would you give any — would you say with any certainty that you could — that if anything else could have caused the death?" She responded: "A number of things could have potentially caused the death." At trial, Dr. Boschult testified that the necropsy report was suggestive that bacteria caused Indian Magic's death.

The Facklers offered testimony that six or seven other horses at the racetrack had swollen necks at approximately the same time as Indian Magic. When asked what might have caused the horses to develop swollen necks, Dr. Cooper stated that there "could be contamination of the substance that was being injected; contamination of the needles and syringes used; poor technique." Dr. Cooper stated that these were "potential things that could cause lesion formation in the neck."

[8,9] Assuming the truth of all competent evidence submitted on behalf of the Facklers, resolving every controverted fact in the Facklers' favor, and giving them the benefit of every inference that can reasonably be deduced from the evidence, the Facklers have failed to establish their burden of proof that the injections administered by Dr. Genetzky were the proximate cause of Indian Magic's death. Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. *Id.*

The testimony given by Drs. Boschult and Cooper did not establish the cause of Indian Magic's death or whether any

negligence on Dr. Genetzky's part could have proximately caused the death. The Facklers have failed to produce any evidence by which a jury could reasonably conclude that the death of Indian Magic was caused by negligence on the part of Dr. Genetzky. Therefore, the trial court correctly directed a verdict in favor of Dr. Genetzky regarding the death of Indian Magic.

The Facklers also assert that Dr. Genetzky was negligent in administering an injection of Vetalog to Patricia Gold. Howard Fackler testified that he requested a lubricating cortisone injection. Vetalog is a cortisone injection, but the Facklers claim that it is not a lubricant. They allege that Vetalog caused Patricia Gold's joint to stiffen.

Dr. Boschult testified that Vetalog could increase the chances of a joint's shattering. However, he also testified that Vetalog does not necessarily stiffen joints, and he could not say that Vetalog stiffened Patricia Gold's joint. He testified that the stiffness in the joint was probably caused by arthritis.

The Facklers did not offer any expert testimony about the actual cause of the alleged injury. Howard Fackler stated that after the leg "supposedly shattered," he had the knee x-rayed, but no veterinarian testified as to the results of any x ray.

Evidence that an injection of Vetalog could increase the chances of injury is not sufficient to establish the proximate cause of the injury or that Dr. Genetzky deviated from the standard of care in giving this injection. The jury would be forced to speculate on both the type and cause of the injury.

[10] The Facklers also claim that Dr. Genetzky breached the standard of care by not informing them of the possible side effects of Vetalog. Howard Fackler claimed that had he known of the possible side effects, he would not have raced Patricia Gold so soon after the injection. This allegation was not included in the Facklers' petition. The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). The Facklers did not amend their pleading before trial, and therefore, this claim is not properly before us. Furthermore, no expert testimony established that Vetalog caused any harm to Patricia Gold.

In summary, the Facklers' failure to produce expert testimony regarding the cause of the injuries to their horses would require a jury to speculate about the nature of the injuries. Therefore, the trial court was correct in directing a verdict in favor of Dr. Genetzky.

The Facklers' second assignment of error is based upon their claim that the trial court erred by failing to allow them to prepare and submit charts regarding the expected earnings of the horses. Because we find that the trial court properly sustained Dr. Genetzky's motion for directed verdict, we do not consider this assignment of error.

Finally, the Facklers claim that the trial court erred in "not permitting [them] to submit all of the report Witness Dan Sweetwood had with him." Daniel Sweetwood, an investigator for the State Racing Commission, and Dr. Jack Muller, who was at that time the official veterinarian for the commission, conducted an investigation into the death of Indian Magic.

[11] Our examination of the record reveals that the Facklers never offered the report as an exhibit. When Dr. Genetzky offered the report, the Facklers objected to the admission of the exhibit as hearsay. The objection was overruled except as to hearsay. The Facklers cannot complain about the exclusion of evidence that was not admitted because of their objection. A party who objects to evidence and causes it to be excluded cannot complain that the trial court erred in excluding the evidence. See *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999). This assignment of error is without merit.

CONCLUSION

The Facklers failed to produce expert testimony which could support a finding that Dr. Genetzky was negligent or that such negligence was a proximate cause of the injuries. The judgment of the trial court sustaining Dr. Genetzky's motion for directed verdict is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK C. BIRGE, APPELLANT.

638 N.W.2d 529

Filed February 1, 2002. Nos. S-00-984, S-00-1029.

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. **Plea Bargains: Prosecuting Attorneys: Specific Performance.** In a case where the prosecutor has breached a plea agreement and the issue of the breach has been preserved, the defendant is entitled to some relief which might take the form of either specific performance of the agreement on the plea or withdrawal of the plea.
3. **Plea Bargains: Prosecuting Attorneys: Sentences: Specific Performance: Appeal and Error.** Where the prosecutor has breached a plea agreement by failing to remain silent at sentencing, the defendant is precluded from obtaining trial or appellate relief in the form of withdrawal of the plea unless the defendant moves to set aside the plea in the trial court; however, if the defendant objects at the trial level, despite failing to move to withdraw the plea, the defendant is nevertheless entitled at trial and on appeal to consideration of relief in another form, such as specific performance of the plea agreement.

Petitions for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL MCGILL, Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Patrick C. Birge, pro se.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

These consolidated cases on further review from the Nebraska Court of Appeals involve a violation of a plea agreement by the State and the availability of relief therefrom by a criminal defendant. Pursuant to a plea agreement in which the State agreed to remain silent at sentencing, Patrick C. Birge pled

no contest in the district court for Douglas County to unlawful possession with intent to deliver cocaine in case No. S-00-984, to burglary in case No. S-00-1029, and to habitual criminal charges in both cases.

At sentencing, the State asked the district court "to consider the full range" of available sentences. Birge's objection to the State's comment was overruled, and the sentences were imposed. Birge appealed his sentences to the Court of Appeals, which vacated Birge's sentences and remanded the causes for resentencing on the basis that the State had violated the plea agreement by failing to remain silent at sentencing. *State v. Birge*, Nos. A-00-984, A-00-1029, 2001 WL 968393 (Neb. App. August 28, 2001) (not designated for permanent publication). The State petitioned for further review claiming that because Birge did not move to withdraw his pleas, he was precluded from obtaining relief on appeal from the State's violation of the plea agreement, and that the Court of Appeals erred in granting appellate relief. We granted the State's petition for further review. We affirm the decision of the Court of Appeals.

STATEMENT OF FACTS

On April 24, 2000, Birge entered pleas of no contest to unlawful possession with intent to deliver cocaine in case No. S-00-984, to burglary in case No. S-00-1029, and to habitual criminal charges in both cases. Birge's pleas were entered as part of a plea agreement in which the State agreed both to dismiss certain other charges and to "remain silent at the time of sentencing." Other charges were dismissed, and the district court accepted Birge's pleas and found him guilty on the remaining charges indicated above.

At sentencing on August 30, 2000, defense counsel asked that Birge's sentences run concurrently and argued for the minimum sentences allowed by law. Thereafter, the following dialog occurred:

> THE COURT: . . . Does the State wish to be heard at all?
>
> [Prosecutor]: Just to make it clear, Judge, that the State does not share the comments of the defense. I would simply ask you to consider the full range of potential at your availability.

> THE COURT: Okay. [Defense counsel], anything further then?
>
> [Defense counsel]: No, Your Honor.

The district court then reviewed Birge's record and commented upon the violence of the instant crimes and Birge's prior convictions. The district court commented on whether the sentences should be consecutive or concurrent and concluded, "[E]ven though I've tried to listen to the strong statement made by your attorney . . . it's my conclusion that the sentences in these cases should run one after the other."

Defense counsel then called the district court's attention to the fact that the State had agreed as part of the plea agreement to "remain silent" at sentencing. Defense counsel argued that the prosecutor had violated the plea agreement by making the comments quoted above. The prosecutor then stated:

> I have not made any recommendation as to sentencing. The Court asked me if I had anything to say, and I said that I didn't share counsel's remarks and that you're free to consider the full range available to you. But I haven't made any recommendation. The Court obviously is going to disregard anything that I say if the Court perceives it was inviolate [sic] of the plea agreement in any way. And if in fact it was, which I don't think it was, I will withdraw the remarks. I do not make any recommendation as to sentencing at all.

Defense counsel responded that the prosecutor's comments alone were enough to have violated the portion of the plea agreement that the State would remain silent at sentencing. The prosecutor replied, "In that case, if counsel wants to move to withdraw the plea agreement we can take that up, and obviously I would move to reinstate all the other charges." Birge did not subsequently move to withdraw his pleas.

The district court then stated that the prosecutor's comments "would not in any way have changed the Court's opinions." Defense counsel again objected to the prosecutor's comments; the district court noted the objection and overruled it. The district court then sentenced Birge to 10 to 20 years' imprisonment on the possession with intent to deliver charge and 10 to 20 years' imprisonment on the burglary charge and ordered that the sentences be served consecutively.

Birge appealed to the Court of Appeals, assigning as error the district court's imposition of excessive sentences and the State's violation of the plea agreement. The Court of Appeals determined that the prosecutor's comments at sentencing violated the State's plea agreement with Birge and vacated the sentences and remanded the causes to the district court for resentencing before a different judge. The State petitioned this court for further review. We granted the State's petition.

ASSIGNMENTS OF ERROR

On further review, the State asserts that the Court of Appeals erred in (1) failing to find that Birge was precluded from obtaining appellate relief from the alleged violation of the plea agreement because although Birge objected, he did not move to withdraw his pleas; (2) finding *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), controlling under the facts of this case; and (3) failing to apply a harmless error analysis.

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 made by the court below. *State v. Kinney*, 262 Neb. 812, 635 N.W.2d 449 (2001).

ANALYSIS

Preservation of Issue of Violation of Plea Agreement and Entitlement to Relief.

The State argues that the Court of Appeals erred in failing to conclude that Birge had waived all errors with respect to the violation of the plea agreement because although he objected, he did not move to withdraw his pleas in the district court. The State asserts that the Court of Appeals erred by failing to follow the statement of this court in *State v. Shepherd*, 235 Neb. 426, 429, 455 N.W.2d 566, 568 (1990), wherein we stated, "A defendant is precluded from obtaining appellate relief from a prosecutor's violation of a plea agreement unless the defendant moves to set aside the plea in the court."

The Court of Appeals did not read *Shepherd* to require that the defendant was required both to object to the violation of the plea agreement and to move to withdraw pleas in order to preserve the

issue for appellate review. The Court of Appeals concluded that Birge's objection was sufficient to preserve the issue of violation of the plea agreement for appeal. The Court of Appeals thus rejected the State's argument and granted Birge relief. We conclude that where Birge objected before the district court, the Court of Appeals did not err in considering the issue of violation of the plea agreement on review and in ordering relief in the form of specific enforcement of the plea agreement by remanding the causes for resentencing before a different judge.

The leading U.S. Supreme Court case in this area is *Santobello v. New York, supra*. In *Santobello*, the U.S. Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. The Court determined in *Santobello* that the State's promise to remain silent at sentencing had not been fulfilled and concluded that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration." 404 U.S. at 262-63. In *Santobello*, the defendant both objected at the time of the breach of the plea agreement and attempted to withdraw his plea of guilty. In regard to the remedy for the breach of a plea agreement, the Court stated:

> The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner would be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i.e.,* the opportunity to withdraw his plea of guilty.

Santobello v. New York, 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

[2] Thus, in a case where the prosecutor has breached a plea agreement and the issue of the breach has been preserved, the U.S. Supreme Court has stated that the defendant is entitled to some relief which might take the form of either "specific performance of the agreement on the plea" or withdrawal of the

plea. *Id.* In the instant case, the State breached the portion of the plea agreement in which the State had agreed to remain silent at sentencing. In a situation such as the present case in which the State has breached the plea agreement by failing to remain silent at sentencing, specific performance may take the form of resentencing before a different judge, wherein the State remains silent. The U.S. Supreme Court left the choice of appropriate remedy under the circumstances of a particular case to "the state courts" and implied that the relief sought by the defendant should be considered in the choice of remedy. *Id.*

This court's decision in *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990), refers to *Santobello*, and *Shepherd* should be viewed in light of the U.S. Supreme Court's statements in *Santobello*. In *Shepherd*, the defendant neither objected nor moved to withdraw his plea but nevertheless contended on appeal that the State had breached its promise made in the plea agreement to not make a sentencing recommendation. The defendant in *Shepherd* was denied relief on appeal. This court in *Shepherd* concluded that the defendant had waived the issue of violation of the plea agreement and made two separate statements. First, the defendant "did not object to the prosecutor's recommendation even after the court asked if he cared to respond." 235 Neb. at 428, 455 N.W.2d at 568. Referring to decisions in other state courts, this court stated that "where no objection to a plea bargain violation was made to the sentencing judge, the defendant waived the error, and the issue was not preserved for appellate review." *Id.* Second, this court observed in *Shepherd* that "the defendant not only failed to object to the prosecutor's breach of the plea agreement, but did not move in arrest of judgment or to withdraw his plea of guilty in the trial court." 235 Neb. at 429, 455 N.W.2d at 568. This court then commented, "A defendant is precluded from obtaining appellate relief from a prosecutor's violation of a plea agreement unless the defendant moves to set aside the plea in the trial court." *Id.* In view of the facts in *Shepherd*, this last comment, being broader than the case then sub judice, was dicta.

In the present case, the State and the Court of Appeals interpret *Shepherd* differently and Birge essentially relies on *Santobello*. It is undisputed that Birge objected to the State's violation of the plea agreement but did not move to withdraw his

pleas. In its decision granting relief, the Court of Appeals stated that *Shepherd* did not require Birge to both object and move to withdraw his pleas, and therefore, Birge's objection was sufficient to preserve the issue of the State's violation of the plea agreement for appellate review.

The State focuses on the second comment in *Shepherd* and argued to the Court of Appeals and again to this court that a defendant is entitled to no appellate relief for violation of a plea agreement unless the defendant has specifically moved to set aside the plea. We acknowledge that the State's position finds support in the language of *Shepherd*. However, in light of the U.S. Supreme Court's statements in *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), upon which *Shepherd* is based, and the facts in *Shepherd*, we conclude that this court's comment in *Shepherd* with respect to the purported necessity to move to withdraw a plea in order to preserve the issue of a breach of a plea agreement was overly broad and is hereby disapproved.

The Court in *Santobello* recognized that the appropriate relief for a plea agreement violation could be either specific performance of the plea agreement or withdrawal of the plea. The Court left the form of relief to the discretion of "the state courts" and implied that the choice was to be made based on the circumstances of a particular case and that the relief sought by the defendant should be considered in the choice of remedy.

[3] In certain cases involving a violation of a plea agreement by the State, such as the present case, the defendant may seek to preserve the benefit of the portion of the plea agreement regarding the dropped charges and seek the remedy of specific performance of the portion of the plea agreement requiring the State to remain silent at sentencing. If the defendant is required to move to withdraw his or her plea before being entitled to appellate relief for a violation of the plea agreement, he or she risks the unwanted result that such motion will be granted and the plea withdrawn, rather than that the portion of the plea agreement requiring the State to remain silent at sentencing will be enforced. In order to (1) allow the trial courts and the appellate courts the option of granting relief in the form of specific performance of the plea agreement where appropriate, (2) permit the granting of

withdrawal of the plea where appropriate, and (3) allow a defendant to seek either form of relief pursuant to *Santobello*, we conclude that the defendant is precluded from obtaining trial or appellate relief in the form of withdrawal of the plea unless the defendant moves to set aside the plea in the trial court; however, if the defendant objects at the trial level, despite failing to move to withdraw the plea, the defendant is nevertheless entitled at trial and on appeal to consideration of relief in another form, such as specific performance of the plea agreement.

In the present case, Birge objected at sentencing to the State's violation of the portion of the plea agreement in which the State agreed to remain silent at sentencing, and the district court overruled Birge's objection. Birge preserved the issue of the State's violation of the plea agreement for appellate review. Because Birge did not move in the district court to withdraw his pleas, on appeal, Birge is precluded from obtaining relief in the form of withdrawal of his pleas. However, because Birge preserved the issue for review on appeal by noting his objection, the Court of Appeals properly granted relief in the form of specific performance. We therefore conclude that the Court of Appeals did not err in granting relief in the form of specific performance by vacating the sentences and remanding the causes to the district court for resentencing by a different judge.

Application of Santobello *and State's Assertion of Harmless Error.*

The State next argues that the Court of Appeals erred by misapplying the U.S. Supreme Court's holding in *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), in the instant case. The State distinguishes *Santobello* on the basis that in the present case, after Birge's objection, the prosecutor offered to withdraw his remarks to the extent the district court might have found that they violated the agreement and invited Birge to withdraw his pleas. The State further asserts that the Court of Appeals erred by failing to apply a harmless error analysis and argues that there is proof in the instant case that Birge was not prejudiced by the prosecutor's comments at sentencing because the district court stated that it was not influenced by the comments.

We reject these arguments. In *Santobello*, the Court stated:

> [The sentencing judge] stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state court for further consideration. . . . We emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge.

404 U.S. at 262-63.

Under *Santobello*, once the State has violated the plea agreement by failing to remain silent at sentencing, the violation cannot be cured either by the prosecutor's offer to withdraw the comments or by the trial court's statement that it will not be influenced by the prosecutor's comments in imposing sentence. Instead, relief must be afforded by either withdrawal of the plea or specific performance of the plea agreement in the form of sentencing before a different judge. Therefore, the Court of Appeals did not err where it did not find the violation of the plea agreement to be harmless error, notwithstanding the district court's statement that it was not influenced by the prosecutor's comments. The prosecutor could not cure its violation of the plea agreement by offering to withdraw the remarks, nor did the prosecutor's "offer" to Birge to withdraw his pleas cure the violation. We therefore reject the State's second and third assignments of error on further review.

CONCLUSION

We conclude that the fact that Birge did not move to withdraw his pleas precluded him from obtaining relief on appeal in the form of withdrawal of his pleas but did not preclude Birge from obtaining appellate relief in the form of specific performance of the State's agreement to remain silent at sentencing. We disapprove the comment in *State v. Shepherd*, 235 Neb. 426, 455 N.W.2d 566 (1990), to the contrary. By objecting to the State's breach of the plea agreement, Birge preserved the issue of violation of the plea agreement and his entitlement to specific

performance for review on appeal. The Court of Appeals did not err in vacating his sentences and remanding the causes for resentencing before a different judge. We reject the State's assignments of error on further review and affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUAN L. LEONOR, ALSO KNOWN AS JUAN ARMAND, APPELLANT.

638 N.W.2d 798

Filed February 1, 2002. No. S-00-1318.

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. **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. **Convictions: Appeal and Error.** On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. ____: ____. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition.
5. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
6. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
7. **Criminal Law: Indictments and Informations: Aiding and Abetting.** An information charging an aider and abettor of a crime need not include any additional facts than those necessary to charge the principal of the crime.

8. **Aiding and Abetting.** Neb. Rev. Stat. § 28-206 (Reissue 1995) states that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he or she were the principal offender.
9. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent.
10. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
11. ____: ____. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
12. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.
13. **Aiding and Abetting: Convictions.** A defendant can be convicted of the use of a deadly weapon charge under an aiding and abetting theory.
14. **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.
15. **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.
16. ____. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.
17. ____. 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 Douglas County: GERALD E. MORAN, Judge. Affirmed.

Anthony S. Troia and Jason E. Troia, of Troia Law Offices, for appellant.

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

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

McCormack, J.

I. NATURE OF CASE

The appellant, Juan L. Leonor, was charged by amended information in the Douglas County District Court with first degree assault and use of a deadly weapon to commit a felony for his actions on November 20, 1999. He was charged in a separate case with two counts of second degree murder and two counts of use of a deadly weapon to commit a felony for his actions on November 22, 1999. After a consolidated trial, Leonor was found guilty on all counts. He was sentenced to serve prison terms of 20 years to life on each second degree murder count, 5 to 10 years on each of the three use of a deadly weapon to commit a felony counts, and 5 to 10 years on the first degree assault count, all to be served consecutively. Leonor appeals his convictions and sentences, assigning as error insufficiency of the evidence and excessive sentences. We affirm.

II. BACKGROUND

1. November 20, 1999, Incident

On November 20, 1999, Omaha police officer Angela Baker was called to the area of 21st and Q Streets in Omaha, at approximately 12:51 a.m. The nature of the call was a shooting at the La Loma Cafe, where it was believed that a Hispanic male had been shot in the leg. The victim was identified as Jose Silva, a member of the "Lomas XIII" street gang.

Silva testified that he was with his girl friend, Rhonda Ponce, at the La Loma Cafe sometime after midnight on November 20, 1999, when three individuals entered the restaurant. The three individuals, one of whom he identified as Rodolfo Chavez, a member of the "Surenos" street gang, got their food and left. Three to five minutes after Chavez and his companions left the restaurant, Silva heard gunshots coming from his left, near the front door. He jumped up, covered Ponce, threw her down on the floor, and got down on the floor himself. He realized that he had been shot only after he hit the floor. It was stipulated at trial that the wounds involved a substantial risk of death and a substantial risk of permanent disfigurement.

Two persons who were with Leonor that evening testified that they saw Leonor shoot into the La Loma Cafe. Chavez testified

that there was a discussion between Leonor and David Gonzales, also known as Creeper, in Chavez' presence about who was going to do the shooting. Leonor then shot three or four times through the window of the La Loma Cafe.

Gerardo Ortiz, who was also present, testified that he saw Leonor shoot through the window of the La Loma Cafe three or four times. Ortiz testified that the reason Leonor shot Silva was that a person named "Speedy," who was with Ortiz and Leonor, said Silva had shot his mother. Ortiz also testified that after the shooting, several persons, including Leonor, went to Ortiz' apartment. At that time, Leonor mentioned losing his pager. Officer Bruce Ferrell was one of the investigating officers at this shooting. Ferrell found a Uniden digital pager on the curb approximately 70 to 90 feet northeast of the La Loma Cafe. This pager was determined to be rented to Leonor.

2. November 22, 1999, Incident

Officer Kimberly Woolery was working in the early morning hours of November 22, 1999, and received a call at 1:32 concerning shots fired in the area of 20th and Q Streets. En route, Woolery overheard a second call of a car accident in the area of 20th and N or M Streets. She went to the scene and observed that a black car had struck a light pole. She saw a single male occupant unconscious in the driver's seat. Woolery observed that the driver's-side window had been shattered, but held intact by the tinting, with a small hole just above the door lock. She opened the door and noticed a matching hole in the driver's upper back. From this, Woolery determined that the driver had been shot. She determined that the identity of the driver was Miguel Medrano. Medrano later died at the hospital where he had been taken.

Officer Craig Wylie was also on the scene that morning. At approximately 5 a.m., Wylie was approached by three teenagers who notified him of a body in the alley to the east. Wylie then went to the alley and noticed a Hispanic female. The victim was identified as Sylvia Valadez.

Witness Antoniette Gomez stated that she was with Valadez and Medrano on the evening of November 21, 1999, at the Guaca Maya restaurant. She testified that she, Valadez, and Medrano left the Guaca Maya restaurant at closing time and

went to Medrano's home. They remained at Medrano's for a few minutes, then Medrano and Valadez left together in Medrano's car. Gomez last saw Medrano and Valadez at approximately 1:30 a.m. driving toward 20th Street.

Dr. Jerry W. Jones performed autopsies on Valadez and Medrano. Valadez died as a result of blunt trauma injuries that were consistent with a car accident. According to Jones, Valadez probably remained alive and conscious for several minutes after the accident. The cause of Medrano's death was concluded to be a penetrating gunshot wound to the left side of the chest, which perforated the apex of the upper lobe of the left lung and severed the common carotid and the left subclavian arteries.

There were several individuals in the neighborhood who testified as to what they saw and heard in the early morning hours of November 22, 1999. Michael Jacobs testified that he saw two cars speeding north down 20th Street at around 1:30 a.m., with one man hanging out the passenger-side window of the car that was following the first car. He saw that man fire one shot, and he heard at least two other shots after the cars were no longer in his field of vision. Jacobs described the car from which shots were fired as dark colored with silver or chrome wheels. When shown a picture of Leonor's car, exhibit 64, Jacobs identified it as similar to or consistent with the car that gunshots were fired from.

Roy Nelson testified that he heard two or three gunshots, a "car scream around 20th and Q going north on 20th," with another car behind it, and three more gunshots. He testified that the gunshots were coming from the rear car, which he described as a dark sports car, possibly a Trans Am. Nelson was shown exhibit 64 and testified that it was very similar to the car he saw gunshots fired from on November 22, 1999.

Abel Diaz was standing outside of his car on 20th and N Streets and observed a black car being chased by a light brown car. He heard five or six gunshots and saw the shots coming from the passenger side of the second car, which was chasing the first car. Diaz then saw the first car crash into the light pole. Diaz was also shown exhibit 64 and stated that the taillights on the second car looked like the taillights on the car depicted in the exhibit.

Several of Leonor's fellow gang members testified as to what they observed on the morning of November 22, 1999. Ortiz

testified that he was with a group of people watching television at his apartment on the evening of November 21. Around 1 a.m. on November 22, Ortiz' roommate received a call from Leonor and Gonzales, who said that they were coming over to the apartment from the Guaca Maya restaurant. About 10 minutes later, Ortiz and the others at his apartment heard gunshots coming from 20th and Q Streets. Ortiz' apartment is located on the corner of 20th and P Streets. About 10 minutes after hearing the gunshots, Leonor and Gonzales arrived at the apartment. They were drunk and laughing. Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them. He also stated that he had been driving and that Gonzales did the shooting.

Jose Hernandez was present at Ortiz' apartment on the evening of November 21, 1999. He remembers Leonor and Gonzales calling at about 11 p.m. or 12 a.m. to say they were coming over. Hernandez later heard three to five gunshots coming from around 20th and Q Streets and went outside to see what had happened. Ortiz and his roommate went outside too. They could not see where the shots came from, so they went back inside the apartment. About 5 to 15 minutes later, Leonor and Gonzales appeared outside the apartment. Leonor was carrying Gonzales, who was very intoxicated, and Gonzales was waving around a 9-mm gun, pointing it at Hernandez.

Leonor told Hernandez that the gun was not loaded because the last bullet had been fired. Once they got into the apartment, Leonor explained that they were coming from the Guaca Maya restaurant and that Gonzales "wanted something to go on with his gun." They were driving down Q Street, and Gonzales shot his gun two or three times. Leonor then told Hernandez that he and Gonzales saw a bald-headed man in a black car, who got "paranoid" when they all looked at each other at a four-way stop sign. Leonor got in front of the bald man's car to block his way. When the bald man tried to reverse, Leonor reversed and got right beside him. Gonzales then shot his gun at the man. Leonor next raced the bald man's car down the street until it crashed.

Arthur Carter testified that he had been incarcerated with Leonor in the Douglas County Correctional Center in February 2000. According to Carter, Leonor told him about the shooting

of Medrano's car because he was seeking Carter's advice as to possible sentences. Leonor told Carter that he and another person were out "looking for the enemies," when they saw a black car and began to follow it "aggressively." Leonor also told Carter that he was driving and that his friend was in the passenger seat. Leonor's friend began shooting at the other car while at an intersection. They chased the car south, shooting at it, until the car hit a pole.

Omaha Police Department crime laboratory technician Daniel Bredow testified that the shell casings collected from the shootings of Silva and Medrano matched. They were both 9-mm casings which had been fired from the same weapon. Ortiz testified that the 9-mm gun belonged to Leonor.

For his actions on November 22, 1999, Leonor was charged in docket 149, page 834, with counts I and II, murder in the second degree, Class I felonies in violation of Neb. Rev. Stat. § 28-304(1) (Reissue 1995). He was also charged with counts III and IV, use of a deadly weapon to commit a felony, Class II felonies in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995). For his actions on November 20, 1999, Leonor was charged in docket 149, page 835, with count I, assault in the first degree, a Class III felony in violation of Neb. Rev. Stat. § 28-308(1) (Reissue 1995). He was also charged with count II, use of a deadly weapon to commit a felony. After being convicted on all counts in a consolidated trial, Leonor moved for a new trial in both cases. The trial court overruled the motions. Leonor was sentenced to prison for 20 years to life on each second degree murder charge, 5 to 10 years on each use of a deadly weapon to commit a felony charge, and 5 to 10 years on the first degree assault charge, all to be served consecutively.

III. ASSIGNMENTS OF ERROR

Leonor assigns as error and argues that (1) the evidence adduced at trial was insufficient to find him guilty of any of the crimes charged beyond a reasonable doubt and (2) the trial court abused its discretion by imposing upon him an excessive sentence.

IV. 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. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

[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).

V. ANALYSIS

1. Sufficiency of Evidence

(a) November 20, 1999

As to the conviction stemming from the shooting of Silva on November 20, 1999, Leonor argues that the evidence was insufficient to convict him beyond a reasonable doubt.

[3] On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999). 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, supra*; *State v. Rieger, supra*.

[4,5] Moreover, in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *State v. Jackson, supra.* On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994), citing *State*

v. Cook, 244 Neb. 751, 509 N.W.2d 200 (1993), and *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992).

[6] Section 28-308(1) states that "[a] person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person." When the sufficiency of the evidence as to criminal intent is questioned, " 'the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.' " *State v. Tweedy*, 224 Neb. 715, 720, 400 N.W.2d 865, 869 (1987), quoting *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983).

Section 28-1205(1) states:

> Any person who uses a firearm . . . to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm . . . during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.

Viewing the evidence in a light most favorable to the State demonstrates that there is ample evidence supporting Leonor's convictions for his actions on November 20, 1999. Both Chavez and Ortiz testified that they actually saw Leonor shoot through the window of the La Loma Cafe early in the morning on November 20. No witnesses refuted that testimony. Therefore, we determine that the State produced sufficient evidence that the jury could have found, beyond a reasonable doubt, that Leonor was guilty of the crimes of first degree assault and use of a deadly weapon to commit a felony in the November 20 incident.

(b) November 22, 1999

Leonor claims that the evidence was also insufficient to prove that he committed or aided and abetted in the commission of the murders of Medrano and Valadez on November 22, 1999. Once again, an appellate court looks at the evidence to determine whether a rational juror in this case could find that Leonor was guilty of two counts of second degree murder. We will address the two counts of use of a weapon later in this opinion.

While no eyewitnesses placed Leonor by name in the car that was doing the chasing and from which the shots were being fired, there was the following evidence:

(1) Witnesses Jacobs and Nelson identified the car doing the chasing and from which the shots were fired as being similar to Leonor's car.

(2) Witness Gomez was with Medrano and Valadez at the Guaca Maya restaurant. She testified Medrano and Valadez left together in Medrano's car at 1:30 a.m., driving toward 20th Street. A police officer, Woolery, at 1:32 a.m., received a radio call, and on her way to answer this radio call, came upon the accident where Medrano's car had hit the pole. Therefore, this testimony places Valadez in Medrano's car.

(3) The pathologist, Jones, testified that Valadez died as a result of blunt trauma from the car accident.

(4) Jones testified that Medrano's death was from a gunshot wound to the left side of his chest.

(5) The gun which shot Medrano was the same gun that had shot Silva in the November 20, 1999, incident.

(6) Fellow gang member, Ortiz, testified that in the early morning hours of November 22, 1999, he was in his apartment and heard gunfire from the corner of 20th and Q Streets. Ortiz testified that about 10 minutes later, Leonor and Gonzales arrived at his apartment and that Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them. Leonor said he was driving and Gonzales was shooting.

(7) Hernandez, who was also present in Ortiz' apartment in the early morning hours of November 22, 1999, recalled hearing gunshots from 20th and Q Streets. Hernandez testified that about 5 to 15 minutes later, Leonor and Gonzales arrived at the apartment, and that Gonzales was waving around a 9-mm gun. Leonor stated the gun was not loaded because the last bullet had been fired. Leonor told Hernandez that he and Gonzales were driving down Q Street, that Gonzales had shot his gun two or three times, and that they saw a bald-headed man in a black car who got paranoid when they all looked at each other at a four-way stop sign. Leonor got in front of the bald man's car to block his way. When the bald man tried to reverse, Leonor reversed and got right beside him. Gonzales then shot his gun

at the man. Leonor next raced the bald man's car down the street until it crashed.

(8) Carter testified that he had been incarcerated with Leonor in the Douglas County Correctional Center in February 2000, when Leonor told him about shooting at Medrano's car. Leonor told Carter that he and another person were out "looking for the enemies" when they saw a black car and began to follow it "aggressively." Leonor stated that he was driving and that his friend was in the passenger seat. His friend began shooting at the other car while at an intersection. They chased the car south, shooting at it, until the car hit a pole.

[7] While the information did not describe Leonor as an aider and abettor, Neb. Rev. Stat. § 28-206 (Reissue 1995) provides that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he or she were the principal offender. This same language was used in the prior aider and abettor statute. See Neb. Rev. Stat. § 28-201 (Reissue 1975). An information charging an aider and abettor of a crime need not include any additional facts than those necessary to charge the principal of the crime. *Neal v. Grammer*, 769 F. Supp. 1523 (D. Neb. 1991). See, also, *Burnell v. State*, 159 Neb. 349, 66 N.W.2d 838 (1954).

[8,9] Section 28-304(1) states that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Section 28-206 states that "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001), citing *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999), *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998), and *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

[10,11] Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an

aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999), citing *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998), *State v. Arnold, supra*, and *State v. Mantich, supra*. Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory. *State v. Ramsay, supra*; *State v. Larsen, supra*; *State v. Arnold, supra*.

[12] One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *State v. Mantich, supra.*

We determine that the evidence was sufficient to support the guilty verdicts. The evidence showed that Leonor told Ortiz that he and Gonzales had shot someone who had thrown a Lomas gang sign at them; Leonor told Carter in the Douglas County jail that he and another person were out "looking for the enemies" when they began to follow the victim's car aggressively and chased the victim's car, shooting at it, until the victim's car hit a pole. Therefore, Leonor is guilty as an aider and abettor in the deaths of both Medrano and Valadez.

2. Use of Deadly Weapon

[13] The evidence was sufficient to convict Leonor of both counts of use of a deadly weapon to commit a felony, even if Leonor never fired a shot. *State v. Mantich, supra*, holds that a defendant can be convicted of the use of a deadly weapon charge under an aiding and abetting theory. In that case, the defendant was found guilty of felony murder on the theory that he aided and abetted the kidnapping and robbery of the victim. We held that as a natural and probable consequence of the kidnapping and robbery, the defendant could properly be convicted of using a firearm to commit a felony even if the jury believed that he was unarmed.

In *State v. Johnson*, 240 Neb. 924, 485 N.W.2d 195 (1992), the evidence was deemed sufficient to find the defendant guilty

of use of a knife to commit a felony and first degree assault, despite the fact that she did not use a knife, when she and her boyfriend accosted the victim when he was coming out of a bar. The defendant struck the victim from behind and pulled his jacket over his head, thereby immobilizing his arms over his head, which allowed the defendant's boyfriend to repeatedly stab the victim with a knife.

Similarly, Leonor drove the car in a manner which enabled Gonzales to repeatedly shoot at Medrano's car by blocking Medrano in at the intersection and then chasing Medrano down the street. Leonor aided and abetted the second degree murders of Medrano and Valadez, and the crime of use of a deadly weapon to commit a felony is a natural and probable consequence of those crimes. Therefore, we conclude that the evidence is sufficient to convict Leonor of the use of a deadly weapon to commit a felony charges.

We determine that the evidence adduced at trial, when viewed and construed in a light most favorable to the State, was sufficient to support Leonor's convictions on all charges stemming from his actions on November 22, 1999.

3. Excessive Sentences

Leonor next argues that his sentences represented an abuse of discretion. According to Leonor, the facts of the case should cause a sentencing court to pause and consider whether he truly committed the crimes alleged. Leonor claims that the trial court "simply did not note the suspect evidence offered in the case." Brief for appellant at 19. Leonor argues, therefore, that the trial court abused its discretion and that the sentences should be either vacated or reduced.

[14-16] In *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001), we held that 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). Furthermore, in considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.

[17] 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).

These crimes involved two separate violent and senseless incidents, and as a result, one person was injured and two people are dead. Leonor's sentences are within the statutory limitations. The trial court relied on the senselessness of Leonor's actions and the detrimental effect of "urban terrorism" that results from gang violence to justify its order.

The sentences are within statutory guidelines and were not an abuse of discretion. We conclude, therefore, that the sentences are not excessive.

VI. CONCLUSION

For the aforementioned reasons, we affirm the holding of the trial court. The evidence, when viewed in a light most favorable to the State, was sufficient to convict on all counts. Additionally, the sentences imposed on Leonor were not an abuse of discretion when taking into account the circumstances surrounding his crimes.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
STUART R. PRUETT, APPELLANT.

638 N.W.2d 809

Filed February 1, 2002. No. S-01-187.

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. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Convictions: Weapons: Intent.** Under Neb Rev. Stat. § 28-1205 (Reissue 1995), when the felony which serves as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony.
4. **Assault: Words and Phrases.** Reckless assault is not an intentional crime.
5. **Other Acts: Proof.** Where uncharged misconduct is not evidence of prior bad acts, Neb. Rev. Stat. § 27-404 (Reissue 1995) does not apply.
6. **Rules of Evidence: Expert Witnesses: Hearsay.** Neb. Rev. Stat. § 27-703 (Reissue 1995) contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than requiring firsthand knowledge as the only source of information for an expert's opinion.
7. **Expert Witnesses: Hearsay.** An expert may rely on hearsay facts or data that are reasonably relied on by experts in that field.
8. **Rules of Evidence: Hearsay.** The admission of hearsay is controlled by the Nebraska Evidence Rules.
9. **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 discretion a factor in determining admissibility.
10. **Rules of Evidence: Hearsay: Proof.** Under Neb. Rev. Stat. § 27-801(3) (Reissue 1995), 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.
11. **Rules of Evidence: Words and Phrases.** A statement for purposes of Neb. Rev. Stat. § 27-801 (Reissue 1995) is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him or her as an assertion.
12. **Trial: Hearsay: Photographs.** Where autopsy photographs are not oral or written assertions, nor are they nonverbal conduct of a person, the photographs are demonstrative evidence and are not hearsay.
13. **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.
14. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed in part, and in part set aside and vacated.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays 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.

The appellant, Stuart R. Pruett, was convicted by a district court jury of manslaughter by unintentionally causing another's death while committing the offense of reckless assault. Pruett was also convicted of using a weapon to commit a felony. On appeal, Pruett argues that he cannot be convicted of use of a weapon to commit a felony when the underlying felony is an unintentional crime. He further claims that the district court erred in various respects regarding evidentiary and instruction issues. We affirm Pruett's conviction and sentence for manslaughter but set aside the verdict and vacate the sentence for use of a weapon to commit a felony because both manslaughter and reckless assault are unintentional crimes.

BACKGROUND

Pruett was charged in a two-count information with manslaughter and use of a weapon to commit a felony after he unintentionally shot and killed Joseph Curtis Wakan. Count I of the information charged that Pruett killed Wakan unintentionally while committing the unlawful act of assault in the second degree by recklessly causing serious bodily injury to Wakan with a dangerous instrument. Pruett filed a motion to quash count II, use of a weapon to commit a felony, because he was charged with using a weapon to commit an unintentional act. The district court overruled the motion to quash, and Pruett appealed. We determined that there was not a final, appealable order and dismissed the appeal for lack of jurisdiction. *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

At trial, Pruett's fiance, Michelle Strange, testified that Pruett purchased a .25-caliber semiautomatic gun in June 1998. After the purchase, Pruett and Strange took the gun out in the country and fired it. Strange testified that it fired easily. She stated that on June 30, she and Pruett met his friends, Shane Chandler, James Gates, and Wakan at a truckstop. Pruett then drove them

to his home in Lincoln. On the way to Lincoln, Pruett showed the three friends the gun.

Chandler testified that Pruett showed him and his companions a gun while in the car and that when the group arrived at Pruett's residence, they sat down, started talking, and smoked marijuana. He believed that the gun was set on the coffee table. He stated that after the group sat there for awhile, Pruett got up and fired a round from the gun into a telephone book. Pruett then laughed because his actions made everyone jump. At that point, the group began asking Pruett questions about how the gun worked and asked him to unload the gun, reload it, and cock it. Pruett then demonstrated these techniques and let them hold the gun.

Chandler testified that after Pruett showed the gun to the group, they smoked more marijuana. He stated that at various times, Pruett picked up the gun and pointed it at several of the people in the room. According to Chandler, Wakan went to the kitchen to get something to eat, and while he was gone, Pruett dug the empty bullet out of the telephone book. Pruett told Chandler that "he was going to mess with Wakan, play with him." Pruett then put two pieces of the bullet from the telephone book together so that they looked like a normal bullet and placed the "dummy round" in the top of the clip. Pruett then showed Chandler that after the gun was cocked and the trigger pulled, nothing would happen. Pruett then took the dummy round out, put it back together, and loaded it into the top of the clip. As Pruett was loading the gun, Wakan came out of the kitchen, and Pruett showed Wakan the dummy round as it was being placed in the top of the clip. Chandler testified that Pruett then raised the gun, fired it, and instead of a blank round, the gun fired an actual round, striking Wakan. Wakan was later pronounced dead.

In a taped interview given to police, Pruett stated that he purchased the gun for protection and that the gun was very easy to fire but did not necessarily have a hair trigger. According to Pruett, he had been playing with the gun by taking the clip out so it could not fire and then aiming it at people. He admitted smoking marijuana and firing a round into the telephone book to scare everyone and later using that bullet to make a dummy

round. He showed Wakan how the dummy round worked, popped the dummy round out, moved his hand to the side while holding the gun, and the gun went off. Pruett then assisted the others in getting medical assistance for Wakan.

During trial, Pruett objected to testimony that he had smoked marijuana on the night Wakan was killed. He argued that such evidence was uncharged misconduct and that under Neb. Rev. Stat. § 27-404 (Reissue 1995), the State was required to show the purpose for which the testimony was offered. He also moved that any portion of his statement referring to marijuana use be redacted. The trial court determined that the evidence was not subject to § 27-404 and overruled Pruett's motion and objections. Pruett proposed a jury instruction consistent with his objections, but the requested instruction was not given. The court did instruct the jury that evidence Pruett may have been smoking marijuana was received for the purpose of describing the circumstances surrounding Wakan's death. The instruction stated that "[s]uch evidence is not admissible to prove Mr. Pruett's character in order to show that he acted in conformity therewith and you may not consider this evidence for such purpose."

Dr. Matthias Okoye, a forensic pathologist, testified that an autopsy was performed by one of his colleagues. Okoye reviewed the autopsy reports and photographs taken at the time of the autopsy. He also examined the organs and microscopic tissue sections taken at the autopsy. He opined that the cause of death was from a gunshot wound. During Okoye's testimony, autopsy photographs, exhibits 39 through 54, were entered into evidence over Pruett's hearsay objections. Pruett requested that the jury be instructed that they could not consider Okoye's testimony about facts and data not directly perceived by him. The court did not give the requested instruction.

At the end of the State's case, Pruett moved to dismiss the charge of use of a weapon to commit a felony. The motion was overruled. Pruett did not present any evidence. The jury was instructed on the statutory definition of "recklessly." Pruett requested that the jury also be instructed on the definition of "accident." The district court did not give the requested instruction.

The jury found Pruett guilty on both counts. Pruett's motion for a new trial was overruled, and he was sentenced. Pruett appeals.

ASSIGNMENTS OF ERROR

Pruett lists 26 assignments of error, which, rephrased, are that the district court erred in (1) overruling his motion to quash, overruling his motion for a directed verdict, and instructing the jury on the count of use of a firearm to commit a felony; (2) allowing evidence that he smoked marijuana on the night Wakan was killed and refusing his requested jury instruction regarding marijuana use; (3) overruling his hearsay objection regarding Okoye's testimony about facts not directly perceived by Okoye and refusing his requested jury instruction; (4) refusing to instruct the jury on the definition of "accident"; and (5) overruling his motion to dismiss when there was insufficient evidence to convict him.

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. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

[2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001).

ANALYSIS

Conviction of Use of Weapon to Commit Felony

Pruett contends that he cannot be convicted of both manslaughter and use of a weapon to commit a felony because both manslaughter and the act of reckless assault are unintentional crimes. Pruett argues that a person can be convicted of use of a weapon to commit a felony only when the underlying felony is an intentional crime.

[3] Neb. Rev. Stat. § 28-1205(1) (Reissue 1995) provides:

> Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of

> this state commits the offense of using a deadly weapon to commit a felony.

In *State v. Ring*, 233 Neb. 720, 724, 447 N.W.2d 908, 911 (1989), applying principles of statutory construction, we held that the language " 'to commit any felony' " in § 28-1205 is synonymous with " 'for the purpose of committing any felony.' " We further explained that the purposes behind § 28-1205 are to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage individuals from carrying deadly weapons while they commit felonies. We then stated, "It cannot reasonably be said that § 28-1205 will dissuade a person from using a deadly weapon to commit an unintentional felony; the two concepts are logically inconsistent." *Ring*, 233 Neb. at 724, 447 N.W.2d at 911. As a result, we concluded that when the felony which served as the basis of the use of a weapon charge was an unintentional crime, the accused could not be convicted of use of a weapon to commit a felony.

Under Neb. Rev. Stat. § 28-305(1) (Reissue 1995), "[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." Pruett was convicted of unintentionally causing the death of Wakan while in the commission of a second degree assault under Neb. Rev. Stat. § 28-309 (Cum. Supp. 2000). A person commits second degree assault under § 28-309 if he or she: "(a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument; [or] (b) Recklessly causes serious bodily injury to another person with a dangerous instrument . . . ." Pruett was specifically charged with reckless assault. He was not charged with intentionally assaulting Wakan, and the jury was instructed on only reckless assault.

Although Pruett was charged under § 28-305 with unintentionally causing Wakan's death, the State, however, argues that Pruett intentionally committed the crime of reckless assault and, thus, committed a felony which can serve as the basis for his conviction of use of a weapon to commit a felony.

Neb. Rev. Stat. § 28-109(19) (Reissue 1995) provides:

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial

> and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

[4] In *State v. Kistenmacher*, 231 Neb. 318, 436 N.W.2d 168 (1989), we discussed the extent to which a reckless act involves a conscious choice in a course of action but held that the definition of "recklessly" contained in § 28-109(19) is an objective one, thereby making testimony as to the defendant's subjective intent irrelevant. Our decision in *Kistenmacher* illustrates that reckless assault is not an intentional crime. Although recklessness can involve some intent on the part of the actor, for example, the act of intentionally pointing a gun at another person, this does not transform the crime of reckless assault into an intentional crime. Reckless assault requires not just the act of reckless behavior, but the result of serious bodily injury. A person can be guilty of reckless assault when he or she acted recklessly but did not intend serious bodily injury to occur. Thus, the state of mind to convict for reckless assault does not rise to the level of "knowing" or "intentional." See, generally, *State v. Hemmer*, 3 Neb. App. 769, 531 N.W.2d 559 (1995) (holding that no crime of attempted reckless assault of police officer exists because reckless is not intentional mens rea). See, also, *Jenkins v. State*, 640 So. 2d 1053 (Ala. Crim. App. 1993) (sentence could not be enhanced due to commission of felony with weapon when underlying felony was reckless assault).

We hold that reckless assault is not an intentional crime. As a result, under *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), Pruett could not be convicted of using a weapon to commit a felony when the underlying felony was manslaughter due to unintentionally causing Wakan's death while in the commission of reckless assault. We set aside the verdict and vacate the sentence for use of a weapon to commit a felony.

Evidence Regarding Marijuana Use

Pruett contends that evidence that he smoked marijuana was uncharged misconduct, subject to § 27-404. Pruett argues that

the trial court erred in failing to require the State to identify the purpose for offering the evidence and in failing to hold an evidentiary hearing. He does not argue that the evidence was inadmissible under Neb. Rev. Stat. § 27-403 (Reissue 1995) as being more prejudicial than probative.

[5] Section 27-404 provides in part that "[e]vidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion . . . ." Evidence of uncharged misconduct, often referred to as evidence of "prior bad acts" may be admitted under § 27-404 for other purposes, but the proponent of the evidence must prove to the court outside the presence of the jury that the defendant committed uncharged misconduct. § 27-404(3). In addition, the proponent of the evidence must state on the record the specific purpose or purposes for which the evidence is being offered and the court must state the purpose or purposes for which the evidence is received. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). We have held, however, that where uncharged misconduct is not evidence of prior bad acts, § 27-404 does not apply. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

Here, the State did not introduce evidence that Pruett smoked marijuana on a prior occasion or as evidence of his character to prove that he acted in conformity with that behavior on a later occasion. Instead, Pruett's action of smoking marijuana was contemporaneous with his other acts immediately before Wakan was shot, and the State offered the evidence to explain the circumstances surrounding Wakan's death. The evidence that Pruett smoked marijuana shortly before Wakan was killed was not evidence of prior bad acts subject to § 27-404. Instead, the evidence was relevant to show that Pruett was acting in a reckless manner at the time that he shot Wakan. See, generally, *State v. Canbaz, supra*. Nevertheless, the court gave a limiting instruction to the jury. We hold that under these circumstances, § 27-404 is not applicable. We conclude that Pruett's assignments of error regarding this issue are without merit.

Hearsay Objections

Pruett contends that the court erred in allowing Okoye to testify regarding facts provided to him by others and not perceived

by him directly. He objected on the basis of hearsay to the introduction into evidence of the autopsy photographs.

[6,7] Neb. Rev. Stat. § 27-703 (Reissue 1995) provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If 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.

We have held that § 27-703 contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than requiring firsthand knowledge as the only source of information for an expert's opinion. *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985). Further, an expert may rely on hearsay facts or data that are reasonably relied on by experts in that field. See *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). Thus, a doctor who did not directly treat a patient may provide expert testimony regarding the patient, and any lack of firsthand knowledge goes to the weight of the opinion. See *Gibson v. City of Lincoln, supra*.

Okoye could give his opinion because he relied on data that are reasonably given by other experts in his field. Pruett's argument that Okoye could not testify regarding facts that he did not perceive directly is without merit.

[8-11] Pruett also objected to the introduction into evidence of autopsy photographs on the basis of hearsay. The admission of hearsay is controlled by the Nebraska Evidence Rules. *State v. Whitlock, supra*. 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 discretion a factor in determining admissibility. *Id*. "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). A statement for purposes of § 27-801 "is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion." § 27-801(1).

[12] Here, the autopsy photographs were not oral or written assertions, nor were they nonverbal conduct of a person. Under

these circumstances, photographs are demonstrative evidence and are not hearsay. See *Kucki v. State*, 483 N.E.2d 788 (Ind. App. 1985), citing *Bergner v. State*, 397 N.E.2d 1012 (Ind. App. 1979). See, generally, *State v. Lang*, 197 Neb. 47, 246 N.W.2d 608 (1976); *State v. Henderson*, 100 N.M. 260, 669 P.2d 736 (N.M. App. 1983).

Concerning Okoye's testimony, Pruett requested the following jury instruction, which was refused by the district court:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. A witness has testified in this case about facts or data which were not perceived by him, but which were relied upon by him in forming his opinion. You may consider such facts or data in determining what weight, if any, to give to the expert's opinion. However, you may not consider the witness' testimony about facts or data not directly perceived by him as evidence of the truth of such facts or data.

The court refused the requested instruction and instead instructed the jury as follows:

> A witness who has special knowledge, skill, experience, training or education in a particular area may testify as an expert in that area. You may adopt, or not, his or her conclusions, according to your own best judgment. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness.
>
> In determining the weight to be given such testimony, you should consider:
>
> 1. The education, training, experience and knowledge of the expert;
> 2. The reasons given for the expert's opinion; and
> 3. The sources of the expert's information.

[13,14] 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. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). All the jury instructions must be read together, and

if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

In this case, the court's instruction was a correct statement of the law, adequately covered the issue, and was supported by the evidence. We conclude that the trial court did not err in refusing Pruett's requested instruction and that his assignments of error regarding this issue are without merit.

Jury Instruction on Definition of Accident

Pruett contends that he was entitled to an instruction on the definition of "accident." He requested that the jury be instructed, " 'Accident' shall mean a sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result." Instead, the court instructed the jury using the following statutory definition of "recklessly":

> Recklessly means acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The focus of the inquiry in this case is not whether the gun discharged accidentally. Instead, the question is whether Pruett was acting recklessly at the time the gun discharged. The threatening use of a firearm is an unlawful assault sufficient to convict a person of manslaughter when defined as causing the death of another unintentionally while in the commission of an unlawful act. *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984). Thus, if a person is found to be acting recklessly at the time the gun discharged, whether the gun discharged by accident is not at issue and is not a defense to reckless assault. See, generally, *id.* at 688, 344 N.W.2d at 925 ("the accidental discharge of a gun, the use of which was not justified under the circumstances, is

not a defense to manslaughter when the killing occurred upon a sudden quarrel").

The court properly instructed the jury regarding the elements of the offense and the definition of "recklessly." We conclude that Pruett was not entitled to an instruction on the definition of the term "accident."

Sufficiency of Evidence

Pruett contends that the evidence was insufficient to convict him of manslaughter. We have reviewed this assignment of error and find it to be without merit.

CONCLUSION

We hold that Pruett could not be convicted for use of a weapon to commit a felony when the underlying felonies were manslaughter and reckless assault. Accordingly, we affirm Pruett's conviction and sentence for manslaughter but set aside the verdict and vacate the sentence for use of a weapon to commit a felony. We determine that all of his remaining assignments of error are without merit, and we affirm his conviction for manslaughter.

Affirmed in part, and in part set aside and vacated.

Phyllis H. Newman, appellee, v. Wanda Rehr, appellee, and William Harris, garnishee-appellant.

638 N.W.2d 863

Filed February 8, 2002. No. S-00-513.

1. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. ____: ____. Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals.

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, W. MARK ASHFORD, Judge. Judgment of Court of Appeals affirmed.

Dennis E. Martin and Kevin J. McCoy, of Martin & Martin, P.C., for garnishee-appellant.

Craig A. Knickrehm, of Knickrehm Law Offices, and Kathy Pate Knickrehm for appellee Phyllis H. Newman.

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

WRIGHT, J.

NATURE OF CASE

In this proceeding, Phyllis H. Newman attempted to utilize a garnishment procedure against William Harris to enforce a judgment she had obtained against Wanda Rehr. Harris had given a promissory note to Rehr, and Harris sought to litigate the issues concerning whether the garnishment of Harris on the note was proper. The district court found Harris partially liable to Newman for the amount due on his promissory note to Rehr. The Nebraska Court of Appeals reversed the judgment of the district court and remanded the cause for a new trial. The Court of Appeals found that Harris had been deprived of due process of law because a successor judge entered the judgment although the evidence had been heard and the trial conducted by a different judge. See *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001). We granted further review, and we now affirm the decision of the Court of Appeals, albeit on different grounds.

SCOPE OF REVIEW

[1] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000).

[3] Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999).

FACTS

Newman's first application for determination of garnishee liability against Harris was dismissed by the Douglas County District Court after a hearing on September 28, 1999, because the note being garnished was not yet due. After the note became due, Newman filed a second application for determination of garnishee liability. At a hearing on December 20, the parties allegedly agreed to submit "Ex[hibit] # 11 (transcript of prior proceeding)" as evidence. The district court took the matter under advisement and told the parties that briefs could be submitted.

Before any briefs were submitted or the proceedings transcribed, the trial judge mailed counsel a "[l]etter decision" on February 18, 2000. In the letter, he reportedly directed Newman's counsel to draft and submit an order. A copy of the letter decision is not contained in the record before this court. Included in the record is an order prepared and submitted by Newman's counsel and signed by the successor judge on February 28. The successor judge found that Newman's application for determination of garnishee liability should be sustained and entered judgment in Newman's favor in the amount of $17,989.

Harris filed a motion for new trial, and at the hearing on the motion on April 14, 2000, counsel for each party described his recollection of the prior events. Harris' counsel stated that it was his understanding that the transcription of the September 28, 1999, hearing would be prepared and then briefs would be submitted. Exhibit 11, which is included in the bill of exceptions before this court, indicates that the September 1999 hearing was not transcribed until April 4, 2000.

Newman's counsel stated at the hearing on the motion for new trial that the parties had agreed that because there was no additional evidence to be adduced at the second hearing, the evidence from the first hearing would be submitted in the form of a transcription of the hearing. The parties had also allegedly

agreed to submit briefs, but before any briefs were submitted, the trial judge issued a letter decision on February 18, 2000, stating that he had concluded that Newman's application for determination of garnishee liability should be granted and that judgment should be entered against Rehr for $22,000, less a prior garnishment of $4,011. Newman's counsel argued that the trial judge was entitled to rely on his memory of the evidence at the prior hearing and that the mere absence of the written transcription of the proceedings was not fatal to the judgment. The successor judge denied Harris' motion for a new trial.

COURT OF APPEALS OPINION

Harris appealed to the Court of Appeals, which noted that the transcription of the September 1999 trial had not been prepared at the time of the December hearing. Prior to receipt of the transcription, the trial judge determined that Harris was liable for the full amount of his note to Rehr and apparently noted the decision in a letter to counsel. However, the letter was not included in the record before the Court of Appeals. The Court of Appeals stated that the decision was not entered as a judgment in accordance with Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).

The Court of Appeals addressed only Harris' assertion that he was denied due process because a judgment was entered against him by a judge who had no record to review and who had no knowledge of the case. The Court of Appeals framed the issue as whether a replacement or substitute judge may enter a judgment that a former judge indicated he or she would have entered. The Court of Appeals stated: "We do not agree that one judge may sign an order for another or that a judge who has proper jurisdiction over a motion for new trial does not have authority to grant a new trial because another judge had been involved." *Newman v. Rehr*, 10 Neb. App. 356, 360, 630 N.W.2d 19, 22 (2001).

Reviewing cases in other jurisdictions, the Court of Appeals noted that "the majority view holds that in cases tried to a court, a successor or substitute judge may not render a judgment for a predecessor judge who conducted the trial even if the predecessor had indicated the decision that the predecessor intended to make." *Id*. The Court of Appeals found that the parties' stipulation to submit the case on the record could not be fairly applied

or implemented by any judge other than the judge who initially heard the case.

The Court of Appeals concluded that Harris was deprived of a significant property interest by the successor judge's entry of an order in the garnishment proceeding and that Harris was denied the opportunity to be heard because the successor judge entered a judgment based on evidence he had not heard. It reversed the judgment and remanded the cause, finding that the judgment entered against Harris should be vacated and the garnishment proceeding retried.

ANALYSIS

Newman asks this court to find that the Court of Appeals erred in holding that Harris' due process rights were denied when a successor judge signed an order reflecting the trial judge's decision. We agree with the Court of Appeals that Harris' due process rights were violated. However, we affirm the decision of the Court of Appeals because the initial trial judge decided the case before the transcription of the proceedings was prepared, and therefore, the trial judge did not have the record before deciding the case.

The trial judge heard the evidence at the September 1999 trial. The parties later stipulated that the trial judge could decide the matter based on a transcription of those proceedings. The trial judge's decision was reportedly announced in a letter mailed on February 18, 2000. The transcription of the September 1999 trial was not prepared until April 4, 2000. The parties had stipulated that the judge who heard the original testimony and observed the witnesses could use the transcription of that hearing to make his decision. However, the record shows that the trial judge decided the case before the transcription had been prepared and before the parties had submitted any evidence to the court.

As the Court of Appeals noted: "The protections of the procedural due process right attach when there has been a deprivation of a significant property interest." *Newman v. Rehr*, 10 Neb. App. at 361, 630 N.W.2d at 23 (citing *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999)). Due process requires notice and an appropriate opportunity to be heard when a significant property interest has been shown. Harris was

deprived of a significant property interest when the initial trial judge announced the decision in a letter prior to the preparation of the transcription of the evidence and before such evidence was submitted to the court.

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000). Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct merely because it may disagree with the reasoning employed by the Court of Appeals. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999). Although we do not adopt the reasoning employed by the Court of Appeals, this court's independent review of the record indicates that the Court of Appeals reached the correct result.

CONCLUSION

We affirm the decision of the Court of Appeals, which reversed the judgment of the Douglas County District Court and remanded the cause for a new trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
KIP P. HOOKSTRA, APPELLANT.

638 N.W.2d 829

Filed February 8, 2002. No. S-00-791.

1. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of a statute exists because it is unconstitutional on its face, is a facial challenge.
3. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.

4. **Constitutional Law: Statutes.** The doctrine of overbreadth pertains to a statute designed to burden, punish, or prohibit an activity that is not constitutionally protected, but which includes within its scope activities that are protected by the First Amendment to the U.S. Constitution.
5. **Constitutional Law: Criminal Law: Ordinances.** The void-for-vagueness doctrine requires that a penal ordinance define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and so that the language of the ordinance does not encourage arbitrary and discriminatory enforcement.
6. **Constitutional Law: Statutes.** An enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of First Amendment rights.
7. **Constitutional Law: Statutes: Appeal and Error.** As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
8. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.
9. ____: ____. A statute may be invalidated on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. Stated another way, in order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.
10. **Constitutional Law: Statutes: Standing.** The doctrine of substantial overbreadth provides an exception to the traditional rule of standing. Under the doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge an enactment on its face because it also threatens others not before the court who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.
11. **Constitutional Law: Ordinances: Presumptions.** An ordinance, like a statute, is presumed to be constitutional and its unconstitutionality must be clearly established before it will be declared void.
12. **Constitutional Law: Criminal Law: Statutes: Presumptions.** In affording a presumption of constitutionality to legislative enactments, the Nebraska Supreme Court, while construing penal statutes strictly, nonetheless gives them 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.
13. **Constitutional Law: Statutes.** When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
14. **Constitutional Law: Statutes: Standing.** The traditional rule of standing applies to a facial challenge to a statute on the ground of vagueness. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly

prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.

15. ____: ____: ____. Conduct which is clearly proscribed by the statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.

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 Lancaster County, STEVEN D. BURNS, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgment of Court of Appeals affirmed.

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

John C. McQuinn, Chief Lincoln City Prosecutor, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ., and BUCKLEY, D.J., Retired.

STEPHAN, J.

At issue in this case is the constitutionality of a Lincoln ordinance which makes it unlawful to "intentionally or knowingly refuse to comply with an order of a police officer made in the performance of official duties at the scene of an arrest, accident, or investigation." Lincoln Mun. Code § 9.08.050 (1990). In affirming the conviction of Kip P. Hookstra under this ordinance, the Nebraska Court of Appeals held that the ordinance was not facially unconstitutional on the ground of overbreadth and that Hookstra lacked standing to challenge the ordinance on the ground of vagueness. We granted Hookstra's petition for further review and now affirm the judgment of the Court of Appeals.

BACKGROUND

FACTS

We briefly summarize the operative facts which are fully set forth in the opinion of the Court of Appeals. *State v. Hookstra*, 10 Neb. App. 199, 630 N.W.2d 469 (2001). In the early morning hours of March 20, 1999, Lincoln police officer Mitchell Evans was administering field sobriety tests to a motorist whom

he had stopped at an intersection in downtown Lincoln on suspicion of driving under the influence. Hookstra and two other pedestrians observed this process from a distance of approximately 15 to 20 feet.

When Evans concluded the sobriety tests and began placing the motorist in the back seat of his police car, Hookstra and his friends began to "heckle" Evans and the motorist. Hookstra shouted slogans and told the motorist that he was not required to cooperate with Evans. Evans testified that this distracted him and upset the motorist. Evans was concerned for his own safety and that of the motorist because the commotion detracted from Evans' ability to pay attention to the traffic around him and to the motorist.

Evans told Hookstra to leave the area, but Hookstra refused to do so despite the urging of his companions. After repeating the order two or three times, Evans then walked toward the sidewalk where Hookstra and the others were standing. Hookstra then began to walk backward, facing Evans with his fist raised in the air. Alerted by Evans, other Lincoln police officers took Hookstra into custody approximately one block from the scene of the incident and charged him with a violation of § 9.08.050.

Disposition Below

Hookstra filed a motion to quash the complaint on grounds that the Lincoln ordinance was, on its face, unconstitutionally overbroad and vague. The motion was overruled by the Lancaster County Court. Hookstra renewed the motion to quash at his trial but offered no evidence. He was found guilty and was fined $100 plus court costs. After the conviction was affirmed on appeal to the district court for Lancaster County, Hookstra perfected this timely appeal.

The Court of Appeals affirmed the conviction, holding that the ordinance was not unconstitutional on its face on the ground of overbreadth and that Hookstra lacked standing to challenge the statute on the ground of vagueness. *State v. Hookstra, supra.* In its overbreadth analysis, the Court of Appeals construed the word "order" in the Lincoln ordinance "by adding the 'gloss' that it be a 'lawful order.' " *Id.* at 208, 630 N.W.2d at 477. We granted Hookstra's petition for further review.

ASSIGNMENT OF ERROR

In his petition for further review, Hookstra assigns that the Court of Appeals erred in finding that the ordinance is not unconstitutionally overbroad and vague on its face in violation of his right of free speech under the Constitution of Nebraska and the Constitution of the United States.

STANDARD OF REVIEW

[1] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).

ANALYSIS

[2,3] A challenge to a statute, asserting that no valid application of a statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999); *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). Hookstra asserts only a facial challenge to the Lincoln ordinance and does not contend that he did not violate the ordinance if it is found to be valid. The facial challenge is based on a claim that the ordinance violates the right of free speech under the state and federal Constitutions. The 1st Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, requires that the state "make no law . . . abridging the freedom of speech." Article I, § 5, of the Nebraska Constitution provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty . . . ." The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *Village of Winslow v. Sheets, supra*; *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). Accordingly, as did the Court of Appeals, we apply the same analysis to Hookstra's state and federal constitutional claims.

[4-6] Although we have referred to vagueness and overbreadth together, we have recognized that the two are conceptually distinct. *State v. Roucka, supra*. The doctrine of overbreadth pertains to a statute designed to burden, punish, or prohibit an activity that is not constitutionally protected, but which includes within its scope activities that are protected by the First Amendment to the

U.S. Constitution. *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993). The void-for-vagueness doctrine requires that a penal ordinance define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and so that the language of the ordinance does not encourage arbitrary and discriminatory enforcement. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). An enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of First Amendment rights. *State v. Roucka, supra*; *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984).

[7] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth. *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). The U.S. Supreme Court has established guidelines in this regard:

> "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

State v. Roucka, 253 Neb. at 891, 573 N.W.2d at 422, quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

Overbreadth Claim

[8,9] A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). "A statute may be invalidated on its face, however, only if its overbreadth is 'substantial,' i.e., when the statute is unconstitutional in a substantial

portion of cases to which it applies." *Id.* at 238, 450 N.W.2d at 406. Stated another way, in order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. *Id.* The requirement that the overbreadth be substantial arose from the recognition that the application of the overbreadth doctrine is " ' "manifestly strong medicine." ' " *Id.*, quoting *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

[10] The doctrine of substantial overbreadth provides an exception to the traditional rule of standing. *State v. Kipf, supra*. Under the doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge an enactment on its face because it also threatens others not before the court who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. *Id.* The doctrine is predicated on the sensitive nature of protected expression and the fear that " 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.' " *New York v. Ferber*, 458 U.S. 747, 768, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), quoting *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).

This "exception" to the traditional rule of standing is sometimes confused with the requirement in a facial challenge to a statute that the claimed overbreadth be "substantial." In *State v. Sommerfeld*, 251 Neb. 876, 880, 560 N.W.2d 420, 422 (1997), we stated that "[i]f the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis the statute is overbroad, and such challenge must fail." Similarly, we stated in *Kipf*, 234 Neb. at 238, 450 N.W.2d at 406, that "a litigant must show that the statute is substantially overbroad before he or she

is deemed to have standing to challenge it on the ground it is unconstitutional with respect to a hypothetical party." See, also, *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998) (finding no standing to challenge statute as overbroad when statute does not reach substantial amount of protected conduct); *State v. Copple*, 224 Neb. 672, 681, 401 N.W.2d 141, 149-50 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990) ("[i]n determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct").

However, the exception to the standing rule is conceptually distinguishable from the requirement that the overbreadth be substantial. In *Secretary of State of Md. v. J.H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984), a professional fundraiser brought an action challenging on overbreadth grounds a 25-percent limit on charitable fundraising expenses imposed by a Maryland statute. In its standing analysis, the Court analyzed whether the professional fundraiser had a sufficient " 'injury-in-fact,' " to entitle it to assert a challenge to a statute directed at charitable organizations. 467 U.S. at 958. Finding that such injury existed, the Court then stated:

> Besides challenging [the professional fundraiser's] standing as a "noncharity" to bring its claim, the Secretary urges that [the fundraiser] should not have standing to challenge the statute as overbroad because it has not demonstrated that the statute's overbreadth is "substantial." . . . The Secretary raises a point of valid concern. The Court has indicated that application of the overbreadth doctrine is "strong medicine" that should be invoked only "as a last resort." . . . The Secretary's concern, however, is one that is more properly reserved for the determination of [the] First Amendment challenge on the merits. The requirement that a statute be "substantially overbroad" before it will be struck down on its face is a "standing" question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has no "standing" to allege that, as applied to others, the statute might be unconstitutional. . . .

> We therefore move on to the merits of [the] First Amendment claim.

(Citations omitted.) 467 U.S. at 958-59. See, also, *State v. Burke*, 225 Neb. 625, 632, 408 N.W.2d 239, 246 (1987) (recognizing that issue of standing in overbreadth challenge is "inextricably entwined" with merits). Thus, although our prior case law has sometimes referred to "substantial overbreadth" as an aspect of standing, it is more properly characterized as a test for determining the merits of a facial overbreadth claim. In its opinion in this case, the Court of Appeals correctly treated it as such. *State v. Hookstra*, 10 Neb. App. 199, 630 N.W.2d 469 (2001).

[11-13] In considering the constitutionality of the Lincoln ordinance, we begin with well-established general principles. An ordinance, like a statute, is presumed to be constitutional and its unconstitutionality must be clearly established before it will be declared void. *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985). In affording a presumption of constitutionality to legislative enactments, we, while construing penal statutes strictly, nonetheless give them 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. Burke, supra*. When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted. *Id.*

The latter principle is of particular importance when considering a claim of facial unconstitutionality based upon overbreadth. In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Supreme Court noted that historically, the doctrine of facial overbreadth has not been invoked when a limiting construction has been or could be placed on a challenged statute. Similarly, this court has affirmed that a statute challenged as overbroad should be construed so as to avoid constitutional problems if it is subject to such a limiting construction. *State v. Burke, supra*.

With these principles in mind, we consider the limiting construction the Court of Appeals placed on the language of the Lincoln ordinance. Construed broadly, the ordinance could be

deemed applicable to *any* order given by a police officer while performing official duties at the scene of an arrest, accident, or investigation. However, the Court of Appeals reasoned that the phrase "in the performance of official duties" placed a substantive limitation on the word "order" in that an order must conform to the law in order to be "made in the performance of official duties," and therefore the "order" referred to by the ordinance must necessarily be a " 'lawful order.' " *State v. Hookstra*, 10 Neb. App. at 208, 630 N.W.2d at 477. The Court of Appeals reasoned that the "official duties" limitation of the ordinance, together with the judicially imposed "requirement that the order be 'lawful,' prevents unconstitutional police activity, such as interference with protected speech, while sufficiently narrowing the scope of proscribed conduct, for instance, the failure to leave a crime scene so as to avoid contamination of evidence." *Id*. As noted by the Court of Appeals, other courts have given such a narrowing construction to similar statutory language. See, e.g., *United States v. Shiel*, 611 F.2d 526 (4th Cir. 1979) (holding regulation mandating compliance with officer's order uniformly construed as applying only to proper orders and, so construed, not facially overbroad); *Ex parte Battles*, 771 So. 2d 503, 504 (Ala. 2000) (construing ordinance making it unlawful " 'for any person to fail to obey the direction or order of a member of the police department . . . while such member is acting in an official capacity in carrying out his duties' " as applying only to "lawful orders" and thus holding ordinance not unconstitutionally overbroad on its face).

On further review, Hookstra argues that the narrowing construction which the Court of Appeals placed on the language of the ordinance is improper because "[a] mere distinction between lawful and unlawful orders adds no objectivity or limits to an officer's order" and that the term "lawful" is itself "merely another conclusory and overly broad term." Supplemental brief for appellant in support of petition for further review at 3. We disagree. A court called upon to apply the ordinance, so narrowed, to a particular factual circumstance is certainly capable of determining whether the State has met its burden of proving that the order in question was a lawful one. We conclude that the language of the ordinance is susceptible to construction and that

the narrowing construction applied by the Court of Appeals was reasonable and appropriate.

The next question we must address is whether the Lincoln ordinance, so construed, is nonetheless so broad that every application of the ordinance creates an impermissible risk of suppression of ideas, or that the statute is "substantially overbroad" in that there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. See *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). In arguing that this is so, Hookstra relies upon *Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). In *Hill*, the Supreme Court considered a Houston ordinance which made it " 'unlawful for any person to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty . . . .' " 482 U.S. at 455. As originally drafted, the ordinance applied to both physical conduct and speech. However, because the Texas penal code preempted the application of the ordinance to physical conduct, the Court concluded that the remaining portion of the ordinance "deals not with core criminal conduct, but with speech." 482 U.S. at 460. Noting that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," 482 U.S. at 461, the Court concluded that the ordinance constituted an unlimited prohibition of speech that " 'in any manner . . . interrupt[s]' an officer." 482 U.S. at 462. Because it determined that the ordinance "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement," the Court concluded that the ordinance was substantially and therefore unconstitutionally overbroad. 482 U.S. at 466.

In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Supreme Court rejected a facial challenge to a statute which regulated political activity by state employees. The Court noted that while "claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words,' " 413 U.S. at 612, such claims, "if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." 413 U.S. at 613. The Court further stated:

> It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. . . . But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

(Citations omitted.) 413 U.S. at 615.

The Lincoln ordinance differs from that in *Hill* in that it does not focus exclusively on speech. Indeed, many orders which a police officer may give to a citizen at the scene of an accident or crime are completely unrelated to speech, such as an order to detour around the scene of a motor vehicle accident; an order not to enter a crime scene under investigation; or an order that a bystander step aside in order to enable medical personnel to assist an injured victim. As the Court of Appeals correctly noted, the ordinance could also reach a police order involving "speech, conduct, or a combination thereof." *State v. Hookstra*, 10 Neb. App. 199, 206, 630 N.W.2d 469, 476 (2001). However, even in the circumstance where an order pertains to speech in some way, it is not the speech itself which is criminalized, as in *Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987), but, rather, the failure to comply with a lawful order with respect thereto. The Court in *Hill* acknowledged that there are instances

where speech which interferes with the performance of a police officer's official duties could be constitutionally punished under a "properly tailored statute, such as a disorderly conduct statute that makes it unlawful to fail to disperse in response to a valid police order . . . ." 482 U.S. at 463 n.11. Given the fact that the Lincoln ordinance does not criminalize speech per se, but, rather, the noncompliance with a lawful police order which may or may not involve speech, we cannot say that it is unconstitutional in all or in a substantial portion of cases to which it applies. Accordingly, we conclude that the Court of Appeals did not err in determining that the ordinance was not unconstitutional on its face.

Vagueness Claim

[14,15] Unlike an attack based on the overbreadth of a statute, a vagueness challenge questions the clarity of statutory language. The traditional rule of standing applies to a facial challenge to a statute on the ground of vagueness. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *Id.* Conduct which is clearly proscribed by the statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. *Id.* Therefore, although Hookstra asserts a facial challenge to the ordinance, the facts of this particular case are relevant to the determination of whether he possessed the requisite standing to bring a vagueness challenge.

In denying Hookstra's renewed motion to quash and finding him guilty of violating § 9.08.050 after trial, the county court made the following findings:

> The Court finds that Officer Evans was in the performance of his official duties when he ordered the defendant Kip Hookstra to leave the area. The Court further finds that the defendant's actions were interfering with the arrest procedure and the officer had legitimate safety concerns when ordering the defendant to leave the area.

Hookstra did not challenge these factual findings on appeal or contend that his conduct did not clearly fall within that proscribed by the Lincoln ordinance. Accordingly, the Court of Appeals did not err in concluding that Hookstra lacked standing to assert a facial challenge based upon vagueness.

CONCLUSION

For the reasons discussed, we conclude that the Court of Appeals did not err in determining that § 9.08.050 was not unconstitutionally overbroad on its face and that Hookstra lacked standing to challenge the ordinance on grounds of vagueness. The judgment of the Court of Appeals is therefore affirmed.

AFFIRMED.

McCORMACK, J., not participating.

IN RE INTEREST OF JADEN H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. DARREN H., APPELLANT, AND AMANDA T., APPELLEE AND CROSS-APPELLANT.

638 N.W.2d 867

Filed February 8, 2002. No. S-00-831.

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 from the lower court's decision.
2. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. **Juvenile Courts: Summary Judgment.** There is no statute which authorizes a separate juvenile court, or a county court sitting as a juvenile court, to grant summary judgment, partial or otherwise.
5. ____: ____. Juvenile courts are without authority to grant partial summary judgment.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, WADIE THOMAS, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Christine P. Costantakos for appellant.

Laura M. Hilliard for appellee Amanda T.

James S. Jansen, Douglas County Attorney, and Karen Kassebaum Nelson for appellee State of Nebraska.

Thomas K. Harmon, guardian ad litem for Jaden H.

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

HENDRY, C.J.

INTRODUCTION

The separate juvenile court of Douglas County granted a motion by the State of Nebraska for partial summary judgment in proceedings to terminate the parental rights of Amanda T. and Darren H. to their child, Jaden H. Amanda and Darren separately appealed. The Nebraska Court of Appeals affirmed, and remanded for determination of those issues not resolved in the grant of partial summary judgment. Amanda and Darren then filed petitions for further review with this court, which we granted.

For the sake of clarity, although Darren is the appellant and Amanda the cross-appellant in this action, because of the mutuality of their interests, we hereinafter refer to them collectively as appellants.

FACTUAL BACKGROUND

On May 15, 2000, the State filed a petition to terminate appellants' parental rights to Jaden pursuant to Neb. Rev. Stat. § 43-292(2) (Reissue 1998). Section 43-292(2) allows for the termination of parental rights on the ground that the "parents have substantially and continuously or repeatedly neglected and refused to give . . . a sibling of the juvenile necessary parental care and protection." Section 43-292(2) was the only ground for termination alleged by the State.

The petition alleged that appellants previously neglected and refused to give parental care to Jaden's sibling, Suede H. Suede was born on May 28, 1994, and removed from the home by the Department of Health and Human Services on June 12, 1998, due to allegations of abuse. Another sibling, Destiny H., born on

May 26, 1993, was removed from the home at the same time as Suede. Jaden was born approximately 5 months after Suede and Destiny had been removed from the home by the department. In an order filed March 30, 1999, the separate juvenile court of Douglas County terminated appellants' parental rights to Suede and Destiny.

Pursuant to § 43-292(2), the State alleged in the petition to terminate appellants' parental rights to Jaden that (A) appellants continuously or repeatedly neglected and refused to give necessary care and protection to Suede, Jaden's sibling; (B) appellants' parental rights to Suede and Destiny had been terminated; (C) Suede suffered from "failure to thrive/malnourishment" while under appellants' care; (D) Suede suffered from several broken ribs and two broken arms while under appellants' care; (E) Suede had numerous bruises and swollen feet when he entered foster care; (F) Suede was forced to stand in a closet for extended periods of time; (G) Suede was subjected to nonaccidental injury (child abuse) while under appellants' care; (H) Suede's injuries occurred while in the care and custody of appellants; and (I) terminating appellants' parental rights to Jaden was in Jaden's best interests.

On July 21, 2000, the State filed an "Amended Motion for Partial Summary Judgment and Notice of Hearing" in the termination proceedings regarding Jaden, asserting that allegations in counts II and III, (A) through (H), contained in the petition "are res judicata and are considered the law of the case." The State asked the court to apply collateral estoppel based upon its earlier findings concerning appellants' abuse of Suede as determined in the court's prior termination order of March 30, 1999. The State also alleged that appellants had the opportunity to fully and fairly litigate the allegations contained in the March termination proceeding and that the March termination order was a final order.

On July 25, 2000, the court held a hearing on the motion for partial summary judgment and other unrelated matters. Appellants' counsel objected to the motion for partial summary judgment on the basis that granting the motion would deprive appellants of their "due process right to confront and cross-examine the witnesses with regard to . . . allegations A through H."

The court granted the motion for partial summary judgment on allegations (A) through (H) on July 25, 2000, leaving for determination at trial only the issues of whether "Jaden . . . is at risk for harm and whether or not it's in the best interest of the child . . . that the parental rights of the parents be terminated."

Appellants filed a motion for new trial. At the hearing on the motion, Darren's attorney presented evidence that Darren had petitioned for further review of the Court of Appeals' decision affirming the March 30, 1999, order terminating appellants' rights to Suede and Destiny and that this petition was still pending before the Nebraska Supreme Court. Appellants then argued to the juvenile court that because the matter was still on appeal, the judgment was not final and collateral estoppel could not be applied. The State responded, contending that in civil cases, a judgment is considered final for purposes of collateral estoppel when it is rendered, regardless of whether an appeal is taken from the order. On August 7, 2000, the court issued an order denying the motion for new trial.

Appellants appealed the grant of partial summary judgment to the Court of Appeals. In *In re Interest of Jaden H.*, 10 Neb. App. 87, 625 N.W.2d 218 (2001), the Court of Appeals found, inter alia, that the juvenile court lacked the statutory authority to grant summary judgment. However, the Court of Appeals went on to conclude that the juvenile court's grant of partial summary judgment constituted harmless procedural error on the facts of the case and affirmed the order of the juvenile court. The Court of Appeals then remanded the cause for resolution of those issues not determined in the grant of partial summary judgment.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998); *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

ASSIGNMENTS OF ERROR

Appellants assert, rephrased, consolidated, and renumbered, that the Court of Appeals erred in (1) determining the underlying

merits of the case when the Court of Appeals lacked jurisdiction to consider the appeal on its merits, (2) determining that the juvenile court's grant of summary judgment absent statutory authority to do so constituted harmless error, (3) finding that collateral estoppel applied to the issues determined by the March 30, 1999, order terminating appellants' parental rights to Suede and Destiny, (4) finding the juvenile court applied the correct standard of proof in the March 30 termination order, and (5) failing to apply the public interest exception to the doctrine of mootness in order to consider anew the issues regarding the March 30 order. Finally, appellants assert that (6) the decision by the Court of Appeals violated their constitutional rights to equal protection, procedural due process, and substantive due process under the U.S. Constitution. Because we determine that the first assignment of error has merit, we do not address the remaining assignments of error.

JURISDICTION

[2] The threshold issue in this case is whether the separate juvenile court of Douglas County had the power to grant a motion for partial summary judgment. If the juvenile court did not have the power to grant such an order, there would be "no order" from which an appeal could be taken. See *Big John's Billiards*, 254 Neb. at 530, 577 N.W.2d at 296. In such cases, this court "lacks jurisdiction" to determine the merits of the appeal. *Id*. While this issue was not raised by appellants in the proceedings before the juvenile court, lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001).

[3] Pursuant to Neb. Const. art. V, § 27, the juvenile court is a statutorily created tribunal established by the Legislature, "with such . . . powers as the Legislature may provide." Each county, depending on its population, has either a separate juvenile court or a county court with authority to sit as a juvenile court. See Neb. Rev. Stat. §§ 43-2,111 (Reissue 1998) and 24-517(9) (Cum. Supp. 2000). As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute. See, *Schweitzer v. American Nat. Red*

Cross, 256 Neb. 350, 591 N.W.2d 524 (1999); *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997); *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995).

[4,5] There is no statute which authorizes a separate juvenile court, or a county court sitting as a juvenile court, to grant summary judgment, partial or otherwise. Therefore, the juvenile court was without authority to grant partial summary judgment.

Appellants assert that because the juvenile court lacked the statutory authority to grant summary judgment, the Court of Appeals erred in failing to dismiss the appeal for lack of jurisdiction. The Court of Appeals, in its opinion, treated the juvenile court's grant of summary judgment as a type of "procedural error" and concluded that such error was harmless. *In re Interest of Jaden H.*, 10 Neb. App. 87, 103, 625 N.W.2d 218, 233 (2001). However, this court has consistently treated the authority of a statutorily created tribunal to grant summary judgment as a jurisdictional matter, whether the tribunal was a statutorily created court or an administrative body. See, *Jolly, supra*; *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Buckingham, supra*. We discussed this issue most recently in *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998), wherein we dismissed the appeal after concluding that the Tax Commissioner lacked authority to grant summary judgment. We stated that "summary judgment granted without authority is no order at all." *Id.* at 530, 577 N.W.2d at 296.

Similarly, in the present case, the juvenile court's summary judgment order was granted "without authority" and, thus, was "no order at all." See *id*. Accordingly, we determine that the Court of Appeals was without jurisdiction to consider the merits of the appeal as there was no order from which an appeal could be taken. See, e.g., *Big John's Billiards, supra*; *Jolly, supra*; *Buckingham, supra.*

CONCLUSION

The decision of the Court of Appeals is reversed. The cause is remanded to the Court of Appeals with directions to dismiss the appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. SHELDON M. GALLNER, RESPONDENT.
STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. SHELDON M. GALLNER, RESPONDENT.

638 N.W.2d 819

Filed February 8, 2002. Nos. S-00-854, S-01-088.

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 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: States.** Although a judicial determination of attorney misconduct in another state is generally given conclusive effect, the Nebraska Supreme Court is entitled, in a reciprocal discipline action, to independently assess the facts and independently determine the appropriate disciplinary action to be taken against the attorney in this state.
3. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and 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.
5. ____. The propriety of a disciplinary 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 suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Roger J. Kuhle and Joseph D. Thornton for respondent.

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

PER CURIAM.

NATURE OF CASE

In an attorney disciplinary proceeding, the Iowa Supreme Court suspended Sheldon M. Gallner's license to practice law in

the State of Iowa for 6 months. See *Bd. of Prof. Ethics & Conduct v. Gallner*, 621 N.W.2d 183 (Iowa 2001). Both formal charges (case No. S-00-854) and a motion for reciprocal discipline (case No. S-01-088) have been filed against Gallner in this court. This opinion will dispose of both cases.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; 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. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

[2] Although a judicial determination of attorney misconduct in another state is generally given conclusive effect, this court is entitled, in a reciprocal discipline action, to independently assess the facts and independently determine the appropriate disciplinary action to be taken against the attorney in this state. *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993).

FACTS

Gallner was admitted to the practice of law in the State of Nebraska on August 18, 1989. He practiced law in both Nebraska and Iowa. After a disciplinary proceeding was brought against Gallner in Iowa, the Iowa Supreme Court suspended his license to practice law there effective January 18, 2001. See *Bd. of Prof. Ethics & Conduct v. Gallner, supra*. Gallner was reinstated by the Iowa Supreme Court on July 18. Based on a motion for reciprocal discipline, this court suspended Gallner's license to practice law in Nebraska on February 14.

The charges in Nebraska were initially presented to the Committee on Inquiry of the Second Disciplinary District. On January 6, 2000, both the Counsel for Discipline and Gallner appeared before the Committee on Inquiry. After finding reasonable grounds to believe that Gallner had engaged in conduct that violated the Code of Professional Responsibility, the committee sent formal charges to the Disciplinary Review Board.

The Disciplinary Review Board filed amended formal charges with this court on August 17, 2000. Gallner was charged with violating Canon 1, DR 1-102(A)(1), (4), and (5), and Canon 7, DR 7-102(A)(5), of the Code of Professional Responsibility, which provide as follows:

> 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 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> . . . .
>
> (5) Knowingly make a false statement of law or fact.

Gallner filed an answer on September 29.

A hearing was held before a court-appointed referee on January 3 and 11, 2001. The referee found that Gallner had represented Rick Gibbons in a workers' compensation case against a Nebraska employer during a time when Gibbons was eligible for Social Security benefits. The combined benefits paid by workers' compensation and the Social Security Administration (SSA) cannot generally exceed 80 percent of the claimant's preinjury income. Any amount Gibbons paid in legal fees was not included in calculating the maximum benefits for which he was eligible.

While representing Gibbons, Gallner wrote three letters to the SSA, two of which falsely stated that Gallner and Gibbons had agreed that Gallner would receive 25 percent of Gibbons' workers' compensation checks. A letter dated January 12, 1994, stated: "I have a contract to take 25% of $242.42 or $60.61 per week out of his workers compensation checks." Another letter, dated February 7, 1994, stated: "Our contract has been in effect since that time as has our entitlement to 25% of his weekly benefit."

The referee's report found that there had never been a contract or any type of agreement for Gallner to receive a portion of Gibbons' benefits. The referee concluded that Gallner never intended to take 25 percent of Gibbons' weekly benefits.

In August 1995, Gibbons' workers' compensation case was settled by Gallner for $110,000. A third letter was sent to the SSA stating that from the final settlement, Gallner was to receive $27,500 in attorney fees. The referee found that Gallner never intended to take that amount. Instead, he had agreed to receive $17,500 from the final settlement. The referee found that the letters were untrue and designed to influence the SSA. No exceptions have been taken from the factual findings of the referee.

The referee concluded that Gallner's conduct violated the Code of Professional Responsibility and recommended suspension from the practice of law for a period of 1 year. On March 2, 2001, Gallner and the Counsel for Discipline filed a joint exception to the report of the referee. The parties requested that Gallner's suspension be indefinite, with no possibility of reinstatement for 6 months.

ASSIGNMENT OF ERROR

Gallner asserts that the referee erred in recommending an excessive disciplinary sanction not warranted by the facts of this case. Gallner claims that this court should impose the same sanction as that imposed by the Iowa Supreme Court, a 6-month suspension.

ANALYSIS

[3] 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). Neb. Ct. R. of Discipline 10(L) (rev. 2001) provides: "If no exceptions are filed, the Court, in its discretion, may consider the [referee's] findings final and conclusive . . . ." Based upon the factual findings in the referee's report, which we consider to be final and conclusive, we conclude that the amended formal charges are supported by clear and convincing evidence. See *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000).

Both Gallner and the Counsel for Discipline ask that this court impose the same sanction as the Iowa Supreme Court, which

suspended the license of Gallner to practice law with no possibility of reinstatement for 6 months, instead of the referee's recommended suspension of 1 year. Although a judicial determination of attorney misconduct in another state is generally given conclusive effect, this court is entitled, in a reciprocal discipline action, to independently assess the facts and independently determine the appropriate disciplinary action to be taken against the attorney in this state. *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993).

[4,5] To determine whether and to what extent discipline should be imposed in an attorney proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and 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. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). Each disciplinary case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. NSBA v. Pullen*, 260 Neb. 125, 615 N.W.2d 474 (2000). 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. Jensen, supra*.

In *Aupperle*, an attorney received a suspension of his license with no possibility of reinstatement for 2 years as a sanction for repeated misrepresentations to clients. In *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997), a 1-year suspension was given for neglecting a client's case and making several misrepresentations to a client and others about the status of a case. Some of Scott's misrepresentations were made to a representative of the Department of Veterans Affairs. The department was claiming a right to subrogation of Scott's client's claims for workers' compensation, and Scott repeatedly told the department that the case was still pending even though it had been dismissed.

Scott and the case at bar are similar in that the attorneys did not make representations to benefit themselves. In *Scott*, we stated:

> In the present case, we recognize that mitigating circumstances certainly exist: (1) Scott's actions were done in an effort to help maintain the viability of Wheeler's workers'

> compensation claim and not to benefit himself, (2) at no time did Scott receive a fee for representing Wheeler in the compensation matter, and (3) Scott's conduct did not result in injury to Wheeler. However, these mitigating factors fail to overcome the fact that Scott deliberately lied to a court and to Veterans Affairs. Although we encourage all attorneys to zealously represent their clients, such advice cannot be construed to permit attorneys to deceive a court of law or other interested entities.

252 Neb. at 704, 564 N.W.2d at 592.

Gallner asserts several mitigating factors. He claims that the letters to the SSA were meant to benefit his client and not himself and that he did not intend to deceive anyone with the letters. Gallner also claims he had a right to take a discounted fee without informing the SSA.

In determining the appropriate discipline, we note the following mitigating factors: Gallner has been cooperative throughout this proceeding. He has acknowledged his mistake and expressed regret and remorse. Gallner did not receive any personal benefit from his misrepresentations. The referee concluded that "[Gallner's] violations arose from the over-zealous representation of his client's interests, and not from any benefit for himself." Indeed, Gallner's misconduct arose when he reduced his fee to give a double benefit to his client in terms of greater recovery and greater Social Security benefits. No other instance of misconduct was proved, and no evidence of other disciplinary complaints was presented.

CONCLUSION

The facts, which are not disputed, show clearly and convincingly that Gallner violated his oath of office as an attorney, as well as DR 1-102(A)(1), (4), and (5) and DR 7-102(A)(5) of the Code of Professional Responsibility. We adopt the referee's recommendation that Gallner's license to practice law in the State of Nebraska be suspended for 1 year. The suspension shall be retroactive to the date of Gallner's temporary suspension, which occurred on February 14, 2001.

JUDGMENT OF SUSPENSION.

City of Lincoln, appellee, v. Central Platte Natural Resources District et al., appellees, and County of Saunders, appellant, Application A-17312 of City of Lincoln.

638 N.W.2d 839

Filed February 8, 2002. No. S-00-1076.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director.
2. **Constitutional Law: Counties: Political Subdivisions.** U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any "person" of life, liberty, or property without due process of law. A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person.
3. **Supreme Court: Administrative Law: Judicial Notice.** The Nebraska Supreme Court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law.
4. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
5. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
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: 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.

Appeal from the Department of Natural Resources. Affirmed.

Thomas S. Jaudzemis, Saunders County Attorney, and Grant A. Porter for appellant.

Dana W. Roper, Lincoln City Attorney, and Steven Huggenberger for appellee City of Lincoln.

James E. Doyle IV, of Cook, Wightman & Doyle, for appellee Central Platte Natural Resources District.

Michael C. Klein, of Anderson, Klein, Peterson & Swan, for appellee Central Nebraska Public Power and Irrigation District.

Lawrence Raful, Creighton University School of Law, amicus curiae.

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

WRIGHT, J.

NATURE OF CASE

On September 9, 1993, the City of Lincoln filed an application for a permit to appropriate flows of the Platte River for induced ground water recharge. On September 23, 1999, Saunders County filed an "Objection and Request for Hearing" and prayed to become a party to the proceedings. The director of the Department of Natural Resources (Department) subsequently denied Saunders County's request to become a party. Saunders County appeals.

SCOPE OF REVIEW

[1] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. See, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); Neb. Rev. Stat. § 61-205 (Cum. Supp. 2000) (authorizing Department of Natural Resources to exercise powers and perform duties assigned to Department of Water Resources prior to July 1, 2000).

FACTS

After the City of Lincoln filed its application, a notice was published in the Omaha World-Herald which specified that the deadline for filing objections and requests for hearing was August 17, 1994. A number of parties timely filed objections, but after various hearings were held, some of the objectors were dismissed. The remaining objectors included Central Nebraska Public Power

and Irrigation District, Central Platte Natural Resources District (CPNRD), Loup Basin Reclamation District, Nebraska Public Power District, and Twin Loups Reclamation District.

On February 2, 1998, the City of Lincoln entered into two settlement agreements—one with CPNRD and one with the remaining objectors. Pursuant to the settlement agreement with CPNRD, the City of Lincoln filed a corresponding amendment to its application reducing the streamflow originally requested. On September 24, the City of Lincoln filed a second amendment to its application further reducing its streamflow request. Settlement agreements were signed, and upon the Department's acceptance of the amended application, the objectors were to withdraw their objections to the application. The Department then took the amended application under advisement.

On September 23, 1999, Saunders County filed an "Objection and Request for Hearing" on the application, seeking to become a party to the proceedings. The City of Lincoln opposed Saunders County's participation at such a late date and requested that the Department dismiss the objection.

Pursuant to Department rules, a notice was issued on October 6, 1999, stating that a hearing would be held to consider Saunders County's request to become a party. The notice stated that Saunders County would bear the burden of providing evidence as to the factors set forth in 454 Neb. Admin. Code, ch. 4, § 001.02C (1994), which include consideration of (1) the reason Saunders County did not file its request to be made a party by the time stated in the initial notice, (2) the degree of interest alleged by Saunders County, (3) whether Saunders County's interest was represented by another party, (4) whether Saunders County's participation would be helpful in rendering a decision, and (5) whether Saunders County's participation would unduly disrupt or delay the proceeding. Prior to the hearings, Saunders County made no objection to either the notice or the application of § 001.02C to the proceedings.

At hearings held on December 20 and 21, 1999, and January 28, 2000, to consider Saunders County's request to become a party, the participants included Saunders County, the City of Lincoln, CPNRD, Central Nebraska Public Power and Irrigation District, and Nebraska Public Power District. At the December

20, 1999, hearing, Saunders County orally requested that the Department hire an independent hearing officer, and the request was denied. Following the hearings, Saunders County filed repeated motions for disqualification of the hearing officer. The Department denied all of these motions.

The director denied Saunders County's request to become a party on September 12, 2000. A portion of the director's order stated:

> 13. Saunders County argues that it has sufficient interest in the subject matter of the lawsuit because it would be harmed if the City is not required to apply for and receive the induced ground water recharge water right specified in the City's original application. The City and the objectors argue that the County misunderstands the nature of this proceeding. The City is already using water from wells for which the induced recharge appropriation is sought. Thus, the argument goes, any recharge appropriation granted affords the County more protection of any water-based interests it has than exists without the appropriation. From the City's perspective it is not a matter of harm to the County which is at issue but how much benefit the County will gain from any appropriation granted. The argument is different than the usual objection to an application in which objectors seek to reduce the quantity that will actually be granted by the Department. The Department is expressly permitted to take such action (Neb. Rev. Stat. § 46-235(4)). In this matter the City has pending a request to amend its application to reduce the quantity of flow specified in its application. In effect, the County argues that this request provides it with sufficient interest to become a party because the County argues, if the Department rejects the amendment then the City will be forced to proceed with the application at the higher flow rates. What the County argument does not consider is the City's right to simply seek to amend its application again if the most recent amendment is rejected. Fundamentally, however, the question remains whether the County would have a sufficient interest in the proceeding because of the possible increased benefits if the application amendments

would be rejected. A complicating factor in this matter is the County's original "Objection and Request for Hearing" which specifically prays that the City's application be denied. The objection has not been amended. The County's argument, however, is moot because the County has failed to prove either that it will be benefited or harmed if the City's application, either in its original form or as amended, is granted.

14. In its Reply Brief, Saunders County asserts that the City will unlawfully appropriate the County's riparian water supply if the City is granted the induced recharge water right as requested in this proceeding pursuant to the second amendment. In addition to failing in this proceeding to establish that it has any riparian water rights, this argument also fails because it is not the granting of the induced recharge water right which appropriates the County's alleged riparian water but rather it is the use by the wells which the City previously placed in operation as long as 37 years ago (i.e. 1963 wells).

15. In summary, Saunders County's request to become a party to this matter should be denied because it failed to meet its burden of proof (1) that it has sufficient interest in the subject matter to be a party, (2) that its participation would be helpful in rendering a decision, and (3) that its participation at the time of filing would not unduly disrupt or delay the proceeding. Each factor separately is sufficient to deny Saunders County's request.

Saunders County petitioned for rehearing, which was denied, and the county timely appealed.

ASSIGNMENTS OF ERROR

Saunders County makes 20 assignments of error, which we have summarized and restated. Saunders County claims the Department erred (1) in providing incorrect notification as to the issues to be resolved and incorrectly stated the burden of proof to be used in determining whether Saunders County could become a party; (2) in failing to make a complete record of the proceedings; (3) in allowing improper and unrecorded ex parte communications, in violation of Neb. Rev. Stat. § 84-914(6)(c) and (d)

(Reissue 1999); (4) in denying Saunders County's petition for a hearing before the director or a new and independent hearing officer, based on a violation of Neb. Rev. Stat. § 84-913.04 (Reissue 1999); and (5) in denying Saunders County's request for subpoenas. Saunders County also claims that the Department erred in finding that the county should not be permitted to become a party to the application proceedings.

ANALYSIS

[2] The principal issue for our consideration is whether the Department erred in denying Saunders County's request to become a party. Saunders County's remaining assignments of error will be considered as they relate to the county's request to become a party. To the extent Saunders County argues that it was denied due process, we do not consider such arguments. U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any "person" of life, liberty, or property without due process of law. *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990). A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person. *Id.*

In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. See, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); § 61-205.

Saunders County claims that the Department used incorrect standards in determining whether to allow it to become a party. A hearing notice dated October 6, 1999, listed the standards set forth in § 001.02C. Saunders County asserts that the notice should have contained the factors with respect to granting intervention stated in Neb. Rev. Stat. § 84-912.02 (Reissue 1999). We disagree.

[3,4] This court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law. *Raben v. Dittenber*, 230 Neb. 822,

434 N.W.2d 11 (1989). Pursuant to Neb. Rev. Stat. § 81-112 (Reissue 1996), the director of the Department is empowered to prescribe regulations for the conduct of its business. Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). Section 001.02C has been adopted by the Department and filed with the Secretary of State.

Saunders County did not object to the hearing notice at the time of the prehearing conference, and the county has not demonstrated any reason why § 84-912.02 should have been applied, as opposed to § 001.02C. Thus, Saunders County has failed to establish that the application of § 001.02C was error.

Saunders County next complains that the Department failed to keep complete official records and failed to disclose "the proposed, draft or recommended decisions or orders authored by LeRoy W. Sievers." See brief for appellant at 31-32. Neb. Rev. Stat. § 84-913 (Reissue 1999) provides that in a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

The Department's decision is not arbitrary, capricious, or unreasonable simply because the record does not contain drafts of the hearing officer's findings. We conclude this assignment of error is without merit.

Next, Saunders County makes two related claims. First, Saunders County alleges that Susan France, LeRoy W. Sievers, and the director engaged in ex parte communications and that the Department failed to make a record of these ex parte communications as required by § 84-914(6)(d) and Neb. Rev. Stat. § 84-915.01(2)(b) (Reissue 1999). Second, Saunders County alleges that Sievers served as the hearing officer and that France assisted Sievers, in violation of § 84-913.04. Saunders County alleges that Sievers and France served as "investigators" as to the correctness and completeness of the City of Lincoln's application and are therefore prohibited from serving as or assisting the hearing officer in a contested case. France was the unit supervisor for permits and adjudications and later was the division manager.

Saunders County claims that Sievers should have disqualified himself as a hearing officer. Section 84-913.04(1) provides: "A

person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding . . . .” Section 84-914(6)(c) provides:

> No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an ex parte communication to a hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

We therefore consider whether the activities of Sievers and France prevented them from participating in the hearings involving Saunders County.

Saunders County points to specific documents written by or sent to France while she was the unit supervisor for permits and adjudications and later while she was the division manager. As the division manager, France was responsible for processing permit applications. She reviewed the application for completeness and accuracy so that the director could make a decision based on the information required by applicable state laws. France signed the initial notice concerning the application that was published in July 1994. On December 21, 1998, Dr. Ann Bleed sent a memorandum to France regarding her concerns about the City of Lincoln’s application. Bleed is the state hydrologist, who advises Department staff as to the hydrologic information provided by applicants. The memorandum raised doubts about whether the information in the application was sufficient to make a determination on the minimum flow necessary to maintain the well field. On May 17, 1999, France sent a memorandum to the attorneys for the City of Lincoln and CPNRD that referred to prior discussions. The City of Lincoln sent a letter in reply to France with a copy to CPNRD discussing the Department’s concerns with the application. France then sent a memorandum to Sievers, Bleed, and Mary Lonowski. The memorandum raised a legal question for Department counsel and asked if there were other matters that needed to be addressed prior to staff working on a draft order for the director’s consideration. Each of these documents was sent before Saunders County requested to become a party to the application proceedings.

When Sievers denied Saunders County's request for a new hearing officer, his written findings stated that he had been a full-time employee of the Department from July 2, 1991, through December 31, 1999, serving as a special assistant to the director until August 1, 1999, and legal counsel thereafter. He was retained by the Department to serve as a hearing officer in this matter on January 6, 2000. In his capacity as special assistant and legal counsel, Sievers provided legal advice to Department staff to assist them in deciding how to proceed with applications in general. As the hearing officer in this matter, he had no discussions with Bleed, who assisted the director in his role as decisionmaker, regarding the merits of the case.

Sievers' order stated that traditionally, the Department utilized field staff to perform investigations in response to complaints or to prepare for adjudications. Due to the small number of staff available to serve as hearing officers, any staff member who might function as an advocate or prosecutor for the Department in a contested matter was advised to discuss substantive matters only with the investigators. Anyone who provided additional assistance to the advocate or prosecutor was precluded from assisting or discussing facts of the case with another staff member who might later serve as a hearing officer, assist a hearing officer, or assist the director in making a decision.

Sievers found that the exhibits referred to by Saunders County reflected the processing of an application by staff in order that an informed decision could be made by the director. He concluded that although Saunders County alleged that the foregoing was an investigation under the Administrative Procedure Act, Saunders County had provided no authority to support that interpretation.

On September 12, 2000, the director denied Saunders County's petition for a hearing before a new and independent hearing officer or before the director. The director explained:

> In the present matter, no one in the Department performed any investigation for the purpose of presenting any evidence as an advocate or prosecutor in this matter. This case has been contested since 1994. When cases are contested, i.e., there is an applicant and at least one objector, the Department does not participate as an advocate or prosecutor and

> does not perform investigations. No one in the Department who has participated in this matter has functioned as an advocate or prosecutor. Consequently, the Department has not advocated any position or prosecuted any entity. The Department is processing the application and, as deemed necessary, Department employees have requested information in order to have included in the Department files information necessary for the Director to make decisions required under the applicable laws.

Saunders County's basis for claiming that Sievers and France were investigators is stated in its brief as follows:

> The [Department] has no rules or regulations concerning the requirements set forth in Neb. Rev. Stat. §§84-913.04 and 84-914(6) (Reissue 1999). The [Department] has ignored the requirements of said statutes in this contested case. Neb. Rev. Stat. §84-913.04 (Reissue 1999) was intended to prohibit agency employees that have served as investigators in contested cases (i.e. investigating the completeness and correctness of applications for appropriating surface water from the Platte River) from serving as the hearing officer or assisting the hearing officer. Neb. Rev. Stat. §84-913.04 (Reissue 1999) is intended to prevent the result reached in Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994) wherein Ann Bleed[,] State Hydrologist[,] was allowed to serve as hearing officer concerning CPNRD's application for an instream flow appropriation. . . .
>
> Susan France and LeRoy W. Sievers have both served as investigators to determine the correctness and completeness of Lincoln's Application and Amendments thereto and are prohibited by Neb. Rev. Stat. §84-913.04 (Reissue 1999) from serving as or assisting the hearing officer in this contested case.

See brief for appellant at 30-31.

[5] "Administrative adjudicators serve with a presumption of honesty and integrity." *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 465, 513 N.W.2d 847, 865 (1994). There is no factual support for Saunders County's conclusion that Sievers and France were investigators in this matter. Saunders County

has made the assumption that Sievers and France were investigators but does not discuss what would constitute an investigation, and the term "investigator" is not defined in the Administrative Procedure Act.

[6,7] The Legislature specifically barred only prosecutors, investigators, and advocates from participating as hearing officers in administrative hearings. See § 84-913.04. 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. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). 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. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

Here, the director found that no one in the Department had performed an investigation for the purpose of presenting evidence and that no one in the Department had participated as an advocate or prosecutor. Under the facts of this case, we conclude that Sievers and France were not prosecutors, investigators, or advocates so as to be prohibited from participation in the application proceedings. Saunders County has not shown that either Sievers or France was prohibited by § 84-913.04 from serving as a hearing officer or advising the hearing officer.

Next, Saunders County claims that Sievers erred in denying its request for subpoenas for Bleed and France. If Bleed became a witness, then she would be unable to participate in the decisionmaking process. France also worked for the Department as a division manager and assisted Sievers in this case. In *Central Platte NRD*, 245 Neb. at 464, 513 N.W.2d at 864, we stated:

> When the Nebraska Evidence Rules apply to an administrative hearing, those persons performing adjudicative functions are presumptively incompetent to testify. To hold otherwise would enable the parties to remove unwanted adjudicators simply by requesting a subpoena. However, there are limits to an agency's power to shield its employees from a subpoena. An employee with unique

> knowledge indispensable to the adjudication may be subject to a subpoena.

Saunders County had the burden to show that Bleed and France possessed unique knowledge indispensable to the determination of whether the county should have been allowed to become a party. Saunders County's claim that Bleed and France had unique knowledge does not explain what unique knowledge was relevant to the case. Saunders County claims Bleed possessed unique knowledge based on a December 21, 1998, memorandum found in exhibit 151. The document was admitted into evidence, and Saunders County failed to show what more Bleed would have added. As to France, Saunders County claims that she communicated with the parties involved and with Sievers and the director. We conclude that Saunders County has not shown that France had knowledge that was indispensable to its request to become a party.

The remaining issue is whether the director's denial of Saunders County's request to become a party was arbitrary, capricious, or unreasonable. Saunders County introduced evidence concerning the factors outlined in § 001.02C. A member of the Saunders County Board of Supervisors testified as to why Saunders County did not object earlier. He stated that Saunders County objected to the amended application after it learned that the City of Lincoln was not asking for sufficient water to adequately recharge the aquifer under the Platte River and provide water for Saunders County. The director concluded that Saunders County had adequately explained its failure to ask to be named a party at an earlier date.

The director found that the most significant factor in Saunders County's request to become a party was the degree of interest alleged. Saunders County alleged interest in the application based on the following: (1) the interests of its citizens, (2) the rights of the Clear Creek Drainage District, (3) Saunders County zoning regulations, (4) the county's rights to county roads pursuant to Neb. Rev. Stat. § 39-1410 (Reissue 1998), and (5) the county's riparian rights.

With respect to Saunders County's alleged interests, the director found that (1) the county had no standing to participate in the proceedings on the basis of its citizens; (2) the Clear Creek

Drainage District was a separate legal entity in which the county did not have an interest; (3) the county's comprehensive development plan and zoning resolution were not evidence of harm to existing uses of water or water rights; (4) the county's right-of-way provided no interest, and there was no showing as to how the City of Lincoln's application would affect the use of the property as a road; and (5) the county had failed to show that it was a riparian owner. Thus, the director concluded that Saunders County had failed to demonstrate any sufficient interest that would entitle it to become a party to the application proceedings.

We conclude that the actions of the director were supported by competent and relevant evidence and were not arbitrary, capricious, or unreasonable.

CONCLUSION

Saunders County has failed to establish that the Department's denial of its request to become a party to the application proceedings was arbitrary, capricious, or unreasonable. Therefore, the Department's decision is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DALE GARTNER, APPELLANT.

638 N.W.2d 849

Filed February 8, 2002. No. S-00-1215.

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: 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.
3. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
4. **Statutes.** The meaning of a statute is a question of law.

5. **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.
6. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
7. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.
8. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
9. **Trial: Motions for Mistrial: Juries.** A mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury.
10. **Trial: Motions to Strike: Jury Instructions.** An objection followed by an admonition or instruction is typically presumed to be sufficient to dispel prejudice.
11. **Theft: Value of Goods: Proof.** The State must prove, beyond a reasonable doubt, the value of the property that is the subject of the theft charge.
12. **Theft: Value of Goods: Words and Phrases.** Value to be proved concerning a theft is market value at the time and place where the property was criminally appropriated.
13. **Value of Goods: Proof.** There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market.
14. **Theft: Value of Goods.** In reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft.
15. **Value of Goods: Expert Witnesses.** Generally, while the preferred method of establishing value may be by expert testimony, the purchase price paid by the owner is admissible as a factor for the jury to consider in determining market value when it is not too remote in time and bears a reasonable relation to market value.
16. **Theft: Value of Goods: Proof.** The value of the stolen property at the time of the crime may be established by proof of the original cost of the item reduced to reflect the actual condition of the property, in terms of how long it has been used and its state of utility or damage.
17. **Theft: Value of Goods: Evidence.** Evidence of cost together with evidence concerning age, condition, and utility of the stolen item may afford a basis for determining value.
18. **Value of Goods: Proof.** Evidence of the purchase price of goods is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially as to allow a reasonable inference that the purchase price is comparable to the fair market value.
19. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.

20. **Theft: Value of Goods: Proof: Case Disapproved.** While Neb. Rev. Stat. § 28-518(8) (Reissue 1995) now requires that intrinsic value be proved beyond a reasonable doubt as an element of the offense, proof of a specific value at the time of the theft is necessary only for gradation of the offense. To the extent that *State v. Ybarra*, 9 Neb. App. 230, 609 N.W.2d 696 (2000), holds otherwise, it is expressly disapproved.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed in part, and in part sentence vacated and cause remanded for resentencing on count VII.

Arthur R. Langvardt, of Langvardt & Valle, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Dale Gartner, former Adams County assessor, was charged with theft after several items of county property were found in his possession after he left office. The primary question presented in this appeal is whether the State presented sufficient evidence regarding the value of the property at the time that it was stolen.

II. BACKGROUND

Gartner was appointed Adams County assessor in 1993 and was elected to a 4-year term in 1995. Gartner sought reelection but was defeated in the primary election on May 12, 1998. Gartner left office on January 6, 1999.

In November 1998, Adams County retained a private accounting firm, Contryman Associates, to conduct an audit of the Adams County assessor's office. The audit began on January 7, 1999. Contryman obtained, from the Adams County clerk, a list of invoices for items purchased by the assessor's office from August 1998 through January 1999. Contryman found invoices for several items that could not be located and prepared a list of those items.

Investigators from the Nebraska State Patrol obtained a search warrant for the items. Searches were conducted on February 26, 1999, at Gartner's residence and at commercial

property owned by Gartner. Several items of county property were seized, including an inkjet printer, a fax modem, and a file cabinet. Investigators later obtained a second search warrant, executed on March 26, 1999, and seized another item, a fax machine. The final item relevant to this appeal, a digital camera, was surrendered to the prosecution by Gartner, through his attorney, shortly before trial.

Gartner was charged by information with seven counts of theft, pursuant to Neb. Rev. Stat. § 28-511(1) (Reissue 1995). Count I of the information was dismissed prior to trial, and the jury found Gartner not guilty on count IV of the information; neither of these charges is relevant to this appeal.

Count II of the information charged Gartner with the theft of a digital camera. The camera was purchased by the assessor's office on December 9, 1998, at a price of $799. The information alleged that Gartner stole the camera sometime between December 9, 1998, and January 7, 1999. When the camera was recovered, it was still in its box and it did not appear that the camera had been used or that the box had ever been opened.

Count III of the information charged Gartner with the theft of a file cabinet. The file cabinet was purchased for the assessor's office on June 13, 1998, for a price of $154.95, and the information alleged that the cabinet was stolen on the date of purchase.

Count V of the information charged Gartner with the theft of an inkjet printer. The printer was sold to the assessor's office on September 14, 1996, for a price of $400. Shayne Raitt, the manager of Computer Hardware, a retail computer store in Hastings, Nebraska, testified that on January 7, 1999, the date on which the printer was allegedly stolen, the printer was worth approximately $25 to $50.

Count VI of the information charged Gartner with the theft of a fax modem. The fax modem was sold to the assessor's office on June 13, 1998, for a price of $140. The information alleged that Gartner stole the fax modem on the date of purchase.

Count VII of the information charged Gartner with the theft of a fax machine. The fax machine was purchased on June 13, 1998, by the assessor's office, at a price of $525. The information alleged that the fax machine was stolen sometime between June 13, 1998, and January 7, 1999.

After trial, Gartner was convicted, pursuant to jury verdict, on counts II, III, V, VI, and VII. On count II, the jury determined that the theft occurred on January 7, 1999, and that the value of the digital camera was $799, thus finding Gartner guilty of a Class IV felony. See Neb. Rev. Stat. § 28-518(2) (Reissue 1995). On count VII, the jury found that the theft occurred on January 7, 1999, and that the value of the fax machine was $525, thus finding Gartner guilty of another Class IV felony. See *id.* On counts III, V, and VI, the jury found that the value of the property for each charge was less than $200 at the time of the theft, thus finding Gartner guilty of three Class II misdemeanors. See § 28-518(4).

Gartner was sentenced to 24 months' probation and 180 days in jail on counts II and VII and to 90 days in jail on counts III, V, and VI, with jail terms to be served concurrently. Gartner was also fined $10,000 for each felony conviction, fined $1,000 for each misdemeanor conviction, assessed court costs, and ordered to perform community service and rehabilitation therapy.

III. ASSIGNMENTS OF ERROR

Gartner assigns the following errors, as consolidated: (1) The district court erred in overruling Gartner's motion for directed verdict at the close of the State's case; (2) the district court erred in giving its instruction No. 6 and in rejecting Gartner's proposed instruction as to the elements of the crime of theft and the methodology the jury was to follow; (3) the district court erred in giving verdict forms that limited the jury's discretion as to its determination of the dates of the alleged thefts to those dates charged in the information despite the lack of value evidence relating to those dates; (4) the district court erred in denying Gartner's motion for declaration of a mistrial based upon the prosecutor's misconduct; and (5) because of a lack of evidence of value at the times of the takings, the jury's verdict is not supported by adequate evidence.

IV. STANDARD OF REVIEW

[1,2] 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. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). 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. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001), *cert. denied* 534 U.S. 1033, 122 S. Ct. 573, 151 L. Ed. 2d 445.

[3-5] Whether jury instructions given by a trial court are correct is a question of law. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001). The meaning of a statute is a question of law. *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996). 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. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

[6] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

V. ANALYSIS

Gartner was charged with violation of § 28-511(1), which provides that "[a] person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Section 28-518 further provides, in relevant part:

> (2) Theft constitutes a Class IV felony when the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars.
>
> (3) Theft constitutes a Class I misdemeanor when the value of the thing involved is more than two hundred dollars, but less than five hundred dollars.
>
> (4) Theft constitutes a Class II misdemeanor when the value of the thing involved is two hundred dollars or less.
>
> . . . .
>
> (8) In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt.

1. Directed Verdict

Gartner's first assignment of error is that the district court erred in overruling his motion for directed verdict made at the end of the State's case in chief. However, the record shows that after the overruling of his motion for directed verdict, Gartner presented evidence and did not renew his motion for directed verdict at the conclusion of all the evidence.

[7] A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). Thus, Gartner has waived any error regarding his motion for directed verdict made at the close of the State's case in chief, and we do not address his assignment of error. Gartner, however, may still challenge the sufficiency of the evidence to sustain his convictions, which we address below as presented by his fifth assignment of error.

2. Jury Instructions

Gartner's second assignment of error relates to the district court's jury instruction No. 6. That instruction stated for each charge that the value of the property was an element of the offense and that, before the jury could find Gartner guilty, "the value of the property must be proved beyond a reasonable doubt and determined pursuant to the last paragraph of this instruction titled DECLARATION OF VALUE." The last paragraph of the instruction read as follows:

> If you decide that the defendant was guilty of theft by unlawful taking on any one or more of the six counts then you must decide as an element beyond a reasonable doubt the value of each item taken. Once you have so decided the value, simply record the amount on the appropriate verdict form. There will be a numbered verdict form for each count. If you decide that the item taken had no value then say so on the verdict form.

The jury was also instructed, in the district court's instruction No. 12, that "[t]he value to be proved concerning a theft charge is market value of the property taken at the time and place where the property was criminally appropriated."

Gartner argues that to the extent that the last paragraph of instruction No. 6 implied that the decision of guilt could be made before the value of the item taken was determined, the instruction was confusing and therefore prejudicial.

In a theft prosecution, the value of the property stolen is now an essential element of the offense that must be proved beyond a reasonable doubt. See, § 28-518(8); *State v. Mohr*, 10 Neb. App. 442, 632 N.W.2d 382 (2001). Prior to 1992, however, the value of stolen property was not an element of the crime because value was not specified by the statute defining theft, and therefore, value was important only in determining the penalty. See *In re Interest of Shea B.*, 3 Neb. App. 750, 532 N.W.2d 52 (1995), citing *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). The Legislature amended the statute in 1992 and reinserted value as an element of theft. See, *id.*; § 28-518(8); 1992 Neb. Laws, L.B. 111. The district court's instruction No. 6, however, was clearly derived from NJI2d Crim. 3.6, which was drafted prior to the statutory amendment.

The district court adapted the language of NJI2d Crim. 3.6 to reflect the statutory amendment, insofar as instruction No. 6 provided that the value of the stolen property was an element of the offense. Nonetheless, the instruction retained language in the "Declaration of Value" paragraph which provided that if the jury found the defendant guilty of theft, then it was to determine the value of the item taken. This language is confusing, and we agree with Gartner that the district court erred in that regard.

[8] However, in an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001). We conclude that under the circumstances of this case, Gartner was not prejudiced by the district court's erroneous instruction. The district court clearly instructed the jury that the State was required to prove,

as an element of the offense, the value of the stolen property beyond a reasonable doubt. On each of the counts of which Gartner was convicted, the jury found the value of the property to be proved and indicated the value of the property on the verdict form. Even if the jury had been confused by the "Declaration of Value" paragraph and in some way determined Gartner's guilt prior to considering the value of the stolen property, the record affirmatively shows that the jury found the value of the stolen property to be proved beyond a reasonable doubt for each of the counts on which Gartner was convicted.

Because the jury was instructed that the State was required to prove, as an element of the offense, the value of the stolen property beyond a reasonable doubt, and because the record shows that the jury found the State to have met this burden, we conclude that Gartner was not prejudiced by the district court's erroneous formulation of jury instruction No. 6. Gartner's second assignment of error presents no basis for reversal.

3. Verdict Forms

Gartner's third assignment of error relates to the guilty verdict forms for counts III, V, and VI. The guilty verdict form for count III required the jury to determine the value of the file cabinet on June 13, 1998. The guilty verdict form for count V required the jury to determine the value of the inkjet printer on January 7, 1999. The guilty verdict form for count VI required the jury to determine the value of the fax modem on June 13, 1998. Gartner argues that the district court erred in providing verdict forms which specified the dates for which the value of the stolen items was to be determined.

Gartner did not object, however, to those portions of the jury instructions, particularly instruction No. 6, that specified the dates on which the items were alleged to have been stolen. The jury was specifically instructed that in order to find Gartner guilty, the State must have proved that the thefts occurred on the dates alleged in the information. For instance, on count III, the information alleged that Gartner stole the file cabinet on June 13, 1998, and the jury was instructed that the State was required to prove that the theft occurred on June 13 and the value of the item on that date.

Consequently, the district court did not err in providing (guilty) verdict forms that were simply consistent with the jury instructions that had been given. As discussed more fully below, the State was required to prove the value of the stolen property at the time of the thefts. The jury instructions required that if the State did not prove that the thefts occurred on the date alleged in the information, Gartner was to be found not guilty. The guilty verdict forms properly required the jury to find the value of the stolen items on the dates alleged in the information because those were the only dates on which Gartner could have, pursuant to jury instruction No. 6, been found guilty of the thefts. Gartner's third assignment of error is without merit.

4. Prosecutorial Misconduct

During closing argument, the prosecutor stated: "Ladies and gentlemen of the jury, I submit to you that Mr. Gartner formed the intent to deprive the county of these items, and these are the items we've charged him with. We haven't charged him with others." Gartner immediately objected. The objection was sustained, and Gartner made a motion for a mistrial. The motion for mistrial was overruled, but the jury was admonished to disregard the prosecutor's improper argument. Gartner's fourth assignment of error is that the district court erred in overruling his motion for a mistrial.

[9,10] A mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999). An objection followed by an admonition or instruction is typically presumed to be sufficient to dispel prejudice. *Id.*

In this case, the district court did not abuse its discretion in overruling Gartner's motion for mistrial. We note that the record contains evidence, admitted without objection, of several additional items of county property that were recovered from Gartner's possession, but the theft of which was uncharged. While the prosecutor's statement was improper, given the context of this record, we conclude that the district court's prompt admonition to the jury was sufficient to dispel any potential prejudice resulting from the statement. Gartner's fourth assignment of error is without merit.

5. Sufficiency of Evidence

Gartner's final assignment of error is that the evidence is insufficient to sustain his convictions. Specifically, he argues that the State did not present sufficient evidence of the value of the stolen property at the time of the thefts.

[11-14] The State must prove, beyond a reasonable doubt, the value of the property that is the subject of the theft charge. *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). Value to be proved concerning a theft is market value at the time and place where the property was criminally appropriated. *Id.* There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market. *Id.* In reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft. *Id.*

(a) Counts III and VI

We first address the sufficiency of the evidence to sustain Gartner's convictions on counts III and VI. On each of these charges, the State alleged that the theft occurred at the time of the purchase. The State's theory of the case, as presented at trial, was that while Gartner ostensibly purchased the file cabinet and fax modem for the assessor's office, Gartner intended at the time of purchase to keep them for himself.

Gartner does not argue on appeal that the evidence is insufficient to support the conclusion that Gartner stole the file cabinet and fax modem at the time that they were purchased. Consequently, we conclude that the evidence is sufficient to sustain these convictions. Because the items were purchased from retail stores by Gartner, the State's evidence shows not only the price at which the items were offered for sale, but the price at which they were actually sold. Compare *Garza, supra* (evidence of market value insufficient where evidence was presented of price asked for property, but no evidence showed that property was actually purchased at that price). Taken in the light most favorable to the State, this evidence is sufficient to support the jury's determination regarding the value of the file cabinet and fax modem at the time of the thefts, and the evidence is sufficient to sustain Gartner's convictions on these counts.

(b) Count V

Count V of the information alleged the theft of an inkjet printer on January 7, 1999. The State presented the testimony of Raitt, the manager of a retail computer store, that on January 7, the value of the inkjet printer was $25 to $50. The jury determined that the value of the printer at the time of the theft was $25. This determination was obviously supported by Raitt's testimony, and the evidence is sufficient to sustain Gartner's conviction on count V.

(c) Count II

A different question is presented regarding the sufficiency of the evidence to sustain Gartner's conviction on count II of the information, for the theft of a digital camera. The jury determined that the digital camera was stolen on January 7, 1999, and that it was worth $799 at the time of the theft. The only evidence supporting this determination, however, is that the digital camera cost $799 when it was purchased on December 9, 1998, less than a month before the date on which the jury determined that the theft occurred.

We have stated:

> While it is true that . . . it is necessary for the State to establish the market value of the stolen property as of the date of the commission of the offense, . . . we do not interpret this rule in such a narrow fashion as to require testimony of a witness or witnesses *in haec verba* that, at the specific time of the taking of the stolen property, it had a market value of a specific amount. These facts may be established circumstantially, as well as by direct evidence, and the ultimate resolution of the value of the property at the time and place of the taking is clearly a fact question for the decision of the jury from the evidence adduced.

(Emphasis in original.) *State v. Weik*, 206 Neb. 217, 221, 292 N.W.2d 289, 291 (1980).

[15-17] Generally, while the preferred method of establishing value may be by expert testimony, the purchase price paid by the owner is admissible as a factor for the jury to consider in determining market value when it is not too remote in time and bears a reasonable relation to market value. See *Coley v. State*, 302

Ark. 526, 790 S.W.2d 899 (1990). The value of the stolen property at the time of the crime may be established by proof of the original cost of the item reduced to reflect the actual condition of the property, in terms of how long it has been used and its state of utility or damage. *People v. White*, 167 A.D.2d 256, 561 N.Y.S.2d 756 (1990). Evidence of cost together with evidence concerning age, condition, and utility of the stolen item may afford a basis for determining value. *People v. Langston*, 96 Ill. App. 3d 48, 420 N.E.2d 1090, 51 Ill. Dec. 532 (1981). See, also, e.g., *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996); *State v. Moody*, 113 N.H. 191, 304 A.2d 374 (1973); *State v. Brown*, 209 Kan. 493, 496 P.2d 1340 (1972); *Lester v. Com.*, 30 Va. App. 495, 518 S.E.2d 318 (1999); *State v. Merchant*, 871 S.W.2d 102 (Mo. App. 1994); *Anderson v. State*, 871 S.W.2d 900 (Tex. App. 1994); *Roundtree v. State*, 191 Ga. App. 423, 382 S.E.2d 173 (1989); *Brewer v. Com.*, 632 S.W.2d 456 (Ky. App. 1982) (cases finding purchase price to be sufficient evidence of market value where purchase is recent and condition of property is good).

[18] Evidence of the purchase price of the goods, however, is competent evidence of fair market value only where the goods are so new, and thus, have depreciated in value so insubstantially as to allow a reasonable inference that the purchase price is comparable to the fair market value. See *People v. Paris*, 182 Colo. 148, 511 P.2d 893 (1973). See, also, e.g., *Zellers v. U.S.*, 682 A.2d 1118 (D.C. 1996); *Dunn v. Commonwealth*, 222 Va. 704, 284 S.E.2d 792 (1981); *Barry v. State*, 406 So. 2d 45 (Miss. 1981); *People v. Harold*, 22 N.Y.2d 443, 239 N.E.2d 727, 293 N.Y.S.2d 96 (1968); *State v. Lyman*, 966 P.2d 278 (Utah App. 1998); *Green v. State*, 603 So. 2d 130 (Fla. App. 1992) (cases finding purchase price to be insufficient evidence of market value where evidence was not presented as to age or good condition of property).

In the instant case, the digital camera was purchased, new, less than a month prior to the time that the theft was found to have taken place. The evidence indicated that the camera had never been used and, in fact, had not been removed from its packaging before it was turned over to the prosecution. We also note that the purchase price of the camera was well in excess of the $500 threshold established by § 28-518(2) for a Class IV felony. See *White, supra* (original cost sufficient evidence of

value where margin between cost and statutory threshold is wide). Compare *Lyman, supra* (original cost insufficient evidence of value where price paid for goods not significantly greater than statutory threshold).

Given these facts, we conclude that, in the light most favorable to the State, the purchase price of the digital camera was sufficient evidence of fair market value to support Gartner's conviction on count II of the information. The short amount of time between the purchase and the theft, in addition to the evidence of the camera's condition when stolen, supports a reasonable inference made by the trier of fact that the purchase price of the camera reflected the fair market value of the camera at the time of the theft.

(d) Count VII

The same principles applied to count II lead to a different result with regard to count VII, which charged the theft of the fax machine. The fax machine was purchased on June 13, 1998, for a price of $525, and the jury found that the fax machine was stolen on January 7, 1999, and was still worth $525 at the time of the theft.

The fax machine was recovered by investigators on March 26, 1999. While Gartner testified that he had not opened the fax machine box, the only evidence presented regarding the condition of the fax machine at the time it was found came from a criminal investigator with the Nebraska State Patrol. The patrol investigator testified that he was not the one who actually located the fax machine and that the fax machine box had been opened when the investigator first saw it.

Thus, with respect to count VII, the only evidence of the market value of the fax machine at the time of the theft is the $525 price at which the fax machine was purchased, nearly 7 months prior to the theft. There was no substantial evidence presented as to the condition of the fax machine at the time of the theft from which the jury could make any reasonable inference regarding depreciation. Furthermore, the value that the jury found for the item, $525, is only marginally greater than the statutory threshold for a felony theft conviction established by § 28-518(2). Compare *State v. Lyman*, 966 P.2d 278 (Utah App. 1998). Under

the principles set forth above, we conclude that the evidence presented is insufficient to support the jury's determination regarding the value of the fax machine.

Having determined that the evidence on count VII is insufficient to support a conviction and sentencing for a Class IV felony, the remaining issue is the appropriate disposition of the charge. In *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), the defendant was convicted of theft by shoplifting as a Class IV felony. This court found that the evidence of fair market value in that case was insufficient to justify a finding of theft punishable as a felony. *Id.* This court concluded, however, that the evidence showed beyond a reasonable doubt that the property stolen had "some intrinsic value that translates into nominal market value, notwithstanding the absence of evidence establishing a specific value for the stolen property." *Id.* at 265, 487 N.W.2d at 557-58. Thus, this court set aside the felony sentence and remanded the matter to the district court with direction to impose an appropriate sentence for theft as a Class II misdemeanor. See *id.*

However, the Nebraska Court of Appeals has concluded that this court's holding in *Garza* has been abrogated by the 1992 amendment to § 28-518 that reinserted value as an essential element of the offense of theft. See *State v. Ybarra*, 9 Neb. App. 230, 609 N.W.2d 696 (2000). In that case, the defendant was charged with, and found by the jury to be guilty of, theft by shoplifting as a Class IV felony. *Id.* The district court, however, concluded that the evidence of value was insufficient and found the defendant guilty of only a Class II misdemeanor. *Id.* The Court of Appeals concluded that

> the judge did not have the authority to reduce the conviction from a Class IV felony to a Class II misdemeanor based upon the insufficiency of evidence as to the value of the goods taken. The State failed to produce sufficient evidence to prove value, an essential element of theft by shoplifting property for more than $500 but less than $1,500. Accordingly, we reverse, and remand this cause with directions to dismiss.

Id. at 243, 609 N.W.2d at 705.

We disagree with the Court of Appeals' conclusion in *Ybarra, supra*. Section 28-518(8) requires only that "value shall be an

essential element of the offense that must be proved beyond a reasonable doubt." The statutory language requires only that some value be proved as an element of a theft offense, not that a particular threshold value be proved as an element of the offense.

We have examined the legislative history of 1992 Neb. Laws, L.B. 111, in an attempt to shed some light on the purpose of the amendment to § 28-518 that reinserted value as an essential element of the offense of theft. The only relevant discussion in the legislative history is the following statement by the amendment's introducer during the floor debate, as the senator explained the amendment that resulted in § 28-518(8):

> [T]his changes a Supreme Court or corrects what happened with a Supreme Court decision and that is that right now . . . the law had previously been assumed to be that when you get charged with a . . . with a theft, one of the elements of that offense that the prosecution has to prove . . . and, remember, we're dealing with criminal statutes, so these are things that the prosecution will have the burden of proving beyond a reasonable doubt. One of the things that the court . . . that the court changed or changed whatever they assumed was the law was that value is something that had to be proven. It's clearly, I think, or the policy should be that that is an element of the offense. If someone is charged with a felony, as it currently stands, since the Supreme Court decision, as it currently stands, the prosecution need not prove that the value was in excess of $300, even though that's what the statutes require. The statutes require that it be . . . have a value in excess of $300. Because the Supreme Court has interpreted the statutes in that direction, I believe this change is necessitated. What the second half of this amendment then would do is that it would simply require that value is an essential element of the offense that has to be proved. Basically, that part of the amendment would return us back to where, I believe, we thought we were prior to that decision.

Floor Debate, Judiciary Committee, 92d Leg., 2d Sess. 8968 (Feb. 13, 1992).

It appears that the Legislature based its decision to amend § 28-518 on a misunderstanding of *State v. Garza*, 241 Neb.

256, 487 N.W.2d 551 (1992). In that case, this court held that value was not an element of the offense of theft, but we specifically stated that "[a]lthough value is not an element of theft, the State must prove, by evidence beyond a reasonable doubt, the value of the property that is the subject of the theft charge." *Id.* at 263, 487 N.W.2d at 556. The senator's statement that "[i]f someone is charged with a felony, as it currently stands, since the Supreme Court decision, . . . the prosecution need not prove that the value was in excess of $300, even though that's what the statutes require" is contradicted by the plain language of *Garza*.

The difficulty we now face is in ascertaining the effect of a statutory amendment that attempted to fix a nonexistent problem; i.e., the Legislature amended a statute, intending to change the law to what the law already was. The language suggests that the Legislature intended simply that the State, in theft prosecutions, should be required to prove the value of the property taken beyond a reasonable doubt and that establishing value as an element of the offense was a means to this end. Therefore, the existence of § 28-518(8) should be read as accomplishing no more profound a change in the law than was intended by the Legislature, and certainly not where the statutory language does not so require.

[19] It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001). The plain language of § 28-518(8) requires that the State must prove, as an element of a theft offense, that the item stolen has at least some intrinsic value. The statute does not require that proof of a specific value must be presented in order for the conviction to be sustained, although the State must prove the *specific value of the stolen property* at the time of the theft beyond a reasonable doubt in order to obtain a conviction for any offense *greater than* a Class II misdemeanor.

[20] In other words, while § 28-518(8) now requires that intrinsic value be proved beyond a reasonable doubt as an element of the offense, proof of a specific value at the time of the theft is necessary only for gradation of the offense. To the extent

that *State v. Ybarra*, 9 Neb. App. 230, 609 N.W.2d 696 (2000), holds otherwise, it is expressly disapproved.

In the instant case, while the State failed to present evidence sufficient to support the jury's conclusion regarding the $525 value of the fax machine at the time of the theft, the evidence does establish beyond a reasonable doubt that the fax machine had some intrinsic value that translated to at least nominal market value at the time of the theft. Compare *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). Consequently, the evidence is sufficient to support Gartner's conviction for theft. However, because the evidence of specific value at the time of the theft is not sufficient to support the gradation of the theft as a Class IV felony, Gartner's sentence on count VII must be vacated, and the cause remanded for imposition of an appropriate sentence for a Class II misdemeanor, pursuant to § 28-518(4). See *Garza, supra*.

VI. CONCLUSION

We find no reversible error with respect to Gartner's convictions and sentences on counts II, III, V, and VI of the information, and we affirm those convictions and sentences. We affirm Gartner's conviction on count VII of the information, but vacate the sentence and remand the cause to the district court with direction to impose an appropriate sentence on Gartner for misdemeanor theft of property with a value of less than $200, a Class II misdemeanor. See § 28-518(4).

AFFIRMED IN PART, AND IN PART SENTENCE VACATED AND CAUSE REMANDED FOR RESENTENCING ON COUNT VII.

CONNOLLY, J., not participating.

SAUNDERS COUNTY, APPELLANT, V.
CITY OF LINCOLN, APPELLEE.

638 N.W.2d 824

Filed February 8, 2002. No. S-01-029.

1. **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.
2. **Administrative Law: Standing: Pleadings: Final Orders.** Proceedings to determine standing to bring a petition before an administrative agency constitute special

proceedings, and an order entered in a special proceeding is final and appealable only if it affects a substantial right of the aggrieved party.

3. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
4. **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.
5. **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.

Appeal from the Department of Natural Resources. Appeal dismissed.

Thomas S. Jaudzemis, Saunders County Attorney, and Grant A. Porter for appellant.

Dana W. Roper, Lincoln City Attorney, Steven Huggenberger, and Margaret Blatchford for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Saunders County appeals from the order of the director of the Department of Natural Resources, which sustained the demurrer filed by the City of Lincoln to three of the four "causes of action" contained in the county's second amended petition and dismissed those claims. The order appealed from is not final, and we dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS

On December 17, 1999, the county filed its single-count petition with the department seeking, inter alia, an order requiring the city to decommission certain water wells constructed by the city. The county alleged the wells were withdrawing water in violation of the county's riparian rights which it claimed on real property situated on the bed and bank of the Platte River. On February 25, 2000, the city filed a demurrer to the petition. On April 24, the department approved the parties' stipulation that

the city's demurrer was withdrawn and that the county would amend its petition.

On May 8, 2000, the county filed its amended petition setting forth four "causes of action." Each "cause of action" was based on the same general set of facts alleging that the city had failed to comply with state laws governing the construction and registration of wells, which wells were purportedly withdrawing water in violation of the county's riparian rights. None of the enumerated "causes of action" sought separate or individualized relief. Instead, each "cause of action" "pray[ed] for relief as set forth at the end of [the amended petition]." In the amended petition's "Request for Relief" section, the county stated that as to "Causes of Action One through Four," it requested that the city be forced to register or otherwise obtain permits for certain of the wells it operated.

On May 15, 2000, the city demurred to the county's amended petition, claiming, inter alia, that the county lacked standing to bring its action before the department. In an order dated August 17, 2000, the department overruled the city's demurrer as to the county's first "cause of action." In the same order, however, the department sustained the city's demurrer as to the second, third, and fourth enumerated "causes of action," concluding that the county lacked standing to bring those "causes of action." The department gave the county 14 days to further amend its petition.

The county filed its second amended petition on September 7, 2000. The second amended petition added approximately 30 paragraphs to the county's fourth "cause of action." In other respects, the second amended petition was identical to the amended petition. In particular, no change was made to the "Request for Relief" section.

The city filed a demurrer to the second amended petition on September 19, 2000, again alleging, inter alia, that the county lacked standing to bring the action before the department. In an order dated November 16, 2000, the department sustained the city's demurrer to the second, third, and fourth "causes of action" set forth in the second amended petition, and in an order dated December 4, 2000, the department dismissed those "causes of action." By virtue of the department's November 16 order, however, the county's first "cause of action" remained

pending. During oral argument on appeal before this court, the parties agreed that proceedings have continued before the department on the county's first enumerated "cause of action."

The county appeals from the department's December 4, 2000, order of dismissal, which dismissed the county's second through fourth "causes of action."

ASSIGNMENTS OF ERROR

On appeal, the county has assigned 11 errors which combine to form 2. The county asserts, as restated, that the department erred (1) in sustaining the city's demurrer to the second, third, and fourth "causes of action" contained in the second amended petition and (2) in denying the county due process in various particulars not recited here. In view of our conclusion that this court lacks jurisdiction due to the absence of a final, appealable order, we do not consider the merits of the assigned errors.

STANDARD OF REVIEW

[1] 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

ANALYSIS

[2,3] Before we address the county's assigned errors, we must first consider the issue of whether this court possesses jurisdiction to hear the instant appeal. See *Keef v. State, supra*. See, also, *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 374, 598 N.W.2d 441, 443 (1999) (stating "[i]t is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it"). We have previously held that proceedings to determine standing to bring a petition before the department constitute "special proceedings," and an order entered in a special proceeding is final and appealable only if it affects a substantial right of the aggrieved party. *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996). See, also, *In re Applications A-14137, A-14138A, A-14138B, and A-14139*, 240 Neb. 117, 480 N.W.2d 709 (1992) (concluding that proceedings brought before Department of Water Resources, now known as Department of Natural Resources, pursuant to Neb. Rev. Stat.

§ 61-205 (Cum. Supp. 2000), are special proceedings). A substantial right is an essential legal right, not a mere technical right. *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

[4,5] As noted above, the county's second amended petition enumerated four "causes of action" for which it sought the same relief. We have stated that 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. *Keef v. State, supra*; *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000); *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999). 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*.

Referring to the above considerations, we conclude that the county's second amended petition sets forth four theories of recovery based upon a single cause of action rather than four causes of action. Each of the purported "causes of action" was based on the same general set of alleged facts and the claim that the city had failed to comply with state laws governing the construction and registration of wells. Identical relief was sought as to each "cause of action." Were the county to succeed on one of its claims, it would gain the relief it sought in its petition and would thus be precluded from relief on the other three theories of recovery.

In the instant case, the county appeals from the department's order which sustained the city's demurrer to the county's second, third, and fourth enumerated "causes of action" and dismissed those claims. The city's demurrer to the first enumerated "cause of action" was overruled by the department, and the proceedings as to the first "cause of action" have continued before the department. Because the separate claims are not actually separate causes of action, but, rather, theories of recovery, the

county is still able to obtain the relief it requested from the department in its petition.

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996). Conversely, an appellate court is without jurisdiction to entertain appeals from a nonfinal order. *Id.* An order entered in a special proceeding is final and appealable only if it affects a substantial right of the aggrieved party. *Id.* Notwithstanding the department's dismissal of the second through fourth "causes of action," the dismissal order has not precluded the county from gaining the relief it seeks in its second amended petition, and the dismissal order has not affected a substantial right of the county. The dismissal order is not a final order, and this court is without jurisdiction to hear the instant appeal. See, *City of Lincoln v. Twin Platte NRD, supra*; *In re Applications A-14137, A-14138A, A-14138B, and A-14139*, 240 Neb. 117, 480 N.W.2d 709 (1992).

CONCLUSION

The department's dismissal of the county's second through fourth theories of recovery has not precluded the county from obtaining the relief it seeks in its second amended petition, and therefore, a substantial right of the county has not been affected. The order from which the county seeks to appeal in this special proceeding is not a final order. Because the county appeals from a nonfinal order, this court is without jurisdiction to hear the appeal. We therefore dismiss the county's appeal.

APPEAL DISMISSED.

STEPHAN, J., not participating.

IN RE INTEREST OF S.B., ALLEGED TO BE A MENTALLY ILL AND DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLANT, V. S.B., APPELLEE.

639 N.W.2d 78

Filed February 8, 2002. No. S-01-233.

1. **Mental Health: Appeal and Error.** In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, appellate courts will affirm the district

court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing.

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. **Mental Health: Due Process.** Pursuant to Neb. Rev. Stat. § 83-1058 (Cum. Supp. 2000), the subject of a petition under the Nebraska Mental Health Commitment Act has the right to confront and cross-examine adverse witnesses and evidence equivalent to the rights granted under the Confrontation Clauses of the federal and state Constitutions.
4. **Mental Health: Due Process: Waiver: Testimony: Public Policy.** In the absence of a waiver by the subject of a petition for commitment of his or her right to confrontation, in order to admit the telephonic testimony of a mental health professional during a civil commitment hearing, the State must demonstrate that (1) such testimony is necessary to further an important public policy and (2) the mental health professional is truly unavailable as a witness, thus necessitating telephonic testimony.
5. **Testimony: Public Policy.** The requirements of a demonstration of an important public policy and necessity are conjunctive, and the absence of a demonstration of either precludes the admission of the telephonic testimony.

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

Tamra L. Walz, Deputy Sarpy County Attorney, for appellant.

Thomas J. Garvey, Sarpy County Public Defender, and Gregory A. Pivovar for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The State of Nebraska appeals from the order of the district court for Sarpy County which reversed the order of the Sarpy County Mental Health Board and remanded the matter for further proceedings. The board had determined that S.B. was a mentally ill dangerous person and had committed him to inpatient psychiatric treatment at a regional center. We agree with the district court that the telephonic testimony of the mental health professional was improperly admitted and that without such testimony, the evidence was insufficient to support the commitment. We affirm the district court's reversal of the commitment order.

STATEMENT OF FACTS

On July 19, 2000, the State filed a petition pursuant to the Nebraska Mental Health Commitment Act (Commitment Act), Neb. Rev. Stat. § 83-1001 et seq. (Reissue 1999 & Cum. Supp. 2000), specifically §§ 83-1024 to 83-1026, alleging, inter alia, that S.B. was a mentally ill, alcoholic, and/or drug-abusing person who was a danger to himself or others as a consequence of S.B.'s hearing voices and having a physical confrontation with his parents. Attached to the petition was a certificate indicating that S.B. had been taken into emergency protective custody. At a hearing on July 25, the board ordered a 90-day continuance of the proceedings on the petition to allow S.B. to seek voluntary psychiatric treatment.

On October 5, 2000, S.B. was taken into emergency protective custody and admitted to Methodist Richard Young Hospital as a result of his attempt to gain access to Offutt Air Force Base. On October 6, the State filed a motion to reinstate mental health board proceedings, alleging that S.B. was not complying with his voluntary outpatient chemical dependency treatment plan and seeking the reinstatement of the board proceedings which had been continued on July 25.

The State's motion came on for hearing on October 12, 2000, pursuant to § 83-1027, which requires that hearings under the Commitment Act be held within 7 days after a person has been taken into protective custody. S.B. was present at the hearing and represented by counsel. During the hearing, the State called as a witness Dr. Jerry Easterday, a psychiatrist who had been evaluating S.B. since his admission to Methodist Richard Young Hospital on October 5. Easterday did not appear in person at the hearing. Instead, over S.B.'s objection, Easterday was permitted to testify at the hearing telephonically via speaker telephone, after being identified by a notary public.

Easterday testified that S.B. was suffering from "schizophrenia, paranoid type, with acute exacerbation with a psychosis" and that S.B. was delusional, "displayed paranoia," and was experiencing "auditory hallucinations of a command type." Easterday further testified that S.B. refused to take his medication and, as a result, was a danger to himself. Easterday recommended antipsychotic medication and inpatient psychiatric

hospitalization at a regional center as the least restrictive treatment plan for S.B.

Counsel for S.B. cross-examined Easterday telephonically regarding his treatment of S.B. and his familiarity with S.B.'s mental illness. S.B. did not offer a second opinion to refute Easterday's testimony and did not present any evidence of his own.

After deliberations, the board issued an order on October 12, 2000, finding that S.B. was a mentally ill person, dangerous to himself. The order confined S.B. to the Norfolk or Hastings Regional Center for inpatient treatment and continuing evaluation.

On November 6, 2000, S.B. appealed the board's order to the Sarpy County District Court. The appeal came on for hearing on December 29. In an order filed January 26, 2001, the district court reversed the board's order, concluding that the admission of Easterday's telephonic testimony violated S.B.'s constitutional right to confront witnesses as provided in § 83-1058, which states as follows:

> The subject of a petition shall have the right at a hearing held under the Nebraska Mental Health Commitment Act to confront and cross-examine adverse witnesses and evidence equivalent to the rights of confrontation granted by Amendments VI and XIV of the Constitution of the United States and Article I, section 11, of the Constitution of Nebraska.

The district court found that there was no showing on the record that S.B. had waived his right to confrontation or agreed to the admission of telephonic testimony. The district court also found that the State had not offered evidence of a "compelling reason or need" for Easterday to appear telephonically rather than in person. The district court concluded that the board's admission of Easterday's testimony was in error. The district court further concluded that without Easterday's testimony, there was insufficient evidence in the record to establish S.B.'s mental illness and dangerousness. Accordingly, the district court determined that the board's October 12, 2000, commitment order was not properly supported by the evidence, and the court

reversed the board's commitment order and remanded the matter for further proceedings.

The State appeals from the district court's order.

ASSIGNMENTS OF ERROR

On appeal, restated, the State has assigned two errors: (1) The district court erred in determining that the board had erred in admitting Easterday's telephonic testimony, and (2) the district court erred in reversing the board's commitment order which had found that S.B. was a mentally ill dangerous person and had ordered S.B. to participate in inpatient psychiatric treatment at a regional center.

STANDARDS OF REVIEW

[1] In reviewing a district court's judgment under the Commitment Act, appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing. *In re Interest of Tweedy*, 241 Neb. 348, 488 N.W.2d 528 (1992); *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990).

[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*, 262 Neb. 205, 631 N.W.2d 464 (2001).

ANALYSIS

Procedures Under Commitment Act.

The Commitment Act establishes certain procedures for civil commitment hearings. Pursuant to § 83-1024:

> Any person believing that any individual is a mentally ill dangerous person may communicate his or her belief to the county attorney. Should the county attorney concur that the individual is a mentally ill dangerous person and that neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than a mental-health-board-ordered treatment disposition are available or would suffice to prevent the harm described in section 83-1009, the county attorney shall cause a petition to be

> drafted and acted upon as provided in the Nebraska Mental Health Commitment Act.

The Commitment Act refers to persons against whom such a petition has been filed as the "subject" of the petition. Section 83-1009 of the Commitment Act defines a "mentally ill dangerous person" as

> any mentally ill person, alcoholic person, or drug-abusing person who presents:
>
> (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
>
> (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

Pursuant to § 83-1020, if a person taken into police custody is believed to be a mentally ill dangerous person, he or she can be taken into protective custody and admitted to a treatment facility. Persons who are taken into protective custody must be evaluated by a "mental health professional," as that term is defined by § 83-1010, as soon as possible after being taken into protective custody, but not later than 36 hours after having been admitted. § 83-1023.

[3] In accordance with § 83-1027, a hearing must be held on a petition filed pursuant to § 83-1024 within 7 days after the subject of the petition has been taken into protective custody. At the hearing, the subject "shall appear personally and be afforded the opportunity to testify in his or her own behalf and to present witnesses and tangible evidence in defending against the petition at the hearing." § 83-1056. Pursuant to § 83-1059, hearings held under the Commitment Act will follow the "rules of evidence applicable in civil proceedings"; however, "[i]n no event shall evidence be considered which is inadmissible in criminal proceedings." Compare *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978) (discussing § 83-1059 in context of Fifth Amendment right against

self-incrimination). Pursuant to § 83-1058, the subject of the petition has the right to confront and cross-examine adverse witnesses and evidence "equivalent" to the rights granted under the Confrontation Clauses of the federal and state Constitutions. Application of § 83-1058 determines the outcome of this case.

Rights Under Confrontation Clauses and Limitations on Use of Telephonic Testimony.

Section 83-1058 refers to the Confrontation Clauses in the U.S. and Nebraska Constitutions. The Sixth Amendment to the U.S. Constitution provides, in relevant part, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." Neb. Const. art. I, § 11, provides, in relevant part, "the accused shall have the right . . . to meet the witnesses against him face to face." This court has held that the analysis under article I, § 11, of the Nebraska Constitution is the same as that under the Sixth Amendment. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). See *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983).

This court has previously recognized that notwithstanding the articulation of the Confrontation Clauses, "if the Confrontation Clauses were interpreted literally, they would require, on objection, the exclusion of any statement made by a declarant not present at trial; however, the right to confrontation is not absolute." *State v. Jacob*, 242 Neb. 176, 190, 494 N.W.2d 109, 119 (1993). See *State v. Warford*, 223 Neb. 368, 375, 389 N.W.2d 575, 580 (1986) (stating that "right of confrontation is not . . . immune to exception" and recognizing that right is subject to certain hearsay exceptions and that right may be waived). See, also, *Maryland v. Craig*, 497 U.S. 836, 847, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (stating that Sixth Amendment does not require "an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant"). The U.S. Court of Appeals for the Eighth Circuit has considered the use of telephonic testimony as it relates to the right of confrontation. See *U.S. v. Jacobs*, 97 F.3d 275 (8th Cir. 1996). In *Jacobs*, the Court of Appeals recognized that certain public policies, such as a criminal defendant's right to a speedy trial or the efficient use of court resources, may compel the telephonic

examination of a witness when the witness is "truly unavailable." 97 F.3d at 282. The *Jacobs* court determined that notwithstanding the Sixth Amendment, telephonic testimony is admissible in a criminal case when (1) an important public policy was demonstrated and (2) the government demonstrated to the trial court the specific necessities justifying telephonic as opposed to face-to-face examination of the witness. See, also, *Maryland v. Craig*, 497 U.S. at 848 (stating that Sixth Amendment Confrontation Clause's preference for face-to-face confrontation at trial " 'must occasionally give way to considerations of public policy and necessities of the case' "), quoting *Mattox v. United States*, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895); *State v. Warford*, 223 Neb. at 375, 389 N.W.2d at 580 (citing to *Mattox* and stating that "[a]s early as 1895, the U.S. Supreme Court held that the right of confrontation must occasionally give way to considerations of public policy and the necessities of the case").

[4,5] Section 83-1058 grants the subject of a petition the right of confrontation, which right we have interpreted as not being absolute. See *State v. Jacob, supra* (right of confrontation not absolute). See, also, *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001) (statutory interpretation presents question of law in connection with which appellate court has obligation to reach independent conclusion). We believe the Court of Appeals' approach in *Jacobs*, relying on *Maryland v. Craig, supra*, is appropriate when considering the admissibility of telephonic testimony by a mental health professional during a commitment hearing under the Commitment Act. Accordingly, in the absence of a waiver by the subject of a petition for commitment of his or her right to confrontation, in order to admit the telephonic testimony of a mental health professional, the State must demonstrate that (1) such testimony is necessary to further an important public policy and (2) the mental health professional is "truly unavailable" as a witness, thus necessitating telephonic testimony. *U.S. v. Jacobs*, 97 F.3d at 282. Such demonstration shall be specific to the case because "[m]ere speculation is insufficient to justify abridgement of a [person's] constitutional right to confront[ation]." *Id*. See, also, *State v. Warford, supra*. The requirements of a demonstration of

important public policy and necessity are conjunctive, and the absence of a demonstration of either precludes the admission of the telephonic testimony.

Propriety of Admission of Easterday's Telephonic Testimony: No Demonstration of Necessity.

In the instant case, the district court found that "the record is devoid of any showing by the State of any compelling reason or need" to receive Easterday's testimony by telephone. The district court thus determined that there was no demonstration of the purported necessity for telephonic as opposed to live testimony. Although there was argument by the State before the district court that mental health professionals in general are unable to appear personally because of their schedules, we agree with the district court's assessment that the State failed to demonstrate on the record before the board that Easterday was unable to appear personally during the specific commitment hearing pertaining to S.B. Absent such a showing, the district court was correct in its determination that given the subject of the petition's confrontation right under § 83-1058 and the state of the record, the board erred in admitting Easterday's telephonic testimony.

Evidence of S.B.'s Mental Illness and Dangerousness.

The State assigns as error the district court's order which determined there was insufficient admissible evidence and which reversed the board's order of commitment. We conclude that the district court did not err.

Under the Commitment Act, the State has the burden of establishing the subject of the petition's mental illness and dangerousness by clear and convincing evidence. *In re Interest of H.W.*, 220 Neb. 423, 370 N.W.2d 155 (1985). See *In re Interest of Wickwire*, 259 Neb. 305, 313, 609 N.W.2d 384, 389 (2000) (stating that in order for mental health board to act under Commitment Act, "[t]here must be clear and convincing proof that the person is mentally ill, [and] there must be clear and convincing proof that the person is dangerous"). The district court stated that "[w]ithout the admission of Dr. Easterday's telephonic testimony, the testimony proffered by S.B.'s father and the deputy sheriff were insufficient, standing alone, to establish the requisite elements of mental illness and dangerousness . . . ."

The district court determined that the board's order was "not properly supported by the evidence." We cannot say, as a matter of law, that the district court erred in this determination. See, *In re Interest of Tweedy*, 241 Neb. 348, 488 N.W.2d 528 (1992); *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990). Accordingly, we affirm.

CONCLUSION

In this appeal, the district court reversed an order of commitment. Section 83-1058 provides that the subject of the petition for commitment shall have a right of confrontation. The district court ruled that the board erred in admitting Easterday's telephonic testimony over objection. The record fails to demonstrate a necessity for the telephonic testimony, and therefore, the district court's decision was correct. In the absence of such testimony, the district court's order which reversed the board's order based on insufficient evidence was correct. We affirm.

AFFIRMED.

IN RE INTEREST OF CHAD S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHAD S., APPELLANT.

639 N.W.2d 84

Filed February 8, 2002. No. S-01-271.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings.
2. ____: ____. In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Trial: Judges: Words and Phrases.** An "ex parte communication" occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Sara L. Komen, of Nebraska Legal Services, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Shellie D. Sayers for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This action was brought by the State of Nebraska in the separate juvenile court of Lancaster County, wherein the trial court found that Chad S. was a person as defined by Neb. Rev. Stat. § 43-247(1) (Reissue 1998), a juvenile who has committed an act other than a traffic offense which constitutes a misdemeanor and infraction under the laws of this state.

This appeal does not involve the trial court's finding as to Chad's status under § 43-247. The only issue is Chad's motion for the trial judge to recuse herself, claiming an improper ex parte conversation between the trial judge and the probation officer regarding the disposition of the case, and the trial court's overruling of that motion.

BACKGROUND

The State, in its second and third supplemental petitions, alleged that Chad engaged in conduct violative of Neb. Rev. Stat. §§ 28-310(1) (Reissue 1995) (third degree assault) and 28-416(13)(a) (Cum. Supp. 2000) (possession of marijuana weighing 1 ounce or less). The allegations came before the trial court for formal hearing in December 2000. At the conclusion of trial, the court took both petitions under advisement. The trial court then entered an order finding that Chad was a child as defined by § 43-247 and finding that the allegations set forth in the second and third supplemental petitions were true beyond a reasonable doubt. Disposition was scheduled for January 11, 2001, pending completion of the probation office's predisposition investigation report.

At the disposition hearing, Chad's attorney elicited testimony from Gary Waldron, the Lancaster County juvenile intensive supervision probation officer, concerning the services that had been rendered with regard to Chad, as well as his recommendation for disposition. Waldron recommended that Chad be committed to the youth center in Kearney. Waldron also testified that he had shared his recommendation with the trial court earlier that day in chambers.

Chad's attorney then elicited testimony from Judy Riddle, a Lancaster County juvenile probation officer, concerning her involvement in the case. Riddle testified that she was a probation officer assigned to the case and that she authored the update to the predisposition investigation report. The briefs of the parties and the bill of exceptions indicate that Riddle authored the original predisposition investigation report as well. Riddle recommended that Chad be committed to the youth center in Kearney.

At the conclusion of the testimony, Chad's attorney made a motion requesting that the trial judge recuse herself due to her in-chambers conversation with Waldron. Chad's attorney argued that ex parte discussions with noncourt employees like Waldron were forbidden under Neb. Code of Jud. Cond., Canon 3 (rev. 2000), and that thus, recusal was appropriate. The trial court requested that Chad's attorney provide authority specifically addressing communications between probation officers and the court, and it subsequently took the motion under advisement to allow such authority to be produced.

The motion for recusal was subsequently overruled by the trial court. The trial court cited to Neb. Rev. Stat. § 29-2249 (Reissue 1995) and noted that while the juvenile probation office is part of the Office of Probation Administration, the Office of Probation Administration is created within the judicial branch of government and is directly responsible to the Nebraska Supreme Court. Probation officers regularly prepare reports for youths who have been adjudicated before the courts. Thus, they are not parties, but court personnel.

The trial court also held that there was no evidence or suggestion by counsel that additional information was provided by Waldron during the in-chambers conversation that was not otherwise included in the probation file and available to counsel. The court stated that the mere fact that Waldron, a probation officer, communicated with the court regarding his recommendation outside the presence of counsel is not, in and of itself, a ground for recusal.

Chad appeals the decision of the trial court overruling his motion for recusal and its finding that communications between probation officers and the court at the disposition stage of a juvenile case were appropriate.

ASSIGNMENTS OF ERROR

Chad assigns that the trial court erred in (1) finding that probation officers are "court personnel," which would permit judges and probation officers to have ex parte discussions regarding the court's disposition of a case; (2) finding that Waldron's conversation with the court regarding his recommendations as to disposition, without counsel present at the time of conversation, is not an ex parte conversation in violation of the judicial canons of ethics and grounds for recusal; (3) finding that Chad was required to adduce evidence of the content of the ex parte conversation between the court and Waldron; and (4) permitting an ex parte conversation with Waldron regarding disposition, as Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2000) and case law provide notice of the form and content of disposition information that must be provided to the parties and to the court.

STANDARD OF REVIEW

[1,2] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings. *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997). In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *Id.*

ANALYSIS

[3] The four assignments of error all relate to an alleged ex parte conversation between Waldron and the trial judge. An "ex parte communication" occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

The Nebraska Code of Judicial Conduct, Canon 3B(7), states:

> A judge shall not initiate, permit or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> . . . .

> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities . . . .

If, therefore, we conclude that a probation officer is "court personnel," whose function it is to aid the judge in carrying out his or her adjudicative functions, then any conversation or communication between the probation officer and the judge is not an ex parte communication in violation of the Nebraska Code of Judicial Conduct, and such a conclusion would negate the need for recusal.

The status of a probation officer can be determined from a review of the following Nebraska statutes:

Neb. Rev. Stat. § 29-2258 (Reissue 1995), describing the duties of district probation officers, states that probation officers shall "(1) [m]ake presentence and other investigations, as may be required by law or directed by a court in which he or she is serving" and "(10) [m]ake such reports as required by the administrator, the judges of the probation district in which he or she serves, or the Supreme Court."

Section 29-2249 specifically states that the Office of Probation Administration is a part of the judicial branch. "The Office of Probation Administration is hereby created within the judicial branch of government and directly responsible to the Supreme Court." *Id.*

Neb. Rev. Stat. § 29-2259(7) (Cum. Supp. 2000) states that the budget for the probation office shall be submitted to the Supreme Court for its approval.

A significant portion of a juvenile court judge's adjudicative responsibility includes determining what actions to take with reference to a juvenile at a disposition hearing. To aid the judge in carrying out his or her responsibility, the judge utilizes the presentence reports and the probation officer's recommendations. See, *State v. Jones*, 254 Neb. 212, 575 N.W.2d 156 (1998), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992). Thus, it is the function of probation officers at the disposition phase of a proceeding to aid the judge in carrying out the judge's adjudicative responsibilities.

The statutes above demonstrate the close working relationship between probation officers and the court. The Office of

Probation Administration exists within the judicial system. Probation officers draft presentence reports at the direction of the court which the probation officer is serving, and courts have a definite influence as to the substance of the reports. We determine, based on the record in this case and the above-cited canon and statutes, that Waldron was "court personnel" of the separate juvenile court of Lancaster County.

Because in this case Waldron was "court personnel," conversation or communication between Waldron and the judge was not an ex parte conversation in violation of Canon 3B(7)(c). Therefore, Chad's remaining assignments of error are without merit.

CONCLUSION

Having determined that Waldron is "court personnel," as that term is used in Canon 3B(7)(c) of the Nebraska Code of Judicial Conduct, it necessarily follows that any communication between Waldron and the trial judge was not an ex parte communication in violation of Canon 3B(7)(c). The ruling of the trial court, therefore, overruling Chad's motion for the judge to recuse herself because of the ex parte communication was correct and should be affirmed.

AFFIRMED.

J.D. WAREHOUSE, A NEBRASKA GENERAL PARTNERSHIP, AND PAUL J. WEISS, LAURENCE J. ESCH, AND DENNIS L. ESCH, THE PARTNERS OF J.D. WAREHOUSE, APPELLANTS AND CROSS-APPELLEES, V. LUTZ & COMPANY, A PROFESSIONAL CORPORATION, SUCCESSORS OF LUTZ, FRIEDMAN & ASSOCIATES, A PROFESSIONAL CORPORATION, AND JAMES D. HONZ, INDIVIDUALLY, APPELLEES AND CROSS-APPELLANTS.

639 N.W.2d 88

Filed February 15, 2002. No. S-00-776.

1. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Damages.** The principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he or she would have been

had there been no injury or breach of duty, that is, to compensate for the injury actually sustained.

3. **Damages: Proof.** Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.
4. ____: ____. While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Earl G. Greene III, of Gaines, Pansing & Hogan, for appellants.

Thomas J. Guilfoyle, of Erickson & Sederstrom, P.C., for appellees.

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

STEPHAN, J.

In this professional liability action, a partnership and its general partners seek damages resulting from incorrect advice given by a certified public accountant with respect to the tax consequences of a real estate transaction. Following a bench trial based on stipulated facts, the district court for Douglas County concluded that the accountant and his firm were negligent and therefore liable for some, but not all, of the damages claimed. The partnership and its partners perfected this appeal in which they contend that the district court erred in not awarding the additional damages which they had claimed.

BACKGROUND

FACTS

The undisputed facts of this case were submitted to the district court by a written stipulation, which we summarize here. J.D. Warehouse (the partnership) is a Nebraska general partnership with its principal place of business located in Omaha, Nebraska. Paul J. Weiss, Laurence J. Esch, and Dennis L. Esch, all Nebraska residents, are its general partners. Lutz & Company, P.C., is a professional corporation authorized to practice public accounting,

with its principal place of business located in Omaha. Lutz, Friedman & Associates, P.C., the predecessor in interest to Lutz & Company, P.C. (hereinafter the accounting firm), performed accounting services for the partnership and its individual partners prior to 1986. Since that time, accounting services have been provided by a certified public accountant, James D. Honz, a Nebraska resident and shareholder of the accounting firm.

The partnership was initially formed for the purpose of acquiring real property known as the John Deere Warehouse located in downtown Omaha. It purchased this property in 1982 for $808,952. Sometime in 1986, the partners learned that the city of Omaha had included the property in an area designated as part of a redevelopment plan. The partners were contacted by a representative of the Omaha Development Foundation, who informed them that the foundation was interested in acquiring the warehouse and that while it had the power of eminent domain, it preferred to negotiate a purchase of the property. In December 1987, the foundation and the partnership executed a purchase agreement for the sale of the John Deere Warehouse to the foundation for $3,150,000 in cash. The transaction was closed on May 4, 1988, and the partnership realized a capital gain of $2,444,252.18 at that time.

From their prior experience, the partners knew generally that the Internal Revenue Code would permit deferral of taxation on the capital gain if the partnership acquired like-kind property in the manner prescribed by the code. The partners considered the acquisition of several properties located in Nebraska and other states in order to effectuate deferral of the gain. Some time during 1989, Dennis Esch, acting on behalf of the partnership, made inquiry of Honz as to the amount of the proceeds from the sale of the John Deere Warehouse required to be invested in like-kind property in order to defer all of its capital gains tax under the code. Honz advised that only the gain from the sale had to be reinvested. Relying upon this advice, the partnership purchased the "ParkFair Mall" property in Omaha in January 1991 for $2,501,284.75. This purchase price represented a negotiated reduction of the asking price of approximately $3.4 million.

The parties now agree that Honz' advice was in error in that all of the proceeds from the sale of the John Deere Warehouse

were required to be reinvested in like-kind property in order to defer taxation on the entire gain. In a 1992 audit, the Internal Revenue Service (IRS) correctly determined that the portion of the sale proceeds not reinvested was subject to capital gains tax for the year 1988. The IRS adjusted the partnership's 1988 tax return to reflect a capital gain of $522,715 and made corresponding adjustments in the tax returns of the partners, causing each of them to incur additional tax liability and interest but no penalties. The partnership incurred attorney fees of $10,000 in connection with the tax audit.

Proceedings Below

The partnership and its individual partners filed this action in the district court seeking recovery from the accounting firm and Honz on theories of breach of contract and negligence. In their operative amended petition, they sought damages including: attorney and accountant fees, federal and state taxes and the interest thereon in the amount of $312,724, the estimated value of an investment tax credit lost by Dennis Esch, and the estimated loss of time and income by Weiss and Dennis Esch.

Following a bench trial at which the only evidence received was the stipulation of facts summarized above, the district court entered its finding of facts, conclusions of law, and judgment. The court determined that under I.R.C. § 1033 (1994 & Supp. V 1999), the partnership could defer all of the capital gain on the sale of the warehouse only if it reinvested the entire sale proceeds in like-kind property within the time period provided by the code. The court found that Honz had "negligently advised the Plaintiffs that only the amount of the gain needed to be reinvested in like-kind property in order to defer all of the gain" and that such advice fell below the standard of care applicable to certified public accountants practicing in this area. The district court further found that the partnership and its partners had relied upon Honz' advice in determining the amount of the proceeds it needed to reinvest to properly defer all of the gain from the sale of the warehouse. Consequently, the district court concluded that both the accounting firm and Honz were liable for any damage resulting from the incorrect advice.

The district court began its analysis of damages by rejecting the argument advanced by the accounting firm and Honz that any determination of the consequences of the loss of a right to defer income necessarily requires speculation and conjecture, as a matter of law, and that such consequences cannot therefore serve as the basis for a damage award. In this regard, the district court stated that "the value of the loss of the tax deferral may constitute recoverable damage if it can be established with a reasonable degree of certitude." Nevertheless, no damages of this type were awarded.

Further addressing the issue of damages, the court determined that the partners were not entitled to recover the taxes which they incurred because of the gain realized on the 1988 sale of the John Deere Warehouse, reasoning:

> The Court finds that the ability to reinvest in like-kind property pursuant to Internal Revenue Code § 1033 does not eliminate tax liability on the gain, but rather defers the gain until the like-kind property is subsequently sold in a taxable transaction. In this case, the taxpayers realized their gain and their liability for the tax was incurred at the time that the Partnership sold the John Deere warehouse building. That was prior to the time the partners sought advice from the Defendants. The transaction creating the taxpayers' liability preceded the Defendants' negligence and hence, the Defendants cannot be the legal cause of the Plaintiffs' tax liability. Since the taxpayers were always ultimately responsible for the tax due on the gain, the erroneous tax advice in this case did not create the Plaintiff's tax liability.

The district court also determined that Dennis Esch could not recover on his claim for the loss of an investment tax credit because that claim was dependent upon the accounting firm and Honz' liability for the capital gains tax. While the district court did not specifically reject the claims of Weiss and Dennis Esch for lost time and income, no damages were awarded on these claims.

The district court also determined that the interest charged by the IRS on the tax liability was not recoverable as damages, reasoning:

> The Internal Revenue Service waived any possible penalties in this case and merely charged Plaintiffs simple interest at market rates for the use of the money. Interest paid to the IRS represents a payment for the Plaintiffs' use of the money. Consequently, interest is not a proper element of damages. The payment of interest is really not a damage suffered by the Plaintiffs at all, but a return by them of what would otherwise be a windfall resulting from their opportunity to use the money. Thus, the Plaintiffs had the use of these monies and, presumably, were able to earn interest while they had it. Therefore, paying the interest effectively cost the Plaintiffs nothing.

Finally, the district court found that the partnership and its partners had incurred attorney fees in connection with the IRS audit in the stipulated amount of $10,000, which the court awarded to the partnership.

The partnership and its partners perfected this timely appeal. The accounting firm and Honz cross-appealed and petitioned to bypass review by the Nebraska Court of Appeals. We granted the petition to bypass.

STANDARD OF REVIEW

[1] In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995).

ASSIGNMENTS OF ERROR

The partnership and its partners assign, restated, that the district court erred in finding that the accounting firm and Honz were not liable for the taxes and interest which the partnership and its partners were required to pay with respect to the gain on the sale of the warehouse property and for the value of the investment tax credit lost by Dennis Esch. In their cross-appeal, the accounting firm and Honz contend that the district court erred in failing to find as a matter of law that the proof of damages resulting from the loss of a right to defer income is necessarily too uncertain and speculative to serve as the basis for any recovery.

ANALYSIS

[2-4] The sole issue presented in this appeal is whether the capital gains tax and interest paid to the IRS, and the value of the lost investment tax credit, are recoverable as damages in this action. The principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he or she would have been had there been no injury or breach of duty, that is, to compensate for the injury actually sustained. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000). Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000); *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000); *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001); *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

Because this case was tried on stipulated facts, we must consider the stipulated facts as if trying the cause originally in order to determine whether the facts warranted the judgment. *Ray Tucker & Sons v. GTE Directories Sales Corp., supra*. Here, the parties stipulated that the IRS adjusted the partnership's 1988 income tax return "to reflect a capital gain of $522,715.00" and that the partners' returns were also adjusted "to reflect the capital gain due as a result of the failure to reinvest the entire proceeds in like-kind property, creating taxable long-term capital gain to the partners." The stipulation stated the amount of attorney fees which were claimed and ultimately awarded by the district court, but as to the other claimed elements of damage, it stated only that

> [e]ach of the partners incurred additional federal and state income tax liability as a result of the adjustments and each partner was required to pay simple interest at market rates on the taxes due from April 15, 1989 until the same was paid by each of the partners.

The stipulation does not state the amount of tax liability and interest which are claimed as damages, nor does it set forth the value of the lost investment tax credit for which Dennis Esch claimed damages.

In their brief, the partnership and partners refer to damage calculations which are set forth in an exhibit which was offered in support of a pretrial motion for partial summary judgment, which the district court denied. While this exhibit is included in the bill of exceptions, the record does not reflect that it was offered at trial or considered by the district court in arriving at its judgment. In *King v. Crowell Memorial Home*, 261 Neb. 177, 183-84, 622 N.W.2d 588, 595 (2001), we stated that "[e]vidence offered in summary judgment proceedings, but not offered at trial, cannot be considered in determining whether the evidence adduced at trial is sufficient to preclude a directed verdict." It follows that evidence offered in summary judgment proceedings, but not offered at a trial on stipulated facts or included in the stipulation, cannot be considered in determining whether the facts warranted the judgment.

[5] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *King v. Crowell Memorial Home, supra*. Because the evidence properly before the district court did not establish the amount of the partners' tax liabilities and interest or the value of the investment tax credit which are claimed as damages, we need not reach the issue of whether, if proved, these would be proper elements of damage under the facts of this case. Likewise, we do not reach the accounting firm and Honz' contention on cross-appeal that proof of damages resulting from the loss of the right to defer income is too uncertain and speculative to serve as the basis of any recovery as a matter of law. The stipulated facts support the judgment of the trial court that the partnership and partners were entitled to damages in the amount of $10,000, representing attorney fees incurred as a result of the incorrect tax advice. There was no evidence at trial to establish the amount of any other damages claimed. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STANLEY GREEN, APPELLEE, V. DRIVERS MANAGEMENT, INC., APPELLANT.

639 N.W.2d 94

Filed February 15, 2002. No. S-00-1156.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a decision from the compensation court 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 evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** Impairments to the body as a whole are compensated in terms of loss of earning power or capacity.
5. **Workers' Compensation: Proof.** While the claimant has the burden to prove by a preponderance of the evidence that his or her employment proximately caused the injury which resulted in a compensable disability, the issue of causation of injury or disability is one for determination of the trier of fact.
6. **Workers' Compensation.** The issue of whether the claimant has sustained a permanent impairment, and the extent of impairment, are questions of fact.
7. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party.
8. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
9. **Workers' Compensation: Words and Phrases.** The term "impairment" is a medical assessment, while the term "disability" is a legal issue.
10. **Workers' Compensation.** Permanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or occupational demands or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.
11. **Workers' Compensation: Appeal and Error.** Determination as to whether an injured employee is able to perform the work for which that employee was previously trained is a question of fact to be determined by the compensation court, and that determination will not be disturbed by an appellate court unless the finding is clearly erroneous.
12. **Workers' Compensation.** Without a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss. Absent permanent impairment or restrictions, the worker is fully able to return to any employment for which he or she was fitted before the accident, including occupations held before the injuries occurred.

13. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
14. **Workers' Compensation: Statutes.** To hold that a worker can receive vocational rehabilitation benefits absent a finding that the worker is permanently impaired does not amount to a sensible reading of Neb. Rev. Stat. § 48-162.01 (Reissue 1998).
15. **Workers' Compensation: Jurisdiction.** The Nebraska Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute.
16. **Workers' Compensation.** The only Nebraska Workers' Compensation Act provisions that permit a judge to modify or change previously issued orders are Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1998).
17. **Courts: Workers' Compensation.** Neb. Rev. Stat. § 48-180 (Reissue 1998) is the statutory embodiment of nunc pro tunc principles.
18. **Judgments: Records.** The office of an order nunc pro tunc is to correct a record which has been made so that it truly records the actions had, which, through inadvertence or mistake, were not truly recorded.
19. **Judgments.** It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
20. **Workers' Compensation: Final Orders.** If future medical expenses are not part of a final award, the judgment is final, and any future claims for medical expenses related to the same accident are absolutely barred unless the requirements of Neb. Rev. Stat. § 48-141 (Reissue 1998) are met.
21. **Judgments.** An order nunc pro tunc may be supported by the judge's notes, court files, other entries of record, or other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth.

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 affirmed in part, and in part reversed.

Raymond P. Atwood, Jr., and Ryan C. Holsten, of Atwood & Associates Law Firm, P.C., L.L.O., for appellant.

Ronald J. Palagi and Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellee.

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

McCormack, J.

NATURE OF CASE

Stanley Green injured his back in the course of his employment, and the trial judge of the Nebraska Workers' Compensation Court awarded him payments for temporary total disability and permanent partial disability. Green was also awarded the opportunity to receive vocational rehabilitation services. Green's employer, Drivers Management, Inc. (DMI), was ordered to pay various medical bills. A review panel of the compensation court affirmed the award and assessed attorney fees against DMI. DMI appealed to the Nebraska Court of Appeals, which held that the trial judge erred in awarding Green permanent partial disability benefits and in ordering DMI to pay for certain medical bills which Green had not offered into evidence. Because Green was not entitled to compensation for loss of earning capacity or for attorney fees, the Court of Appeals held that the total award should be reduced. Both parties filed petitions for further review to this court, and both were granted. We affirm in part, and in part reverse.

BACKGROUND

The facts of this case have been set out in detail in *Green v. Drivers Mgmt., Inc.*, 10 Neb. App. 299, 634 N.W.2d 22 (2001).

The parties stipulated that Green sustained a work-related accident and injury arising out of and in the course of his employment on June 9, 1997, and that his average weekly wage was $988.72.

Green sought treatment in New York following his injury. Dr. Joy Dolorico, Green's first doctor, prescribed muscle relaxants and painkillers. She referred Green to several other doctors who prescribed physical therapy, epidurals, pain medication, and antiseizure drugs.

Green performed a functional capacity assessment in August 1998. The assessment concluded that Green was "capable of working in the heavy work category" based on his performance on strength and agility tests. On September 2, DMI stopped paying compensation benefits and told Green to report back to work within 30 days. Exhibit 33 contains a copy of two notes by Dr. Dolorico, one of which is dated August 28, 1998, and the

other September 2, 1998, both of which state that Green "can go back to work," with the August 28 note specifically stating that Green "can go back to work at a level of maximum medical improvement."

Green consulted Dr. Arnold Criscitiello, an orthopedic surgeon who had been treating Green since June 1998, about the functional capacity evaluation and Dr. Dolorico's release. Dr. Criscitiello advised Green against returning to work until further diagnostic studies could be done. However, Green returned to work for DMI on September 15, 1998. He worked for approximately 2 months driving a truck. On November 17, Green quit work for a second time, stating that the pain had increased in his legs and back and that the numbness in his legs prevented him from safely driving a truck. After an office visit on November 16, Dr. Criscitiello advised Green to stop working and stated, "I don't think that [Green] should be back to full duty work but these are issues that have been overridden [by the functional capacity assessment and independent medical examiners]."

On February 9, 1999, Dr. Myra Shayevitz examined Green to determine whether he was eligible for New York's disability benefits. The State of New York denied Green disability benefits, but Dr. Shayevitz believed that Green needed further diagnostic tests and expressed reservations about his ability to stand, walk, or climb stairs. Green attended physical therapy and took pain medication throughout 1999. An electrodiagnostic test was performed in May 1999, pursuant to Dr. Criscitiello's persistent recommendations. It indicated nerve root irritation in Green's lower back and carpal tunnel syndrome in his right wrist.

Green petitioned for workers' compensation benefits in March 1999. At trial on Green's petition, the parties stipulated that on June 9, 1997, Green "sustained an accident that arose out of and in the course of his employment with [DMI]," that Green's average weekly wage at the time of the accident was $988.72, and that DMI had already paid $14,986.82 of Green's medical bills and had paid Green $27,328 for 64 weeks of temporary total disability compensation. A summary of benefits paid shows that DMI started paying temporary total disability on June 11, 1997, and stopped these payments as of September 1, 1998.

Green testified that at the time of trial, he was 40 years old, was married, had two teenage daughters, and lived with his family in Mexico, New York. Green had a high school education, had taken a 1,000-hour carpentry course during high school, and was "certified" in carpentry. According to Green, his pain and numbness extended from his neck to his legs, feet, arms, and hands. He said he could not drive a truck because he was unable to sit for more than 45 minutes without pain and could not feel his feet depressing the brake pedal because of the numbness in his legs. He stated that he "had maybe one day" without pain since his accident in June 1997.

The trial judge awarded Green temporary total disability and permanent partial disability benefits and the opportunity to participate in vocational rehabilitation training. In addition, the trial judge ordered DMI to pay Eckerd Drug Company $1,462.55; Empi, Inc., $466.55; and Magnetic Diagnostic Resources $291.76, and further required that DMI reimburse Green and his health insurance carrier "for payments made related to the above described accident as the interest of each may appear." The temporary total disability award was $427 per week for 77$^{6}/_{7}$ weeks and covered two different time periods. The permanent partial disability award amounted to $329.54 per week for 222$^{1}/_{7}$ weeks due to what the trial judge determined to be a 50-percent loss of earning capacity.

None of Green's physicians assigned him a permanent impairment rating or gave him permanent physical restrictions. However, the trial judge relied upon Dr. Shayevitz' report, as well as Green's testimony, to find that Green suffered a 50-percent loss of earning capacity as a result of the injury. Additionally, the trial judge pointed out that Green's ability to lift in the "heavy work" classification, according to the August 1998 functional capacity evaluation, was trumped by his testimony that he tried his hardest during the evaluation, that he was in bed 2 to 3 days after the evaluation as a result of his exertion during the test, and that he could physically lift the weight in the evaluation but could not do so continually.

On April 3, 2000, through an order nunc pro tunc, the trial judge amended its award to include the following text: "[Green] will require additional medical care and treatment for which

[DMI] is liable." On April 6, DMI appealed the award to a review panel of the compensation court, which affirmed the award in all respects.

DMI then appealed to the Court of Appeals, where it asserted that the trial judge exceeded her powers and that there was insufficient evidence to support the award. Specifically, DMI alleged that the trial judge erred in (1) finding that Green had suffered a 50-percent loss of earning capacity without evidence of impairment ratings or physical restrictions causally related to Green's injury, (2) finding that Green was temporarily totally disabled from November 19, 1998, through February 9, 1999, (3) ordering DMI to pay medical bills that were not offered into evidence, and (4) awarding Green vocational rehabilitation services.

The Court of Appeals held, in pertinent part, that it was clear error to assign Green a 50-percent permanent partial disability because the record in this case does not contain any evidence that Green suffered a permanent impairment to his body as a whole. *Green v. Drivers Mgmt., Inc.*, 10 Neb. App. 299, 634 N.W.2d 22 (2001). As to vocational rehabilitation, the Court of Appeals concluded that since there is no longer a requirement in the text of Neb. Rev. Stat. § 48-162.01 (Reissue 1998) that an injured worker have a permanent disability to be eligible for vocational rehabilitation benefits, the reversal of Green's permanent partial disability benefits award does not affect the award of vocational rehabilitation. *Green v. Drivers Mgmt., Inc., supra*. The Court of Appeals then vacated the portion of the trial judge's order requiring DMI to reimburse Green and his health insurance carrier for payments related to his June 1997 injury because the lack of evidence and vagueness of the order would require one to speculate about what is required. *Id.*

Both parties then filed petitions for further review with this court, and both petitions were granted.

ASSIGNMENTS OF ERROR

DMI's petition for further review asserts that the Court of Appeals erred in (1) holding that an injured worker is entitled to vocational rehabilitation under § 48-162.01 absent a finding of permanent impairment and (2) failing to vacate the clearly erroneous factual finding of the trial judge that Green was entitled

to an evaluation for vocational rehabilitation services under § 48-162.01 absent a finding of permanent impairment.

Green's petition for further review asserts, rephrased, that the Court of Appeals erred in (1) overruling the trial judge's determination that he is permanently partially disabled as a result of a work-related accident and has experienced a 50-percent loss of earning capacity and (2) overruling the trial judge's award for future medical benefits issued upon his motion for order nunc pro tunc to augment the original award.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a decision from the compensation court 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 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. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001).

[2] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

[3] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *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); *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

ANALYSIS

Permanent Partial Disability

[4] Impairments to the body as a whole are compensated in terms of loss of earning power or capacity. *Snyder v. IBP, inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990). In the instant case, Green was assigned a 50-percent loss of earning capacity by the trial judge. The trial judge, however, did not make a specific finding of impairment, and instead commented only on the evidence of Green's disability.

The Court of Appeals relied upon *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986), to hold that there can be no award for disability or loss of earning capacity in the absence of proof of permanent physical impairment to the body as a whole. *Green v. Drivers Mgmt., Inc.*, 10 Neb. App. 299, 634 N.W.2d 22 (2001). The Court of Appeals also held that it cannot rely solely on the claimant's testimony for evidence of permanent impairment to the body as a whole when the injury is subjective in nature. *Id.* The Court of Appeals went on to hold that the record did not demonstrate that Green suffered a permanent impairment to his body, nor did it establish the crucial causal link between the accident and the limitations. *Id.*

[5-7] While the claimant has the burden to prove by a preponderance of the evidence that his or her employment proximately caused the injury which resulted in a compensable disability, the issue of causation of injury or disability is one for determination of the trier of fact. *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992). Along with causation, the issue of whether the claimant has sustained a permanent impairment, and the extent of impairment, are questions of fact. *Hoffart v. Fleming Cos.*, 10 Neb. App. 524, 634 N.W.2d 37 (2001). See, also, *Crouch v. Goodyear Tire & Rubber Co.*, 255 Neb. 128, 582 N.W.2d 356 (1998). In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party. *Cords v. City of Lincoln, supra.*

[8] We agree with the Court of Appeals that before permanent partial disability benefits can be awarded, the claimant must prove that he or she has a permanent impairment. Additionally, if the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

[9,10] The term "impairment" is a medical assessment, while the term "disability" is a legal issue. *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998), citing *Dayron Corp. v. Morehead*, 509 So. 2d 930 (Fla. 1987). " ' "Permanent medical impairment is related directly to the health status of the

individual, whereas disability can be determined only within the context of the personal, social, or occupational demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment." ' " (Emphasis omitted.) *Phillips v. Industrial Machine*, 257 Neb. 256, 278, 597 N.W.2d 377, 392 (1999) (Gerrard, J., concurring). See, also, *Frauendorfer v. Lindsay Mfg. Co., post* p. 237, 639 N.W.2d 125 (2002).

We agree with the holding of the Court of Appeals that Green had the burden of proving that his injury caused permanent impairment of his body as a whole as a predicate to an award for permanent disability, i.e., loss of earning capacity. We also agree with the Court of Appeals that based on the record in this case, it would be sheer speculation to assign Green a 50-percent permanent partial disability because the record does not indicate that Green suffered a permanent impairment. A workers' compensation award cannot be based on mere possibility or speculation, and if an inference favorable to the plaintiff can only be reached on the basis thereof, then he or she cannot recover. *Green v. Drivers Mgmt., Inc., supra*. We conclude that the trial judge committed clear error in concluding that the evidence in the record was sufficient to allow a finding that Green suffered a 50-percent loss of earning capacity. We thus affirm the decision of the Court of Appeals to reverse and vacate the trial judge's award of permanent disability benefits.

Vocational Rehabilitation

The Court of Appeals held that it was not clearly erroneous for the trial judge to find that because Green is unable to perform the work for which he has previous training or experience, he is entitled to vocational rehabilitation benefits, despite the fact that Green was not permanently disabled. We disagree.

[11] In *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986), this court stated that vocational rehabilitation can be awarded only when the claimant has suffered a total or partial disability which was, or is likely to be, permanent. We quoted from a version of § 48-162.01(6) which stated that vocational rehabilitation may be awarded only if a worker's disability " 'is or is likely to be permanent' " and that there was a reasonable probability that such rehabilitation would help restore the

worker to gainful employment. 222 Neb. at 537, 385 N.W.2d at 427. See, e.g., § 48-162.01 (Reissue 1988). However, in 1993, the statute was amended and the language in subsection (6) requiring at least the likelihood of a permanent impairment was removed. Subsection (3) has remained the same, however, and it states, in relevant part, the standard of eligibility for vocational rehabilitation as follows:

> When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including job placement and retraining, as may be reasonably necessary to restore him or her to suitable employment.

See § 48-162.01(3) (Reissue 1998). Determination as to whether an injured employee is able to perform the work for which that employee was previously trained is a question of fact to be determined by the trial judge, and that determination will not be disturbed by an appellate court unless the judge's finding is clearly erroneous. See *Willuhn v. Omaha Box Co.*, 240 Neb. 571, 483 N.W.2d 130 (1992).

The question is, therefore, whether the Court of Appeals erred in affirming the trial judge's decision that Green was entitled to vocational rehabilitation benefits in light of our determination that Green had not submitted evidence of impairment.

[12] We agree with DMI's assignment of error that the Court of Appeals erred as a matter of law in allowing the award of vocational rehabilitation to stand absent a finding of permanent impairment. Without a finding of permanent medical impairment, there can be no permanent restrictions. Without impairment or restrictions, there can be no disability or labor market access loss. Absent permanent impairment or restrictions, the worker is fully able to return to any employment for which he or she was fitted before the accident, including occupations held before the injuries occurred. As § 48-162.01(3) indicates, if one is able to return to work, he or she is not entitled to vocational rehabilitation.

[13] In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001).

[14] To hold that a worker can receive vocational rehabilitation benefits absent a finding that the worker is permanently impaired does not amount to a sensible reading of the statute. Thus the factual findings, in light of § 48-162.01, do not support a finding that Green is entitled to vocational rehabilitation as a matter of law or fact. Accordingly, we reverse that portion of the Court of Appeals' opinion upholding Green's award for vocational rehabilitation.

Order Nunc Pro Tunc

On March 23, 2000, the trial judge entered its award in favor of Green. The award did not address the issue of future medical care. On April 3, in response to a motion filed by Green, the trial judge issued an order nunc pro tunc modifying the award which stated, "[Green] will require additional medical care and treatment for which [DMI] is liable." The review panel affirmed the entire award, including the order nunc pro tunc. The Court of Appeals vacated the portion of the award ordering DMI to reimburse Green for past and future medical bills as vague and overbroad, but it did not address whether the compensation court had the statutory authority to enter the order nunc pro tunc.

[15,16] The Nebraska Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute. See *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999). The only Nebraska Workers' Compensation Act provisions that permit a judge to modify or change previously issued orders are Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1998). *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). Section 48-141 allows an award to be modified because of an increase or decrease of incapacity due solely to the injury. Since the order nunc pro tunc in the case at hand is not related to an increase or decrease in Green's incapacity, we look to § 48-180.

Section 48-180 provides that the compensation court may, "on its own motion, modify or change its findings, order, award, or judgment at any time before appeal and within ten days from the date of such findings, order, award, or judgment for the purpose of correcting any ambiguity, clerical error, or patent or obvious error."

[17-19] Section 48-180 is the statutory embodiment of nunc pro tunc principles. *Fay v. Dowding, Dowding, supra*. The office of an order nunc pro tunc is to correct a record which has been made so that it truly records the actions had, which, through inadvertence or mistake, were not truly recorded. *Id*., citing *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). However, it is not the function of an order nunc pro tunc to " 'change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.' " 261 Neb. at 226, 623 N.W.2d at 295, quoting *Interstate Printing Co. v. Department of Revenue, supra*.

Green would have us believe that the trial judge's statement in the award that Green was entitled to payment of medical expenses incurred as a result of the accident and the judge's statement during trial that ongoing medical benefits will not be awarded if they are not necessitated by the accident and injury indicated that the judge intended to award Green future medical expenses and that it was merely a clerical error for the judge not to clearly include it.

[20] In *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001), we held that if future medical expenses are not part of a final award, the judgment is final, and any future claims for medical expenses related to the same accident are absolutely barred unless the requirements of § 48-141 are met. Since the award in that case contained no language that could be reasonably construed to provide for future medical benefits, the plaintiff's claim was barred by Neb. Rev. Stat. § 48-140 (Reissue 1998).

[21] An order nunc pro tunc may be supported by the judge's notes, court files, other entries of record, or other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth. See *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983). In this case, however, the order did not make the record reflect what was actually decided, because nothing in the language of the award indicates that the trial judge intended to grant Green future medical benefits. Additionally, § 48-141 is not applicable.

Thus, we determine that the trial judge erred in modifying the award through the order nunc pro tunc which allowed Green to recover future medical payments.

We accordingly affirm, as a matter of law pursuant to *Thornton v. Grand Island Contract Carriers, supra*, the decision of the Court of Appeals reversing and vacating the compensation court's award of future medical benefits.

CONCLUSION

We affirm the decision of the Court of Appeals reversing and vacating the award of permanent partial disability benefits, as there was no competent medical evidence of permanent impairment or causation between the accident and symptoms Green currently complains of. We also affirm the decision of the Court of Appeals reversing and vacating the award of future medical benefits through the order nunc pro tunc, as it was improper as a matter of law. Because there was no evidence Green was permanently impaired, we reverse the decision of the Court of Appeals upholding the award of vocational rehabilitation, as one cannot be considered unable to return to work for the purposes of vocational rehabilitation if he or she is not permanently impaired.

AFFIRMED IN PART, AND IN PART REVERSED.

TRI-PAR INVESTMENTS, L.L.C., APPELLANT, V.
COLETTE LYNN SOUSA, FORMERLY KNOWN AS
COLETTE LYNN WOODS, APPELLEE.

640 N.W.2d 371

Filed February 15, 2002. No. S-00-1166.

1. **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.
2. ____: ____. 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.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Appeal dismissed.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellant.

Betty L. Egan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Tri-Par Investments, L.L.C. (Tri-Par), sued Colette Lynn Sousa, formerly known as Colette Lynn Woods, for negligence and breach of lease after a house Sousa rented from Tri-Par was damaged by fire. The district court granted partial summary judgment to Sousa, and Tri-Par appeals.

SCOPE OF REVIEW

[1] 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[2] 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. *Id.*

FACTS

On April 17, 1996, a fire damaged the house Sousa was renting from Tri-Par. Capt. Ronald LaPour, Omaha Fire Department, stated in an affidavit that he had investigated the fire and determined that it originated in a bedroom in the southeast corner of the basement. LaPour said he observed numerous lighters and matches and other smoking materials scattered throughout the house and that he saw debris in the basement which was approximately 1 foot in depth. The fire was not electrical in origin and was not caused by an act of God, LaPour stated. Tri-Par offered an exhibit containing an estimate which alleged that restoration of the house would cost more than $62,000. Tri-Par's managing partner stated in an affidavit that the company lost $9,000 in rental income after the fire.

Both parties filed motions for summary judgment. On June 30, 2000, the district court granted Sousa's motion to the extent that Tri-Par's case was one of subrogation. All other motions were denied. Tri-Par filed an appeal, which the Nebraska Court

of Appeals dismissed for lack of jurisdiction because the district court's order did not adjudicate all of the claims of all of the parties and was not a final, appealable order under Neb. Rev. Stat. § 25-705(6) (Supp. 1999) (now codified at Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000)). See *Tri-Par Investments v. Woods*, 9 Neb. App. liii (case No. A-00-785, Sept. 1, 2000). Tri-Par then filed a motion asking the district court to enter an order of final judgment. On October 12, 2000, the district court entered an order, pursuant to § 25-705(6), granting Tri-Par's motion and incorporating its findings of June 30.

ASSIGNMENT OF ERROR

Tri-Par asserts that the district court erred in granting summary judgment to Sousa, thus barring Tri-Par's insurer from subrogating against her. Tri-Par argues that the district court's decision is incorrect (1) because it is premised on the legal fiction that under a landlord-tenant relationship, the tenant is always constructively presumed to be an implied coinsured under the landlord's insurance policy, and (2) because the facts preclude a finding that Sousa constitutes a coinsured under Tri-Par's insurance policy.

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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (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. *Id.*

This matter was previously before the Court of Appeals, which dismissed for lack of jurisdiction, finding that the district court's order did not adjudicate all of the claims of the parties and was not a final, appealable order.

When the district court entered its June 30, 2000, order, § 25-705(6) stated:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only

> upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The order reviewed by the Court of Appeals in case No. A-00-785 granted partial summary judgment to Sousa, stating:

> To the extent that [Tri-Par]'s case is one of subrogation, there is no genuine issue of material fact and [Sousa] is entitled to judgment as a matter of law. For those damages asserted by [Tri-Par] that fall outside of subrogated interests, [Sousa]'s motion for summary judgment is overruled on both causes of action. [Tri-Par]'s motion for summary judgment is overruled.

The Court of Appeals dismissed case No. A-00-785 on September 1, 2000, and the mandate was issued on October 6. On October 10, Tri-Par filed a motion for entry of final judgment, in which it asked the district court to enter a final judgment as to the court's order of June 30. On October 12, the district court entered an order finding "no just reason for delaying the entry of a final judgment with respect to this Court's Order of June 30, 2000[,] granting summary judgment in favor of the Defendants [sic] to the extent that the Plaintiff's claim is one of subrogation." The district court stated that the parties should not be required to wait to have the summary judgment finalized, and the court "expressly direct[ed] the entry of" an order of final judgment with respect to the summary judgment order of June 30. No further evidence was offered or received prior to entry of the district court's judgment.

We conclude that the district court erred in expressly directing entry of an order of final judgment. The operative petition before us names one party plaintiff and one party defendant. Tri-Par seeks relief for the fire damage and loss of rent based upon two theories of recovery: negligence and breach of the lease

agreement. There are no separate causes of action but merely two separate theories of recovery. The district court granted partial summary judgment to Sousa "[t]o the extent that [Tri-Par]'s case is one of subrogation."

Section 25-705(6) concerned cases in which more than one claim for relief was raised or where multiple parties were involved. This action involves only Tri-Par and Sousa, and it does not suggest that more than one claim for relief is involved. It is only when more than one claim for relief or multiple parties are involved that the court may direct entry of a final judgment as to fewer than all the claims or parties. Section 25-705(6) specifically provided that an order "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 . . . ." (Emphasis supplied.)

The key fact presented here is that there are neither "multiple claims" nor "multiple parties." Therefore, the district court erred in certifying its order as final for purposes of appeal under the statute in effect at the time of the court's initial order, § 25-705(6), which is now codified at § 25-1315(1). The district court's order of June 30, 2000, was not a final, appealable order, and the court's order of October 12 did not cure the defects of the first order. Therefore, this court lacks jurisdiction to hear the appeal.

CONCLUSION

We dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
LEROY J. PARMAR, APPELLANT.

639 N.W.2d 105

Filed February 15, 2002. No. S-00-1327.

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: Judicial Notice: Appeal and Error.** A reviewing court considering a motion for postconviction relief may take judicial notice of the record in the direct appeal.
3. **Postconviction: Proof: Appeal and Error.** A 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.
4. **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.
5. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
6. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
7. **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.
8. **Postconviction: Right to Counsel.** There is no absolute requirement of appointment of counsel in postconviction cases, and the defendant has the right of self-representation.
9. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Steven E. Achelpohl for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

STEPHAN, J.

LeRoy J. Parmar appeals from an order of the district court for Douglas County denying his motion for postconviction relief. For reasons different from those articulated by the district court, we affirm its judgment.

FACTS AND PROCEDURAL HISTORY

[1,2] This is Parmar's fourth request for postconviction relief since his conviction was affirmed by this court on direct appeal. *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989) (*Parmar I*).

Two of the three previous postconviction proceedings were subjects of appeals decided by this court: *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996) (*Parmar II*), and *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998) (*Parmar III*). 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). A reviewing court considering a motion for postconviction relief may take judicial notice of the record in the direct appeal. *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999). The record in this case and those from Parmar's direct appeal and prior postconviction proceedings disclose the following history.

Conviction and Direct Appeal

On May 7, 1987, Parmar was charged by information with the first degree murder of Frederick Cox. On March 17, 1988, a jury found Parmar guilty beyond a reasonable doubt. A detailed description of the facts leading to Parmar's conviction may be found in *Parmar I*. On June 7, Parmar filed notice of his intent to appeal his conviction and was appointed different counsel. On direct appeal, Parmar's appellate counsel raised a single assignment of error, arguing that the district court committed reversible error by failing to suppress a pump action BB gun that was illegally seized from Parmar's residence, which evidence was used against him at his trial. In affirming the conviction and sentence, this court held that the district court erred in failing to suppress the BB gun but that the admission of such evidence was harmless error beyond a reasonable doubt. *Parmar I*.

First Postconviction Motion

On January 13, 1992, Parmar filed a pro se motion for postconviction relief in the district court. For unknown reasons, and before the district court had ruled on his January 13 motion, Parmar filed an identical pro se motion on June 26. In that motion, Parmar alleged that the district court erred in giving instruction No. 20 at trial, that trial counsel was ineffective for

failing to object to this instruction, and that appellate counsel was ineffective for failing to assign and argue these two purported errors. Parmar prayed that his conviction be vacated. On July 7, the district court held that Parmar had not pled facts amounting to a constitutional violation and dismissed his motion without an evidentiary hearing. Parmar did not appeal this ruling. The record reflects no request by Parmar for appointment of postconviction counsel or for leave to amend the postconviction motion.

Second Postconviction Motion

On February 27, 1995, Parmar filed his second motion for postconviction relief. In that motion, Parmar alleged that "the [trial] judge gave jury instructions that were confusing and misleading," that "the judge gave oral instructions to the jury and failed to put the instructions in writing," and that "defendant's attorney failed to object to [all of the] jury instructions." Parmar alleged that his constitutional rights had been violated because of these errors and requested an evidentiary hearing. On March 7, the district court held that Parmar had pled only conclusions and dismissed his motion without an evidentiary hearing.

On March 23, 1995, Parmar filed notice of his intent to appeal the district court's March 7 ruling. On March 31, the district court appointed counsel to represent Parmar in his postconviction appeal. In his brief, Parmar repeated the errors he had stated in his motion and also argued that the district court erred in refusing to appoint counsel to help him prepare his motion before he submitted it to the district court. We affirmed the postconviction court's judgment because "Parmar's motion for postconviction relief [did] not allege facts entitling him to relief and because he did not request appointment of counsel to assist him with his postconviction relief motion." *Parmar II*, 249 Neb. at 463, 544 N.W.2d at 104.

Third Postconviction Motion

On July 24, 1997, Parmar filed his third motion for postconviction relief. In that motion, Parmar again alleged that the district court erred in giving instruction No. 20, that trial counsel was ineffective for failing to object to that instruction, and that appellate counsel was ineffective for failing to assign and argue

the above two errors. In addition, Parmar alleged that appellate counsel was ineffective for not arguing that all of the evidence seized at Parmar's residence should have been suppressed and for failing to argue that a conflict of interest at the Douglas County public defender's office prejudiced his right to a fair trial. Parmar prayed for an evidentiary hearing and an order vacating his conviction and sentence. On July 30, the district court summarily dismissed his motion and denied his request for an evidentiary hearing, but appointed counsel to represent Parmar on appeal from the denial of postconviction relief.

On August 29, 1997, Parmar's court-appointed counsel filed a notice of appeal in the district court but did not file a separate motion to proceed in forma pauperis or tender a docket fee. Instead, the notice of appeal requested that Parmar be granted in forma pauperis status based on the district court's July 30 determination that Parmar was indigent. On appeal, we held that Neb. Rev. Stat. § 25-1912 (Reissue 1995) required that a poverty affidavit be received in the office of the clerk of the district court no more than 30 days after rendition of the judgment and that the district court's July 30 indigency determination could not substitute for the poverty affidavit. Consequently, we dismissed the appeal for lack of jurisdiction. *Parmar III*.

Fourth Postconviction Motion

On October 25, 1999, Parmar filed his fourth motion for postconviction relief. In that motion, Parmar again alleged that the district court erred in giving instruction No. 20, that trial counsel was ineffective for failing to object to that instruction, and that counsel on direct appeal was ineffective for failing to assign and argue the above two errors. Parmar also argued, for the second time, that his counsel on direct appeal failed to assign as error the district court's failure to suppress all of the evidence seized from his residence and to argue that the alleged conflict of interest at the Douglas County public defender's office prejudiced his right to a fair trial. Parmar prayed that he be granted an evidentiary hearing for the purpose of setting aside his conviction and sentence. On November 1, the district court dismissed his motion without an evidentiary hearing.

On November 23, 1999, the district court vacated its November 1 order and gave Parmar and his court-appointed

attorney 30 days to amend his motion. On December 30, postconviction counsel filed an amended motion for postconviction relief. The record does not indicate that any action was taken on that motion, and postconviction counsel filed another amended motion on September 18, 2000. The September 18 motion stated the following seven claims for relief: (1) the district court erred in giving and/or failing to correct instruction No. 20; (2) trial counsel was ineffective for failing to object to instruction No. 20; (3) direct appeal counsel was ineffective for failing to assign and argue that the district court erred in giving and/or failing to correct instruction No. 20; (4) postconviction counsel was ineffective for failing to properly research Parmar's claims and for not requesting leave to amend Parmar's motion for postconviction relief; (5) trial counsel failed to object to a jury instruction that wrongly advised the jury that intent to kill was an element of felony murder, and direct appeal counsel failed to assign the same on appeal; (6) direct appeal counsel failed to assign as error the district court's failure to suppress all of the evidence seized from Parmar's residence; and (7) Parmar's due process rights were violated by a conflict of interest in the Douglas County public defender's office. Parmar prayed for an evidentiary hearing and an order vacating his conviction and sentence. We note that both the original and amended motions for postconviction relief filed in this proceeding refer to the previous motions filed by Parmar in 1995 and 1997, *Parmar II* and *Parmar III*, but make no reference to Parmar's first postconviction motion filed in 1992.

On September 12, 2000, Parmar appeared before the district court for an evidentiary hearing on his fourth motion for postconviction relief. Parmar offered, and the court took judicial notice of, nine different exhibits, which included the bill of exceptions from Parmar's trial and the transcripts from his three previous appeals. The State offered no evidence. In an order entered on November 20, the district court noted that Parmar had "filed two prior motions for post conviction [sic] relief, which were dismissed by the Supreme Court on procedural grounds." The court further stated that while there had been no "judicial determination" of these prior motions, Parmar's first amended motion filed in this proceeding was without merit and

should therefore be denied. Parmar commenced this appeal in which he is represented by appointed counsel.

ASSIGNMENT OF ERROR

Parmar assigns, restated and summarized, that the district court erred in finding that the seven claims in his fourth motion for postconviction relief were without merit.

STANDARD OF REVIEW

[3,4] A 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. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (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. Caddy, supra*; *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

ANALYSIS

[5-7] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). However, the need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The act specifically provides that a "court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner." § 29-3001. In one of our earliest applications of this statutory language, we noted that "[t]here is no justification for allowing a prisoner to continue litigation endlessly by piecemeal post conviction attacks on his conviction and sentence." *State v. Reichel*, 187 Neb. 464, 466-67, 191 N.W.2d 826, 828 (1971). We then articulated the following rule:

> After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be

> dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

Id. at 467, 191 N.W.2d at 828. More recently, we have followed the principle that 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. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Ryan, supra*.

In its brief, the State argues that the district court reached the correct result for an incorrect reason. The State contends that the district court should not have reached the merits of Parmar's fourth postconviction motion because of a procedural bar arising from the denial of Parmar's first postconviction motion in 1992, of which the district court made no mention. At first glance, this argument seems inconsistent with the fact that we did not apply a procedural bar in affirming the denial of Parmar's second postconviction motion in *Parmar II*. However, our review of that record discloses that it did not contain Parmar's first postconviction motion or the district court's July 7, 1992, order denying the relief requested. We did not reach the issue of procedural bar in *Parmar III* because it was decided on jurisdictional grounds. In the present case, however, we have appellate jurisdiction and the documents from the first postconviction proceeding are included in the record. We must therefore determine, as a matter of law, whether the disposition of Parmar's first postconviction motion constituted a procedural bar to this, his fourth motion.

In his first postconviction motion which was filed pro se in 1992, Parmar alleged that his trial counsel was ineffective for not objecting to instruction No. 20 and that his appellate counsel was ineffective for failing to raise this issue on direct appeal. In denying postconviction relief, the district court specifically held that instruction No. 20 comported with pattern instructions and that any objection to the instruction would have been overruled. The court held that Parmar therefore had not alleged the element of prejudice necessary to support a claim of ineffective

assistance of counsel and denied his motion for an evidentiary hearing and postconviction relief.

In his fourth postconviction motion, Parmar again challenges the failure of trial counsel to preserve error with respect to instruction No. 20 and the failure of appellate counsel to raise the issue on direct appeal. Parmar also alleges other respects in which he contends that trial and appellate counsel were ineffective but makes no affirmative showing that these asserted grounds for postconviction relief were not available to him at the time he filed his initial postconviction motion in 1992. In the absence of such a showing, a subsequent motion for postconviction relief will not be entertained. See *State v. Hunt, supra*.

To avoid a procedural bar, Parmar argues that there has been no "judicial determination" of issues raised in his previous postconviction motions, relying upon *State v. Svoboda*, 199 Neb. 452, 259 N.W.2d 609 (1977), and *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). In *Svoboda*, we held that issues which were raised but not considered on direct appeal could be asserted as grounds for postconviction relief. Applying similar reasoning in *Whitmore*, we held that a second postconviction motion could be entertained because a court never acquired jurisdiction over the first postconviction motion. We ultimately held, however, that the postconviction claims were procedurally barred because they could have been raised on direct appeal but were not. *State v. Whitmore, supra*.

[8,9] Neither *Svoboda* nor *Whitmore* provides a rationale for avoidance of a procedural bar arising from the district court's denial of Parmar's first motion for postconviction relief, which became final when he did not appeal. In that proceeding, the district court clearly exercised its jurisdiction and judicially determined that Parmar's ineffective assistance of counsel claims with respect to instruction No. 20 were without merit because the instruction was properly given and an objection would have been overruled. As noted, Parmar has made no affirmative showing that other ineffective assistance of counsel claims which he now seeks to litigate could not have been included in his first postconviction motion. Although Parmar argues that he appeared pro se in the 1992 postconviction proceeding, this is of no avail because, as we noted in *Parmar II*, there is no absolute

requirement of appointment of counsel in postconviction cases, and the defendant has the right of self-representation. A pro se party is held to the same standards as one who is represented by counsel. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). While Parmar also argues that he was not given an opportunity to amend his postconviction motion, he acknowledges that the record reflects no request to do so.

Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997); *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), *disapproved on other grounds, State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). For the reasons discussed above, which differ from those stated by the district court, we conclude that Parmar's postconviction claims were properly dismissed because they were procedurally barred. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JASON E. VANACKEREN, APPELLANT.

639 N.W.2d 112

Filed February 15, 2002. No. S-01-152.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **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.
3. **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.
4. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.

5. ____: ____: ____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
6. **Minors: Criminal Law.** Neb. Rev. Stat. § 28-709 (Reissue 1995) prohibits any person from engaging in conduct that encourages, causes, or contributes to a child's becoming or tending to become either a delinquent child under § 28-709(2)(a) or a child in need of special supervision under § 28-709(2)(b).
7. **Constitutional Law: Courts.** The Nebraska Supreme Court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action.

Appeal from the District Court for Madison County, ROBERT B. ENSZ, Judge, on appeal thereto from the County Court for Madison County, PHILIP R. RILEY, Judge. District Court judgment of conviction affirmed.

James Martin Davis 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.

INTRODUCTION

Jason E. VanAckeren was convicted in the Madison County Court of contributing to the delinquency of a child under Neb. Rev. Stat. § 28-709 (Reissue 1995). He was sentenced to imprisonment for 1 year and ordered to pay costs of $387.98. VanAckeren appealed to the Madison County District Court, which affirmed the conviction and sentence. VanAckeren appealed the district court's order and filed a petition to bypass, alleging that § 28-709 was unconstitutional as applied to him. We granted the petition and moved the case to our docket pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 1995).

FACTUAL BACKGROUND

In 1999, VanAckeren, a married 28-year-old teacher at Norfolk Catholic High School, entered into a sexual relationship with K.P., a 15-year-old sophomore student at the school. K.P. knew VanAckeren as a teacher and babysat frequently for his family.

The events relevant to VanAckeren's conviction began on April 10, 1999. K.P. was babysitting VanAckeren's child at

VanAckeren's home in Norfolk. K.P. later took the child to the child's grandmother's house after the grandmother called and requested that K.P. do so. K.P. then returned to her own home. At approximately 1:30 a.m., VanAckeren telephoned K.P. and asked her why she was not at his home when he arrived. VanAckeren then began discussing sexual subjects with K.P. and told K.P. she was "hot." He asked her to come to his house because his wife was not there, but K.P. declined the invitation.

On April 18, 1999, VanAckeren called K.P. at home from his cellular telephone and asked her to meet him at a truckstop at the edge of Norfolk. K.P. drove to the truckstop and parked her car there at approximately 8 p.m. She got into VanAckeren's van and they drove outside of Norfolk, where they stopped on a country road. VanAckeren kissed K.P. and performed oral sex on her. K.P. then performed oral sex on VanAckeren. They returned to the truckstop, and K.P. drove home at approximately 9:30 p.m.

At 1 a.m. on April 24, 1999, VanAckeren called K.P. at her friend's house where she was spending the night. He asked K.P. to come to his house because his wife was not there. VanAckeren told K.P. he was "horny and he could make [her] feel good." K.P. exited through the window of her friend's house at approximately 1:30 or 2 a.m. and "got a ride with some guys" who drove her to VanAckeren's home. After she arrived, VanAckeren kissed her and she performed oral sex on him.

Between April 29 and May 19, 1999, VanAckeren also sent at least 18 e-mail messages to K.P. He composed and mailed some of the messages during school hours from school computers. VanAckeren's language in the e-mails was sexually suggestive, with references to K.P. as "miss hotty," "good lookin," "hot one," "miss nice ass," and "sweet cheeks." He told her that she was beautiful and that she made him "horny everytime" he saw her. VanAckeren repeated such phrases as "[I] think about you all of the time," "I love you," "I can't wait to see you," and "I am so whipped." He often reminded K.P. of his promise to divorce his wife and marry K.P. in 5 years, when she would be 21 years old.

On May 6, 1999, VanAckeren told K.P. in an e-mail, "[I]t seems like forever since we have been together. [I] miss your great lips." In another e-mail dated May 13, 1999, VanAckeren

referred to his prior encounter with K.P. on April 18 and discussed another planned meeting during the weekend of May 14 and 15. He wrote:

> You really owe me a little sompen [sic], sompen [sic] for all of these e-mails I send to you. We need to get together soon, I am really getting horny thinking about you all of the time! We need to meet this weekend, girly. We need to plan it and take care of a little bidness [sic]. Damn, you look good today, but that doesn't surprise me. I don't care what it takes, but we have to meet sometime. We can always do the [truckstop] thing. That's not all bad you know. I will remember to bring a blanket.

The meeting did not occur that weekend, but VanAckeren continued to write K.P., telling her on May 17, 1999, "I still love ya, even though you did stand me up." On May 19, VanAckeren, in another e-mail, wrote, "I would like to see you either Saturday night or Monday night . . . . We could do the [truckstop] thing for sure on one of those nights."

VanAckeren did not limit his discussions with K.P. about sexual matters to e-mail messages. VanAckeren continued the sexual dialogue with K.P. during the schoolday and on the telephone.

On May 28, 1999, K.P.'s parents found two of VanAckeren's e-mail messages at their home and notified police. On June 4, the deputy county attorney for Madison County filed a formal complaint in Madison County Court, alleging that VanAckeren violated § 28-709 (contributing to the delinquency of a child). VanAckeren pled not guilty to the charge on July 6. On April 12, 2000, VanAckeren filed two motions to quash the prosecution against him. In the first motion, VanAckeren alleged that § 28-709 was unconstitutional on its face or as applied to him. The second motion alleged certain defects in the form of the information and the manner in which VanAckeren's offense was charged. A hearing on the motions was held on May 11, and the county court overruled both motions on June 15.

Trial was held in Madison County Court on July 24, 2000. The county court entered its order on August 3. In it, the court determined that § 28-709 was constitutional on its face and as applied to VanAckeren. The court further found VanAckeren guilty of contributing to the delinquency of a child. On September 7,

VanAckeren was sentenced to imprisonment for 1 year and ordered to pay costs of $387.98.

VanAckeren appealed to the Madison County District Court, which held a hearing on his appeal on January 11, 2001. VanAckeren asserted, in part, that the county court erred in (1) denying his motions to quash and (2) finding that § 28-709 was constitutional on its face and as applied to him. The district court entered its order on January 18. The court found that VanAckeren waived his facial challenge to the constitutionality of the statute because he did not file his motions to quash before entering a plea of not guilty. The court also determined that VanAckeren's challenge to the constitutionality of the statute as applied was without merit. Accordingly, the district court affirmed the county court's ruling. VanAckeren appealed and filed a petition to bypass, which we granted.

ASSIGNMENT OF ERROR

VanAckeren asserts, rephrased, that the district court erred in affirming the county court's determination that § 28-709 was constitutional as applied to him under the facts of this case.

STANDARD OF REVIEW

[1,2] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.*

ANALYSIS

VanAckeren argues that § 28-709 is unconstitutionally vague as applied to him. The statute states:

> (1) Any person who, by any act, encourages, causes, or contributes to the delinquency or need for special supervision of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent child, or a child in need of special supervision, commits contributing to the delinquency of a child.
>
> (2) The following definitions shall be applicable to this section:

(a) Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance; and

(b) A child in need of special supervision shall mean any child under the age of eighteen years (i) who, by reason of being wayward or habitually disobedient, is uncontrolled by his parent, guardian, or custodian; (ii) who is habitually truant from school or home; or (iii) who deports himself so as to injure or endanger seriously the morals or health of himself or others.

(3) Contributing to the delinquency of a child is a Class I misdemeanor.

VanAckeren argues that his "conduct is not clearly proscribed in the statute" and that his "fate rests solely on the moral beliefs of the fact finder." Brief for appellant at 13-14. VanAckeren maintains that the definition of a "child in need of special supervision" in § 28-709(2)(b)(iii) is unconstitutionally vague in its inclusion of "any child under the age of eighteen years . . . who deports himself so as to injure or endanger seriously the morals or health of himself or others." VanAckeren believes his "conduct is a severe breach of professional ethics," but he argues that "the question remains as to whether such conduct is a crime." Brief for appellant at 5.

[3-5] Before we can address the merits of VanAckeren's claim, we must first determine whether he has standing to challenge the constitutionality of the statute on vagueness grounds. 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. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *Beyer, supra*. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *Beyer, supra*. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied. *Id*.

[6] The question is whether the record shows that VanAckeren "engaged in conduct which is clearly prohibited by

the questioned statute." See *State v. Beyer*, 260 Neb. 670, 679, 619 N.W.2d 213, 220 (2000). Section 28-709 prohibits any person from engaging in conduct that "encourages, causes, or contributes" to a child's becoming or tending to become either a "delinquent child" under § 28-709(2)(a) or a "child in need of special supervision" under § 28-709(2)(b).

Delinquent Child

Section 28-709(2)(a) defines "[d]elinquent child" as "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." K.P. was under the age of 18 at all times relevant to VanAckeren's conviction. Her date of birth is April 20, 1983. On April 18, 1999, the date of the encounter at the truckstop, K.P. was 15 years old; on April 24, the date of the encounter at VanAckeren's home, she was 16 years old.

The uncontroverted evidence in this case shows that K.P. violated a Nebraska state law as a result of VanAckeren's encouragement. In his April 18, 1999, telephone call, VanAckeren asked K.P. to meet him at a truckstop at the edge of Norfolk. K.P. testified, and the county court found, that on April 18, K.P. drove without a driver's license on the public streets to meet VanAckeren at the truckstop. This violated Neb. Rev. Stat. § 60-484 (Reissue 1998) as it existed in 1999, which stated that "no resident of the State of Nebraska shall operate a motor vehicle upon the alleys or highways of the State of Nebraska until the person has obtained an operator's license for that purpose." The record shows that K.P. had a school permit which allowed her to drive "for the sole purpose of transporting [herself] or any family member who resides with [her] to attend school." See Neb. Rev. Stat. § 60-4,124 (Reissue 1998). By driving to a truckstop at 8 p.m. on April 18, K.P. was not "attend[ing] school," and thus was violating § 60-4,124.

The record shows that VanAckeren's invitations also caused K.P. to violate a "city or village ordinance." See § 28-709(2)(a). K.P. testified that on April 24, 1999, she was spending the night at a friend's house in Norfolk. After a 1 a.m. telephone call from VanAckeren asking her to come to his house, K.P. "snuck out the window" of her friend's home "around 1:30 or 2" in the

morning to meet VanAckeren. K.P. acknowledged that she "got a ride with some guys" and traveled the public streets in Norfolk to reach VanAckeren's home. The county court found that K.P.'s actions violated the city curfew in Norfolk, § 14-318(a) of the Norfolk Municipal Code, which prohibits

> any person under the age of eighteen (18) years to loiter, idle, wander, stroll, or play in or upon the public streets, highways, roads, alleys . . . or to ride in or upon . . . any automobile, bicycle or other vehicle in, upon, over, or through the streets, alleys, or other public places of the city, between the hours of 10:30 p.m. on Sundays, Mondays, Tuesdays, Wednesdays, and Thursdays and 6:00 a.m. of the following day, and between the hours of 12:00 midnight on Fridays and 6:00 a.m. on Saturdays, and between the hours of 12:00 midnight on Saturdays and 6:00 a.m. on Sundays, unless such person is accompanied by a parent, guardian, or other adult person having the legal care and custody of such minor person, or unless said minor person is upon an emergency errand or legitimate business, directed by his parent, guardian, or legal custodian.

The record establishes that K.P. was under 18 years of age and violated a law of the state and a city or village ordinance. Having done so, she became a "delinquent child" for the purposes of § 28-709. The record is also clear that VanAckeren encouraged K.P.'s delinquency. VanAckeren's requests that K.P. meet him during the evening or in the early hours of the morning for sexual encounters encouraged, caused, and contributed to K.P.'s violations of Nebraska state law and a Norfolk city ordinance.

We find that VanAckeren engaged in conduct clearly prohibited by § 28-709(1). Accordingly, we determine that VanAckeren lacks standing to challenge the constitutionality of § 28-709 on vagueness grounds.

CHILD IN NEED OF SPECIAL SUPERVISION

[7] Since VanAckeren's actions caused K.P. to become a "[d]elinquent child" under § 28-709(2)(a), it is unnecessary to address VanAckeren's argument that the definition of a "child in need of special supervision" in § 28-709(2)(b)(iii) is unconstitutionally vague. The Nebraska Supreme Court will not pass upon

the constitutionality of legislation absent a need to do so in order to properly dispose of an action. *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998). See, also, *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998); *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981).

CONCLUSION

For the foregoing reasons, VanAckeren lacks standing to assert a constitutional challenge to § 28-709 on vagueness grounds. His conviction is affirmed.

JUDGMENT OF CONVICTION AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESS J. KARCH, SR., APPELLANT.

639 N.W.2d 118

Filed February 15, 2002. No. S-01-182.

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.** Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed.
4. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
5. **Constitutional Law: Speedy Trial: Indictments and Informations: Legislature.** Although the Legislature did not specifically address the problem of setting statutory time limits for procedures in felony cases prior to the return of an indictment or the filing of an information, unreasonable delay occurring in the prosecution of felony offenses prior to the return of an indictment or filing of an information may be considered in determining whether the defendant has been denied the constitutional right to a speedy trial.
6. **Constitutional Law: Speedy Trial: Appeal and Error.** An appellate court does not review questions concerning a defendant's constitutional right to a speedy trial when those questions are not raised in both the trial court and the appellate court.

7. **Criminal Law: Indictments and Informations.** An amended complaint or information which charges a different crime, without charging the original crime, constitutes an abandonment of the first complaint or information and acts as a dismissal of the same.
8. **Speedy Trial: Indictments and Informations: Pleadings.** Although the speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint in the county court.
9. **Speedy Trial: Pleadings.** 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.
10. ____: ____. Time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial complaint and the refiling of a complaint charging the defendant with the same crime alleged in the previous, but dismissed, complaint.
11. ____: ____. When the State dismisses a complaint and refiles another complaint charging the defendant with the same offense alleged in the previous complaint, the periods during which the complaints are pending for the same offense must be combined in determining the last day for commencement of trial under the speedy trial act, excluding certain periods pursuant to Neb. Rev. Stat. § 29-1207(4) (Reissue 1995).

Appeal 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 District Court affirmed.

W. Thomas Brantley, of Hascall, Jungers & Garvey, for appellant.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

GERRARD, J.

Jess J. Karch, Sr., appeals the judgment of the Sarpy County District Court, which affirmed the county court's refusal to dismiss two misdemeanor counts upon the claim that Karch was not brought to trial within 6 months, as required by Nebraska's speedy trial act, Neb. Rev. Stat. § 29-1205 et seq. (Reissue 1995). For the reasons stated below, we affirm the judgment of the district court.

BACKGROUND

On April 12, 2000, the State filed a criminal complaint under case No. CR00-1966, charging Karch with two felony counts:

count I, second degree assault, a Class IIIA felony; and count II, child abuse, a Class III felony. Both charges were alleged to have occurred at a specific address in Sarpy County on or about March 18, 2000. Karch appeared on June 6 at the initial hearing before the county court, at which time the court scheduled a preliminary hearing on both charges for June 29.

With leave of the court, the State filed an amended criminal complaint on June 29, 2000, charging Karch with four misdemeanor counts: count I, third degree assault, a Class I misdemeanor; count II, third degree assault, a Class I misdemeanor; count III, disturbing the peace, a Class III misdemeanor; and count IV, interfering with a public service company, a Class II misdemeanor. All of the amended misdemeanor charges were alleged to have occurred in the same place and on the same date as the original felony charges.

Karch pled not guilty to the four amended counts at the arraignment in county court, and the court set the matter for pretrial conference. On August 2, 2000, Karch waived his right to a jury trial, and the matter was set for bench trial on September 11. On September 11, the date of Karch's scheduled trial, the court denied the State's motion for continuance; the court subsequently granted the State's request to dismiss without prejudice.

The State refiled a criminal complaint against Karch on September 14, 2000, under case No. CR00-4836, charging him with the same four misdemeanor counts charged in the amended complaint of June 29. Karch appeared before the county court on October 24, pled not guilty to all four counts, and posted bond; the court scheduled a jury trial to begin on October 26.

On October 25, 2000, Karch filed a motion to discharge all counts against him, pursuant to his constitutional and statutory right to a speedy trial. The court scheduled a hearing on Karch's motion for November 2. At that hearing, the county court took judicial notice of the pleadings and filings concerning cases Nos. CR00-1966 and CR00-4836. Karch argued that the filing date for all four charged offenses from case No. CR00-4836 should relate back to April 12, 2000, the date of the original felony complaint filed in county court at case No. CR00-1966. Karch argued, based on this court's decision in *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991), that the

charges from case No. CR00-4836 should relate back as either lesser-included offenses of the original charges filed at case No. CR00-1966, or as offenses alleged to have been committed simultaneously with lesser-included offenses charged in the complaint previously dismissed by the State. After hearing arguments from both parties, the court dismissed counts I and II against Karch. The court, however, did not dismiss counts III and IV, stating that there was no evidence that the offenses were committed simultaneously. The court scheduled Karch's trial on counts III and IV to begin on November 13.

Karch appealed the county court's refusal to dismiss counts III and IV to the district court. After a hearing, the district court entered an order affirming the county court's refusal to dismiss counts III and IV and remanded the case to county court for trial. Karch appealed, and pursuant to our authority to regulate the caseloads of the appellate courts, we moved this appeal to our docket.

ASSIGNMENTS OF ERROR

Karch assigns, restated, that the district court erred in affirming the county court's (1) refusal to relate the date of filing of counts III and IV, for computation of speedy trial time, back to April 12, 2000, the date of the original complaint charging Karch with two felonies, and (2) refusal to dismiss counts III and IV. We consolidate these errors for purposes of our analysis.

STANDARD 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. French*, 262 Neb. 664, 633 N.W.2d 908 (2001).

[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. *Id.*; *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

ANALYSIS

Nebraska's speedy trial act, § 29-1205 et seq., provides in part that "[e]very 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." § 29-1207(1). Karch argues that he should have been brought to trial within 6 months of the filing of the April 12, 2000, felony complaint and, because he was not brought to trial within that time period, counts III and IV should have been dismissed.

[3] Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992); *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *State v. Born*, 190 Neb. 767, 212 N.W.2d 581 (1973). The April 12, 2000, complaint filed against Karch in county court contained two felony offenses, and no indictment was returned or information filed based upon those felony offenses. The April 12 complaint, therefore, did not commence the statutory 6-month speedy trial period. See *State v. Born, supra*.

[4,5] The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Tucker, supra*. See, also, *State v. Born, supra*. In *Born*, we noted that the Legislature did not specifically address the problem of setting statutory time limits for procedures in felony cases prior to the return of an indictment or the filing of an information. We stated, however, that we would consider unreasonable delay occurring in the prosecution of felony offenses prior to the return of an indictment or filing of an information in determining whether the defendant was denied the constitutional right to a speedy trial. *Id*.

[6] Karch has waived any constitutional speedy trial claim. Although he cited both his statutory and his constitutional rights to a speedy trial in his motion to discharge, Karch did not assign or argue his constitutional right to a speedy trial in his brief. An appellate court does not review questions concerning a defendant's constitutional right to a speedy trial when those questions are not raised in both the trial court and the appellate court. See *State v. Kearns*, 245 Neb. 728, 514 N.W.2d 844 (1994), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601

N.W.2d 769 (1999). Karch did not preserve a constitutional claim for any delay relating back to the felony complaint, and we do not consider any such claim.

[7] Karch's statutory speedy trial claim also fails under our recent decision in *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001), in which we considered whether an amended complaint or information supersedes the original for purposes of the speedy trial act. We noted in *French* that an amended pleading supersedes the original pleading in civil cases and that after an amended pleading is filed, the original pleading ceases to perform any office as a pleading. See, also, *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996); *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963). With regard to criminal cases, we distinguished in *State v. French, supra*, between an amendment to a complaint and an amended complaint—if the amendment to the complaint or information does not change the nature of the charge, then the time continues to run against the State for purposes of the speedy trial act. If the second complaint alleges a different crime, however, without charging the original crime, then it is an amended complaint or information, and it supersedes the prior complaint or information. *Id.* We ultimately determined that an amended complaint or information which charges a different crime, without charging the original crime, constitutes an abandonment of the first complaint or information and acts as a dismissal of the same. *Id.* 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. *State v. French, supra.*

Here, we must consider whether the amended complaint filed against Karch on June 29, 2000, supersedes the original complaint filed on April 12, 2000. The April 12 complaint charged Karch with one felony count of second degree assault and one felony count of child abuse. The June 29 amended complaint charged Karch with counts I and II, both third degree assault, count III, disturbing the peace, and count IV, interfering with a public service company; all four counts were misdemeanor offenses. Counts I and II of the June 29 complaint were dismissed by the county court on speedy trial grounds. The remaining counts III

and IV, however, do not relate back to the original felony complaint, as count III, disturbing the peace, and count IV, interfering with a public service company, are completely different crimes than those alleged in the original complaint. Thus, under *State v. French, supra*, the June 29 complaint superseded the April 12 complaint and the April 12 complaint ceased to perform any office as a pleading as of June 29.

[8-11] Although the speedy trial act expressly refers to indictments and informations, it is well settled that the act also applies to prosecutions on complaint in the county court. *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). However, time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial complaint and the refiling of a complaint charging the defendant with the same crime alleged in the previous, but dismissed, complaint. See, *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). When the State dismisses a complaint and refiles another complaint charging the defendant with the same offense alleged in the previous complaint, the periods during which the complaints are pending for the same offense must be combined in determining the last day for commencement of trial under the speedy trial act, excluding certain periods pursuant to § 29-1207(4). See, *State v. French, supra*; *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992). In Karch's case, only 3 days elapsed between the dismissal of the June 29, 2000, complaint and the refiling of the same complaint under a different case number—the court dismissed the June 29 complaint on September 11, and the State refiled the same complaint on September 14.

Karch filed his motion to discharge on October 25, 2000; thus, the State has not exceeded the 6-month time period in bringing Karch to trial on the crimes charged in the June 29 amended complaint. Karch's speedy trial claim fails, and upon entry of the mandate from this appeal, the State will have 67 days in which to bring Karch to trial on counts III and IV.

CONCLUSION

For the reasons set forth above, Karch's assignments of error are without merit and his statutory right to a speedy trial was not violated. We affirm the judgment of the district court.

AFFIRMED.

HAROLD FRAUENDORFER, APPELLEE, V.
LINDSAY MANUFACTURING COMPANY, INC., APPELLANT.

639 N.W.2d 125

Filed February 15, 2002. No. S-01-778.

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. ___: ___. 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 the single judge who conducted the original hearing.
3. ___: ___. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
5. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
6. ___: ___. Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
7. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
8. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
9. **Workers' Compensation: Words and Phrases.** The Nebraska Supreme Court has defined temporary disability as the period during which the employee is submitting to

treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.

10. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
11. **Workers' Compensation: Words and Phrases.** An impairment rating is a medical assessment of what physical abilities have been adversely affected or lost by the injury.
12. **Workers' Compensation.** Workers' compensation benefits awarded under Neb. Rev. Stat. § 48-121(2) (Reissue 1998) are not measured by loss of bodily function, but by reduction in earning power or employability.
13. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1998), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
14. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
15. **Workers' Compensation: Expert Witnesses.** Although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
16. **Workers' Compensation: Words and Phrases.** Disability, in contrast to impairment, is an economic inquiry which can be determined only within the context of the personal, social, or occupational demands or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.
17. **Workers' Compensation.** An employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1998) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function.
18. ___. Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact.
19. **Workers' Compensation: Words and Phrases.** Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.
20. **Workers' Compensation: Presumptions.** Under Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999), a loss of earning power evaluation performed by a vocational rehabilitation counselor selected by the parties is entitled to a rebuttable presumption of correctness.
21. **Presumptions: Proof: Words and Phrases.** A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof.

22. **Workers' Compensation: Rules of Evidence: Presumptions: Proof.** In all cases not otherwise provided for by statute or by the Nebraska Evidence Rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999) is correct.
23. **Workers' Compensation: Presumptions.** In determining whether the presumption contained in Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999) has been rebutted, the single judge is required to make factual findings.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Rolf Edward Shasteen for appellee.

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

CONNOLLY, J.

A trial judge of the Workers' Compensation Court found that Harold Frauendorfer suffered a work-related accident on April 17, 1995, while employed with Lindsay Manufacturing Company, Inc. (Lindsay). The trial judge awarded him temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, and permanent total disability (PTD) benefits. The trial judge also ordered that payments be made beginning from the date of the injury. The Workers' Compensation Court review panel affirmed except for determining that Lindsay was entitled to a credit against a portion of the award, an issue which is not a part of this appeal.

We determine that there was sufficient evidence to support the trial judge's award and that the presumption of correctness afforded to the loss of earning power evaluation from the agreed-upon rehabilitation counselor under Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999) was rebutted. Accordingly, we affirm.

BACKGROUND

In June 1999, Frauendorfer filed a petition with the Nebraska Workers' Compensation Court, seeking workers' compensation

benefits for medical costs, TTD, TPD, and PTD. Before trial, the parties stipulated to the following facts: (1) Frauendorfer had suffered an injury to his back in an accident arising out of and in the course and scope of his employment with Lindsay on April 17, 1995, (2) all of his medical expenses had been paid, and (3) he reached maximum medical improvement (MMI) on February 3, 1999. The parties also agreed to Karen L. Stricklett and Tori L. Stratman as vocational rehabilitation counselors under § 48-162.01(3). Finally, the exhibits received at trial were stipulated to by the parties. The trial testimony and exhibits showed the following facts:

Frauendorfer had been employed with Lindsay since 1974 and worked as a tube mill operator when he was injured. He had an eighth grade education and, at the time of the accident, was 51 years old and earned an average weekly wage of $499.26. He injured his back while attempting to position an oversized piece of metal on the tube mill. After the accident, he was prescribed a regimen of pain pills, muscle relaxants, and physical therapy, but he continued to work approximately the same amount of hours and at the same rate of pay until September 27, 1995.

On October 5, 1995, Dr. Matthew C. Reckmeyer performed a hemilaminectomy and diskectomy on Frauendorfer's lower back for a herniated disk. Frauendorfer did not work from that date until March 17, 1996. On January 22, 1996, however, Reckmeyer had expressed an opinion that Frauendorfer could return to work in a limited capacity and released him to return for 6 to 8 hours per day, as could be tolerated.

On March 18, 1996, Frauendorfer returned to light-duty work at Lindsay. The parties stipulated that after his return, Frauendorfer worked at a reduced rate of pay, reduced hours, or both. He testified that after his first surgery, he worked only between 4 to 5 hours per day at light duty because that was all he could tolerate. In April, Reckmeyer released Frauendorfer to return to light-duty work, with restrictions for no lifting over 30 pounds occasionally and no squatting, stooping, crawling, or prolonged sitting. In October, a functional capacity evaluation was performed. The physical therapist classified Frauendorfer in the medium-work category but found he was not qualified for all medium-work jobs.

In March 1997, Reckmeyer issued a final report in which he assigned Frauendorfer a 20-percent permanent partial impairment due to his on-the-job injury and surgery. He also noted that he had referred Frauendorfer to Dr. H. Randal Woodward for possible further surgery.

A loss of earning power evaluation was performed in August 1997, in which Stricklett reviewed Frauendorfer's medical history, functional capacity evaluations, and employment and wage histories. Stricklett concluded that Frauendorfer's loss of access to suitable jobs in the Nebraska labor market was 31 percent and that his loss of earning capacity would be 20 percent if he were able to handle overtime hours at Lindsay, 30 percent if he were restricted to an 8-hour shift at Lindsay, and 40 to 50 percent if he were separated from his employment with Lindsay.

Frauendorfer continued to experience pain in his lower back and legs, and he was advised by Woodward to have a second surgery. February 5, 1998, was the last day that Frauendorfer worked at Lindsay. On February 11, Woodward performed an anterior spine fusion. Frauendorfer's pain persisted after the second surgery, however, and Woodward recommended a third surgery because he believed that Frauendorfer's spine was probably not solidly fused at the fusion site. Frauendorfer, however, was unwilling to undergo a third surgery. Woodward then referred him for another functional capacity evaluation. After receiving that report, Woodward agreed with a recommendation of light duty at 8 hours per day, with restrictions of lifting 30 pounds occasionally and 20 pounds more frequently, and assigned a 15-percent permanent partial impairment to his whole body. As noted, the parties stipulated that his MMI was reached on February 3, 1999.

In May 1999, Lindsay offered Frauendorfer employment within the restrictions of the functional capacity evaluation—i.e., a "light duty" job which would allow him to sit or stand as he felt necessary and which did not require heavy lifting—but he did not respond to the offer. He testified that since the second surgery, he was able to work around the house for only 1 to 2 hours before needing to lie down and relieve the pain in his back. He also stated that he took narcotic analgesics continually for pain, which caused him to be drowsy.

In May 1999, Stratman completed a loss of earning capacity analysis for Frauendorfer. Stratman concluded that if Frauendorfer returned to light-duty work at Lindsay, his loss of earning capacity would be approximately 30 percent, and that if he separated from his employment at Lindsay, his loss of earning capacity would be 60 percent.

In June 1999, James T. Rogers also did an earning capacity analysis. He concluded that Frauendorfer did not entirely fit within the "light duty" work classification because he was unable to either sit or stand for extended periods of time and because of his restrictions against bending, crouching, and stooping. Rogers considered him unsuitable for industrial production or assembly work. Considering Frauendorfer's physical limitations, age of 55, limited eighth grade education, and lack of transferable skills, Rogers concluded that Frauendorfer was totally disabled under the odd-lot doctrine.

Trial Judge's Findings

The trial judge awarded Frauendorfer TTD benefits in the amount of $332.84 per week from October 5, 1995—the date of his first surgery—until January 21, 1996, the day before Reckmeyer expressed an opinion that Frauendorfer could return to work in a limited capacity. In addition, the trial judge awarded him TPD benefits in the amount of $99.85 per week for the period from January 22, 1996 to February 10, 1998—the day before his second surgery—an amount that the trial judge stated represented a TPD of 30 percent. This award was based upon the trial judge's finding that the evidence showed Frauendorfer frequently worked less than 8-hour shifts during this period or received a lower wage. The trial judge conceded that there was no medical opinion that Frauendorfer was unable to work 8-hour shifts during this time. He, however, relied upon Stricklett's 1997 report, in which she concluded that Frauendorfer would have a 30-percent loss of earning capacity at Lindsay if he were restricted to 8-hour shifts.

The trial judge awarded Frauendorfer a second period of TTD benefits from February 11, 1998—the day of his second surgery—to February 2, 1999, the day before his MMI. Concerning Frauendorfer's permanent disability, the trial judge acknowledged that Lindsay had offered Frauendorfer

employment with a sit-or-stand option and which required little physical exertion. But the trial judge specifically stated that he believed Frauendorfer's testimony that he needed to lie down to relieve his back pain from either prolonged sitting or standing. Furthermore, the trial judge stated that he found Roger's opinion persuasive. From this evidence, the trial judge awarded Frauendorfer PTD benefits from February 3, 1999, the date of his MMI, and further PTD benefits as long as he remained permanently and totally disabled.

Review Panel's Findings

Lindsay appealed the award to the review panel of the Nebraska Workers' Compensation Court. The review panel concluded that the trial judge had correctly determined that Frauendorfer was entitled to total disability benefits from the date of his injury to the day before his first surgery. The review panel, however, determined that the trial judge had erred in failing to provide credit for the wages Lindsay paid to him during this time. Because the parties had stipulated that Frauendorfer continued to work full time during this period, the review panel concluded that the wages he had earned exceeded Lindsay's obligation to pay indemnity and reversed the award for total disability from April 18 to October 4, 1995. Frauendorfer has not cross-appealed from this portion of the review panel's order.

The review panel concluded that the trial judge (1) correctly calculated Frauendorfer's TPD benefits and (2) correctly awarded Frauendorfer PTD benefits based on Frauendorfer's testimony regarding his limitations and Rogers' opinion regarding Frauendorfer's loss of earning capacity.

ASSIGNMENTS OF ERROR

Lindsay assigns that the trial judge erred, legally and factually, in awarding Frauendorfer TTD, TPD, and PTD benefits and in failing to consider the presumption of correctness regarding vocational rehabilitation reports authored by Stricklett and Stratman, the specialists agreed upon by the parties. Lindsay assigns that the review panel erred in failing to reverse the trial judge's award of these benefits and in failing to reverse the trial judge's award for the reason that the trial judge did not consider the presumption of correctness of the rehabilitation reports.

STANDARD OF REVIEW

[1,2] 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 did not support the order or award. *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001). 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 the single judge who conducted the original hearing. *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001).

[3,4] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001). If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

ANALYSIS

We set forth some principles that help guide our analysis.

[5,6] We have held that if the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

[7,8] In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light

most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). Moreover, as the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996).

Temporary Total Disability After First Surgery

Lindsay contends that there was insufficient evidence in the form of medical opinion to support the trial judge's finding of TTD. The trial judge awarded Frauendorfer TTD benefits from October 5, 1995, the day of his first surgery for a herniated disk, until January 21, 1996, the day he was released to go back to work in a limited capacity.

[9,10] This court has defined temporary disability as the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990). "Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform." *Miller v. E.M.C. Ins. Cos.*, 259 Neb. at 440, 610 N.W.2d at 405.

[11] Frauendorfer testified that he had surgery on October 5, 1995, and Stricklett's summary of the medical records in her report confirms this date. The report also states that Reckmeyer concluded that in March 1997, Frauendorfer "had sustained a 20% permanent partial impairment to his body as a whole due to his on-the-job injury and subsequent surgery." An impairment rating is a medical assessment of what physical abilities have been adversely affected or lost by the injury. See, *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring); *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998) (citing Florida case with approval that impairment is medical assessment, while disability is legal

issue); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990) (drawing distinction between employee's disability and physician's evaluation and assessment of employee's loss of bodily function).

Here, the parties stipulated to the admission of these reports, and that evidence established that Frauendorfer's physical impairment after his surgery was causally related to his on-the-job injury. Stricklett's report also states that Reckmeyer opined that on January 22, 1996, Frauendorfer had " 'reached a point of medical stability in the sense that he could return to limited capacity employment.' " When we view the evidence in the light most favorable to Frauendorfer and give him the benefit of every reasonable inference, the report shows that Reckmeyer did not release Frauendorfer to return to work from his surgery until January 22, 1996. Thus, the trial judge was not clearly wrong in concluding that he was unable to work from October 5, 1995, to January 21, 1996, and awarding him TTD benefits for this period.

Temporary Partial Disability

Lindsay contends that the trial judge erred in awarding TPD benefits because there was no evidence of specific medical restrictions that Frauendorfer was unable to work 8 hours per day. We disagree. The trial judge awarded TPD benefits at the rate of $99.85 per week from January 22, 1996, the day Reckmeyer released Frauendorfer to return to work in a limited capacity after his first surgery, to February 10, 1998, the day before his second surgery. The amount was based upon a finding of a 30-percent TPD. Although the trial judge stated in his order that there was no medical opinion that Frauendorfer was unable to work 8-hour shifts during this time, he did rely upon Stricklett's 1997 report. In that report, she concluded that as of the report date, Frauendorfer would have a 30-percent loss of earning capacity if he were restricted to an 8-hour shift at Lindsay.

[12] Workers' compensation benefits awarded under Neb. Rev. Stat. § 48-121(2) (Reissue 1998) are not measured by loss of bodily function, but by reduction in earning power or employability. *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

[13] Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure

employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Id.*; *Jorn v. Pigs Unlimited, Inc., supra*.

[14] A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001).

[15] Although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

As noted, Reckmeyer assigned Frauendorfer a 20-percent physical impairment after his first surgery resulting from his on-the-job injury and subsequent surgery. Thus, the issue is not whether his injury resulted in an impairment, but what the extent of Frauendorfer's disability was as a result of that impairment from the period when he returned to work after his first surgery until his second surgery.

[16] Disability, in contrast to impairment, is an economic inquiry which "'"can be determined only within the context of the personal, social, or occupational demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment."'" (Emphasis omitted.) *Phillips v. Industrial Machine*, 257 Neb. 256, 278, 597 N.W.2d 377, 392 (1999) (Gerrard, J., concurring). Stricklett's report indicates that Reckmeyer released Frauendorfer to return to work after his first surgery on a "6-8 hour per day basis 'as tolerated.'" Frauendorfer testified that he worked only between 4 to 5 hours per day at light-duty jobs after his first surgery because that was all that he could tolerate. The parties also stipulated that after he returned to work from his first surgery, Frauendorfer worked "either at a lower rate of pay or at reduced hours or both." When viewed in the light most favorable to Frauendorfer, this evidence demonstrates that Reckmeyer recognized that he might not be able to tolerate 8-hour work shifts, and Frauendorfer's testimony and the parties' stipulation indicates that he could not.

There was also evidence of how Frauendorfer's physical limitations had affected his wage earning capacity in Stricklett's evaluation. Lindsay's occupational health nurse had reported to Stricklett that Frauendorfer had not worked more than 6 hours per day. After reviewing his wage history, Stricklett concluded that Frauendorfer had earned $12.13 per hour—based on a 40-hour workweek—before his injury when his overtime was taken into consideration. Afterward, he earned a maximum of $10.88 per hour for a maximum of 6 work hours per day—a difference in weekly wages of over 30 percent.

Stricklett also found that Frauendorfer had lost access to approximately 31 percent of suitable jobs in the labor market area because of the physical restrictions documented in his functional capacity evaluation. She concluded that he would have a loss of earning capacity of 20 percent if he were able to handle overtime hours at Lindsay, 30 percent if Reckmeyer restricted him to 8-hour shifts at Lindsay, and 40 to 50 percent if he were separated from his employment with Lindsay.

Stricklett's report determined that Frauendorfer's loss of earning capacity would be dependent upon Reckmeyer's final restrictions. But the components of the report—Frauendorfer's impairment rating, functional capacity evaluation, wage losses, and loss of access to the labor market—were based upon his circumstances as they existed after he returned to work from his first surgery. As such, Stricklett's opinion on Frauendorfer's loss of earning capacity was relevant to the determination of the extent of his disability during this time.

Thus, in determining Frauendorfer's loss of earning capacity, the trial judge properly relied on Frauendorfer's testimony and Stricklett's opinion regarding his loss of earning capacity in determining the extent of his disability. See *Cords v. City of Lincoln, supra*. We conclude this evidence was sufficient to support the trial judge's finding of a 30-percent TPD. The trial judge was not clearly wrong in awarding Frauendorfer TPD benefits between his return to work after his first surgery to the day he had his second surgery.

Temporary Total Disability After Second Surgery

The trial judge awarded Frauendorfer a second period of TTD benefits from February 11, 1998, the date of his second surgery

for a spine fusion, to February 2, 1999, the day before the parties stipulated that he reached his MMI. Frauendorfer did not return to work after his second surgery, nor did he seek other employment. Thus, the question is whether the evidence was sufficient to establish that after his second surgery, Frauendorfer was unable to earn wages in either the same or a similar kind of work he was trained or accustomed to perform or in any other kind of work which a person of his mentality and attainments could perform. See *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

[17] "An employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990). While physical restrictions and impairment ratings are important when assessing the extent of a claimant's disability, a compensation court is not limited to this evidence and may rely on the claimant's testimony on this issue. See *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

On February 3, 1999, Woodward noted in his report that Frauendorfer was having difficulty sleeping and experiencing pain in the lumbosacral area of his back and his right leg, radiating down to his foot. Woodward recommended a third surgery for posterior exploration fusion and repair of the pseudarthrosis with internal fixation. When Frauendorfer refused a third surgery, he was referred for another functional capacity evaluation.

That evaluation showed that Frauendorfer's safe lifting parameters had decreased from 60 pounds to 35 pounds. The physical therapist concluded that Frauendorfer had a limited tolerance to standing, walking, and static sitting, but could perform work with his upper extremities in the medium physical demand category. He was given an overall physical demand classification of light duty for 8 hours per day, with a recommendation that he be allowed to change his position periodically to decrease pain.

After receiving this evaluation, Woodward assigned Frauendorfer a 15-percent permanent partial impairment rating

to his whole body that was attributed to the injury of April 17, 1995. This evidence established that after his second surgery, Frauendorfer's physical abilities and condition were impaired as a result of his accident at Lindsay.

Furthermore, Frauendorfer testified that since his second surgery, he typically needed to lie down after doing light work around his house for 1 to 2 hours and that when he had tried to do more strenuous work, he had sometimes been incapacitated for up to 2 days. He also testified that he took narcotic analgesics continually for pain, which caused him to be drowsy. As the successful party, he is entitled to the benefit of all favorable inferences from the evidence. Because the trial judge could properly rely upon Frauendorfer's testimony to determine the extent of his disability, the trial judge was not clearly wrong in finding Frauendorfer was unable to work and temporarily totally disabled from the time of his second surgery to the date of his MMI.

Permanent Total Disability

Lindsay contends there was insufficient medical evidence to support the trial judge's award of PTD benefits. The trial judge awarded Frauendorfer PTD benefits from February 3, 1999, the date of his MMI, and further PTD benefits as long as he remained permanently and totally disabled.

[18,19] Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Id.*

Woodward believed that Frauendorfer should be able to work 8-hour shifts at light duty. Although this evidence is relevant, a trial judge can rely on a claimant's testimony regarding his or her own limitations to determine the extent of the claimant's disability. See *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457

N.W.2d 815 (1990). In *Luehring*, we affirmed the trial judge's award of PTD benefits, despite the doctor's determination of only a 30-percent impairment and without any specific physician's statement that the claimant was unable to work. See *id*.

Lindsay argues that *Luehring* is distinguishable from this case because in *Luehring*, the physician qualified his opinion that Luehring could perform light to moderate duty by stating that " '[Luehring] may not be able to tolerate this due to discomfort, but from an objective standpoint there is no evidence that he would cause any further damage to his low back.' " (Emphasis omitted.) 235 Neb. at 886, 457 N.W.2d at 818. This court did emphasize that statement but did not hold that a claimant's testimony on his or her limitations is incompetent unless supported by the treating physician's statement or equivocation. Disability is not always commensurate with medical restrictions or impairment ratings. See, *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996) (considering claimant's testimony along with other evidence related to his earning power to affirm award of 10-percent PPD despite physician's 2-percent impairment rating); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

After Woodward assigned Frauendorfer a 15-percent impairment rating, Stratman and Rogers each performed loss of earning capacity reports. Stratman concluded that if Frauendorfer returned to work at Lindsay in the light-duty position Lindsay had offered, his loss of earning capacity would be approximately 30 percent, and that if he separated from his employment at Lindsay, his loss of earning capacity would be 60 percent.

Rogers, on the other hand, concluded that Frauendorfer was totally disabled under the odd-lot doctrine because of his physical limitations, age of 55, limited eighth grade education, and lack of transferable skills. See *Schlup v. Auburn Needleworks*, 239 Neb. at 865, 479 N.W.2d at 448 (" '[u]nder the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market' "), quoting 2 Arthur Larson, The Law of Workmen's Compensation § 57.51(a) (1989). Rogers specifically

rejected Stratman's opinion that Frauendorfer could work as a cashier or telephone solicitor because he was not academically qualified. He further found that Stratman's recommendation that he work as a security guard was inconsistent with the available positions for that occupation—all of which required a high school diploma or the ability to stand or walk for an entire shift. The trial judge found Roger's opinion persuasive.

But Lindsay argues that the trial judge should not have accepted Rogers' opinion because he did not take into consideration the employment that Lindsay had offered to Frauendorfer with a sit-or-stand option. Rogers, however, concluded that Frauendorfer did not fit within the light-duty work classification because he was unable to *either* sit or stand for extended periods. Because of Frauendorfer's low tolerance for prolonged sitting, standing, or walking and the physical therapist's recommendation that he never bend, crouch, or stoop, Rogers considered him unsuited for industrial production or assembly work. Thus, Rogers' report indicates that the light-duty job classifications he considered would have encompassed Lindsay's offered employment. The trial judge was not clearly wrong in finding that Frauendorfer was permanently and totally disabled.

Loss of Earning Power Evaluation Presumption of Correctness

[20] Lindsay also contends that the trial judge erred by accepting Rogers' opinion without first finding that the presumption of correctness afforded to the loss of earning power evaluations from the two agreed-upon rehabilitation counselors, Stricklett and Stratman, had been rebutted. Under § 48-162.01(3), a loss of earning power evaluation performed by a vocational rehabilitation counselor selected by the parties is entitled to a rebuttable presumption of correctness.

[21-23] The parties agreed to Stricklett and Stratman as the vocational counselors before trial. Stricklett's report, however, was prepared before Frauendorfer's second surgery and, thus, is not relevant to his loss of earning capacity after that surgery. Stratman opined that Frauendorfer's loss of earning capacity after his second surgery was approximately 30 percent if he returned to light-duty employment at Lindsay and approximately

60 percent if he separated from Lindsay. Here, the trial judge did not specifically state that the presumption of correctness had been rebutted.

> A "rebuttable presumption" is generally defined as "[a] presumption that can be overturned upon the showing of sufficient proof." Black's Law Dictionary 1186 (6th ed. 1990). "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 1995). We hold that this rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to § 48-162.01(3) is correct.

Variano v. Dial Corp., 256 Neb. 318, 326, 589 N.W.2d 845, 851 (1999). "[I]t is clear that in determining whether the presumption contained in § 48-162.01(3) has been rebutted, the single judge is required to make factual findings." *Romero v. IBP, inc.*, 9 Neb. App. 927, 932, 623 N.W.2d 332, 336-37 (2001) (holding that because trial judge need not rely on expert testimony in determining extent of claimant's disability, presumption may be rebutted by claimant's testimony as well as testimony of another expert).

Lindsay relies upon *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 623 N.W.2d 714 (2001), *rev'd on other grounds* 262 Neb. 800, 635 N.W.2d 439, to argue that the trial judge's failure to discuss the presumption of correctness is reversible error. In that case, however, no rebuttal opinion was offered and the trial judge referred only to the claimant's testimony and a physical therapist's report in its order. It did not mention the loss of earning power evaluation. The Court of Appeals stated that "[w]e cannot tell if the trial judge ignored the statutory presumption or concluded that it had been rebutted." *Id.* at 8, 623 N.W.2d at 718-19. See, also, *Variano v. Dial Corp., supra* (statutory presumption must be accepted unless rebutted).

In contrast, the trial judge in this case made specific factual findings concerning the presumption. The trial judge stated that he had opinions from both Stratman and Rogers, that he had

reviewed the functional capacity evaluation and other evidence, and, specifically, that he believed Frauendorfer's testimony on his physical limitations. He then stated, "The Court does not believe the plaintiff is employable . . . and finds the opinion of Mr. Rogers persuasive." Section 48-162.01(3) "anticipates the admission of evidence to rebut the presumption of correctness statutorily assigned to any loss of earning capacity report prepared by the court-appointed vocational rehabilitation counselor." *Fay v. Dowding, Dowding*, 261 Neb. 216, 230, 623 N.W.2d 287, 297 (2001). The trial judge's statements in its order are sufficient to determine that it considered the presumption of correctness rebutted.

We conclude that the trial judge did not err by relying on Frauendorfer's testimony that he required the ability to lie down to relieve the back pain he experienced from either prolonged sitting or standing or Rogers' opinion that Frauendorfer was totally disabled under the odd-lot doctrine. When viewed in the light most favorable to Frauendorfer, the evidence is sufficient to support the award of PTD benefits.

CONCLUSION

We conclude that the evidence was sufficient to support the trial judge's award of TTD, TPD, and PTD benefits and that the trial judge's statements in his order are sufficient to determine that the judge found the presumption of correctness afforded to the loss of earning power evaluation from Stratman, the agreed-upon rehabilitation counselor, was rebutted. We therefore affirm the decision of the review panel.

AFFIRMED.

IN RE INTEREST OF DESTINY S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RANDALL S. AND LINDA S., APPELLEES, AND DOROTHY B., APPELLANT.

639 N.W.2d 400

Filed February 22, 2002. No. S-01-170.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Interventions.** 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 which may be rendered in the action.
3. **Parent and Child: Intent: Proof: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relationship is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relationship.
4. **Parent and Child.** In order to stand in loco parentis, one must assume all obligations incident to the parental relationship. These obligations include providing support for the child and providing day-to-day care for the child.
5. ____. Once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis.
6. ____. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.
7. **Juvenile Courts: Interventions: Parent and Child: Notice.** A foster parent does not have an interest in the placement of an adjudicated child sufficient to warrant intervention in juvenile proceedings as a matter of right. However, such person is entitled to notice and an opportunity to participate in all court reviews pertaining to a child in foster care placement.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

David C. Mitchell, of Yost, Schafersman, Lamme, Hillis, Mitchell, Schulz & Twidwell, P.C., L.L.O., and, on brief, Catherine L. Shugrue-Schaffner, P.C., L.L.O., for appellant.

Joe Stecher, Dodge County Attorney, and Kevin J. Slimp for appellee State of Nebraska.

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

STEPHAN, J.

Dorothy B. appeals from an order of the county court for Dodge County, sitting as a juvenile court, overruling her motion for leave to intervene in a juvenile dependency proceeding to determine the final placement of her great-granddaughter, an adjudicated child, and further overruling her motion for discovery.

BACKGROUND

Destiny S. was born on December 24, 1993. Dorothy is the child's biological maternal great-grandmother. On December 12, 1996, the Dodge County Court, sitting as a juvenile court, conducted a detention hearing and concluded that Destiny should be removed from her mother's home and placed in the temporary custody of the Nebraska Department of Social Services, now the Nebraska Department of Health and Human Services (DHHS). On January 13, 1997, the court adjudicated Destiny to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1996) and ordered that she remain in the temporary custody of DHHS. Upon removal from her mother's home in December 1996, Destiny resided with Dorothy at her home in Fremont, Nebraska.

On October 9, 1998, after both of her biological parents relinquished their parental rights, Destiny was adopted by Randall S. and Linda S. Destiny resided in Fremont with Randall and Linda from March 27, 1998, until May 5, 2000, when the State filed a petition alleging that Destiny was a child as defined in § 43-247(3)(a) due to physical abuse by Randall. At that time, Destiny was removed from Randall and Linda's home and placed in the temporary custody of DHHS, which placed her in the care of foster parents.

At an adjudication hearing on May 31, 2000, the court accepted relinquishments of parental rights executed by Randall and Linda, Destiny's adoptive parents. Thereupon, the court adjudicated Destiny to be a child within the meaning of § 43-247(3)(a) and directed that she remain in the custody of DHHS pending further proceedings. The court ordered DHHS to submit a permanency plan within 30 days and further directed that Dorothy be

included in planning and given notice of all further proceedings. The judge referred to Dorothy as "one person that Destiny has had as a constant in her life." Dorothy's counsel entered an appearance on June 13.

At a dispositional hearing held on July 5, 2000, DHHS filed a plan recommending that Destiny remain in its custody with a permanency goal of placement with an adoptive family. Dorothy appeared with counsel. Referring to Dorothy as "the one stable influence family connection that [Destiny has] had consistently throughout her life," the court inquired as to whether Dorothy was being considered for adoptive placement. The DHHS caseworker replied that Dorothy, as well as several other persons, was under consideration. Through counsel, Dorothy expressed her strong desire to be considered as an adoptive parent. The court approved the plan to place Destiny for adoption and continued the hearing for 60 days to permit a professional evaluation of the various adoptive placements under consideration.

Another hearing was held on August 16, 2000, to consider a request by DHHS for a change in Destiny's foster placement. The guardian ad litem recommended, on a "short term basis only," that Destiny be placed with Dorothy subject to substantial and regular visitation with other persons who were being considered as prospective foster parents. At the conclusion of the hearing, the court advised Dorothy, who was present with counsel, that Destiny would be placed with her "as a grandmother" pending future resolution of placement issues. An order approving temporary placement with Dorothy was entered on August 24. The order included a requirement of liberal visitations by other prospective adoptive parents and a requirement that neither Dorothy nor the other prospective adoptive parents discuss the issue of permanent placement with Destiny.

On January 5, 2001, another hearing was held to change Destiny's temporary placement. Based upon testimony from a caseworker who was attempting to place Destiny for adoption, the court approved the change recommended by DHHS and placed Destiny with Destiny's cousin, a prospective adoptive parent, finding that the change was in Destiny's best interests. Dorothy was given notice of all the juvenile proceedings described above and was represented by counsel at such proceedings.

On January 4, 2001, prior to the second hearing on the temporary placement change, Dorothy filed a motion for leave to intervene and a motion for discovery. In the motion to intervene, Dorothy asserted her biological relationship to Destiny and her role as Destiny's "primary caretaker" and "the only individual with whom Destiny . . . has established a meaningful bond." Dorothy further alleged that DHHS was "embarking on a course which will, if adopted by the Court, effectively eliminate [Dorothy's] role as primary caretaker as well as any rights which [Dorothy] may otherwise have as to be considered as an adoptive parent or have meaningful visitation rights." Finally, Dorothy alleged that permitting her to intervene in the juvenile proceeding would be in Destiny's best interests.

The State filed an objection to Dorothy's motion asserting that she lacked legal standing to intervene. Evidence concerning the motion was received at the January 5, 2001, temporary placement hearing. On January 12, the court entered an order overruling Dorothy's motion to intervene, as well as her motion for discovery. The court determined that Dorothy and Destiny's cousin were

> parties of interest, only as it applies to their qualification to serve as placement for Destiny, and therefore, may present evidence regarding their qualifications. They are not parties of interest allowing discovery, questioning, cross-examining, or calling witnesses beyond that that is personally applicable to their qualifications for consideration of the Court.

From this order, Dorothy 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

Dorothy assigns that the juvenile court erred in (1) failing to recognize that she was an interested party as a matter of law as Destiny's great-grandmother, who is of good moral character and was "suitable family"; (2) failing to recognize her right to intervene as a foster parent; (3) failing to allow her to intervene as a person who stood in loco parentis to Destiny; (4) failing to recognize that she had a justiciable interest in the controversy, thus

giving her the right to intervene; (5) failing to allow her to intervene as a matter of equitable discretion; (6) failing to find that any combination of the foregoing provided a basis for intervention; (7) failing to receive evidence in support of her motion for leave to intervene; and (8) overruling her motion for discovery.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 1998), are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

ANALYSIS

The Nebraska Juvenile Code defines "parties" as the juvenile over which the juvenile court has jurisdiction under § 43-247 and his or her parent, guardian, or custodian. § 43-245(11). The juvenile code contains no specific provisions governing the rights of other persons to intervene in juvenile proceedings. However, juvenile proceedings are civil in nature. See, *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). Moreover, such proceedings must be fundamentally fair. See *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999). We therefore look to the rules governing intervention in civil proceedings as a guidepost in determining whether an individual has a right to intervene in juvenile proceedings.

[2] Generally, intervention in civil actions is governed by Neb. Rev. Stat. § 25-328 (Reissue 1995), which permits intervention by one "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." The interest required as a prerequisite to intervention under this statute 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 which may be rendered in the action. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *In re Interest of Kayle C. & Kylee C., supra*. One seeking to intervene in an action

must submit a petition setting forth the facts on which the intervention rests. *Ruzicka v. Ruzicka, supra*; *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001); Neb. Rev. Stat. § 25-330 (Reissue 1995). Here, Dorothy filed a pleading styled as a "motion" alleging specific facts upon which she bases her claimed right to intervene. It appears that the parties and the juvenile court treated this document as a petition, as do we.

In *In re Interest of Kayle C. & Kylee C., supra*, we held that grandparents had an interest sufficient to permit them to intervene in juvenile proceedings where parental rights had not been terminated. This determination was based upon three factors: (1) the statutory right of grandparents to seek visitation rights with their minor grandchildren pursuant to Neb. Rev. Stat. §§ 43-1801 to 43-1803 (Reissue 1998), (2) the potential for temporary placement of the children with their grandparents pursuant to § 43-284, and (3) the potential termination of the relationship between the grandparents and the grandchildren if the juvenile proceeding resulted in termination of parental rights under the holding in *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982).

The instant case, however, differs in substantial respects from *In re Interest of Kayle C. & Kylee C., supra*. Because § 43-1801 defines "grandparent" as "the biological or adoptive parent of a minor child's biological or adoptive parent," a great-grandparent would have no statutory right to seek visitation pursuant to § 43-1802. Moreover, the record in this case reflects the fact that the parental rights of Destiny's biological mother had been terminated by relinquishment before Dorothy sought to intervene. In *In re Interest of Ditter, supra*, we held that once parental rights have been terminated as to a natural parent, the natural parents of the parent whose rights have been terminated are not entitled to continue visitation with their grandchildren as a matter of right. We based this conclusion on the "generally accepted view" that

> if we are principally concerned with the best interests of the child . . . and by terminating parental rights we intend to divest any tie between the parent and child so that we may, as quickly as possible, find an adoptive family for the child and permit the child to begin anew, then little purpose

> would be served in continuing family ties between the grandparents and the child to be adopted.

(Citations omitted.) *In re Interest of Ditter*, 212 Neb. at 857, 326 Neb. at 676. Applying this rationale, any interest or right which Dorothy may have had solely by virtue of her biological relationship to Destiny ceased to exist when the parental rights of the biological mother were terminated.

However, in seeking to intervene in this proceeding, Dorothy does not rely solely upon her biological relationship with Destiny, but also upon the fact that she was serving as the child's foster parent at the time her motion to intervene was filed. She also bases her claimed right to intervene upon an assertion that "she has stood in loco parentis during a majority of the upbringing of Destiny." Brief for appellant at 27.

[3-6] A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000); *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000). The assumption of the relationship is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relationship. *Id*. In order to stand in loco parentis, one must assume all obligations incident to the parental relationship. *Id*. These obligations include providing support for the child and providing day-to-day care for the child. *Id*. Once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis. *Id*. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby. *Id*. See, also, *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

The record reflects that Destiny lived with Dorothy from December 10, 1996, until March 27, 1998, when she was placed with Randall and Linda, who eventually adopted her.

Assuming without deciding that Dorothy stood in loco parentis to Destiny during this period, the subsequent adoption clearly would have terminated such status. Following the adoptive parents' relinquishment of parental rights and the adjudication under § 43-247(3)(a) in June 2000, Destiny was temporarily placed with Dorothy under what was, at most, a short-term foster placement pending professional evaluation of prospective adoptive parents, including Dorothy. The court clearly informed Dorothy on the record that Destiny was being placed in her care "as a grandmother" and that future decisions regarding placement would be made by the court. Under these circumstances, Dorothy did not stand in loco parentis to Destiny at the time Dorothy filed her motion for leave to intervene and therefore cannot assert any direct and legal interest derived from such status as a basis for intervention.

In support of Dorothy's argument that her status as a foster parent affords the requisite interest to permit intervention, she relies upon *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982), and *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996). *In re Interest of Levey* was an appeal from an order terminating the parental rights of the adjudicated juveniles' biological mother. The opinion notes that the prospective adoptive parents and current foster parents of the children had filed a petition for intervention, which was allowed by the juvenile court over the mother's objection. However, the question of whether this decision constituted error was not raised in the appeal and therefore not addressed by this court. *In re Interest of Levey*, therefore, provides little guidance and no useful precedent.

Although it does not specifically address intervention in a juvenile proceeding, *In re Jorius G. & Cheralee G.* is somewhat more helpful. In that case, DHHS filed notice of a change of foster care placement for two children who had been adjudicated under § 43-247(3)(a). The biological mother had previously entered into an "open adoption agreement" which purported to relinquish parental rights in favor of the foster parents, Dee and Leonard Brown. When DHHS sought to change placement of the children from the Browns to a relative of the children's father, the Browns appeared at the hearing and presented evidence in opposition to

the change. After reviewing the evidence, the county court held that change of placement was not in the children's best interests, and a juvenile review panel affirmed. On appeal, DHHS argued that the Browns, as foster parents, did not have standing to object to the plan to change placement.

In resolving this issue, we examined the relationship between the Nebraska Juvenile Code and the Foster Care Review Act, as then in effect. See Neb. Rev. Stat. §§ 43-1301 to 43-1318 (Reissue 1993). We noted that § 43-285(2) and (3) (Reissue 1993) permitted an "interested party" to object to a change in placement of an adjudicated juvenile and offer proof that a proposed placement plan is not in the juvenile's best interests. We then noted that the Foster Care Review Act addressed placements of neglected, dependent, or delinquent children, including children adjudicated pursuant to § 43-247(3)(a) of the juvenile code. Determining that the standing provisions of the Foster Care Review Act found in § 43-1314 could be used as an aid to determine who is an interested party under § 43-285, we held that because § 43-1314 required that foster parents be given notice and a right to participate in all court reviews pertaining to a child in foster placement, the Browns had "standing to participate in the foster care placement review as foster parents." *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. at 896, 546 N.W.2d at 799. We determined that the Browns had standing for the additional reason that the biological mother had relinquished the children for adoption by them.

As it did at the time of the decision in *In re Jorius G. & Cheralee G.*, § 43-1314 currently provides that foster parents must be given notice and an opportunity to participate in court reviews pertaining to a child in foster care placement. However, in 1998, the statute was amended to add the following language: "Notice to the foster parent, preadoptive parent, or relative providing care shall not be construed to require that such foster parent, preadoptive parent, or relative be made a party to the review solely on the basis of such notice and opportunity to be heard." 1998 Neb. Laws, L.B. 1041.

[7] Using § 43-1314 as an aid, as we did in *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996), we conclude that a foster parent does not have an interest in the

placement of an adjudicated child sufficient to warrant intervention in juvenile proceedings as a matter of right. However, such person is entitled to notice and an opportunity to participate in all court reviews pertaining to a child in foster care placement. In the instant case, the juvenile court required that Dorothy be given notice and an opportunity to participate in future hearings regarding Destiny's placement and permanency plan. Its determination that neither Dorothy nor Destiny's cousin was a "part[y] of interest allowing discovery, questioning, cross-examining, or calling witnesses beyond that that is personally applicable to their qualifications for consideration of the Court" is consistent with the provisions of § 43-1314. Accordingly, the court did not err in denying Dorothy's motion to intervene as a party.

Finally, we consider Dorothy's contention that the district court erred in denying her motion for discovery, filed contemporaneously with her motion seeking leave to intervene. We construe the court's order discussed above as entitling Dorothy to limited discovery on matters pertaining specifically to her personal qualifications to become Destiny's adoptive parent. Dorothy's motion for discovery was not so limited, and the juvenile court therefore did not err in overruling it.

Dorothy's remaining assignment of error is that the court erred in failing to allow her to intervene as a matter of equitable discretion. We have recognized an equitable intervention procedure separate from that outlined in the statutes. *Colman v. Colman Foundation, Inc.*, 199 Neb. 263, 258 N.W.2d 128 (1977) (holding trial court may, independent of statute, allow intervention as matter of discretion); *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962) (recognizing that intervention may be allowed by court of equity in its discretion in proper case); *Department of Banking v. Stenger*, 132 Neb. 576, 272 N.W. 403 (1937) (finding that equitable intervention exists independent of statute and is in discretion of court). These cases clearly establish, however, that any right to equitable intervention is reviewed for an abuse of discretion by the lower court. On the instant facts, the juvenile court did not abuse its discretion in denying Dorothy's motion for leave to intervene, and thus, this assignment is without merit.

CONCLUSION

For the reasons discussed herein, we conclude that the juvenile court did not err in denying Dorothy's motions for leave to intervene and for discovery. Although denying leave to intervene as a party, the court properly and correctly recognized Dorothy's right to notice and limited participation in this proceeding as a foster parent and potential adoptive parent. We therefore affirm the order of the juvenile court.

AFFIRMED.

MILLER-LERMAN, J., dissenting.

I respectfully disagree with the majority's conclusion that there was no abuse of discretion in denying Dorothy equitable intervention. I would reverse.

I agree that Dorothy does not have a "direct and legal interest" which would mandate intervention in this proceeding as a matter of right. Further, as the majority notes, Neb. Rev. Stat. § 43-1314 (Reissue 1998) was amended in 1998 to provide that "notice" such as Dorothy received shall not be construed to require that an individual receiving such notice be made a party. However, § 43-1314 does not preclude an individual who receives such notice from being made a party.

We have noted that "[t]he courts recognize two methods by which intervention may be accomplished. One is statutory and is allowed as a matter of right . . . . The other is a matter of equitable discretion . . . . This existed prior to the enactment of the statute, and still exists independent thereof." *Department of Banking v. Stenger*, 132 Neb. 576, 577, 272 N.W. 403, 404 (1937). Equitable intervention is reviewed for an abuse of discretion. See *id*.

> 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.

Peter v. Peter, 262 Neb. 1017, 1022, 637 N.W.2d 865, 871 (2002).

A review of the record shows that "checkered" results have been delivered by the public systems charged with vigilance in facilitating the best interests of the parentless child involved.

See *Colman v. Colman Foundation, Inc.*, 199 Neb. 263, 266, 258 N.W.2d 128, 129 (1977) (White, J., dissenting) (referring to "checkered course" of the proceedings therein and concluding that equitable intervention should have been allowed). Indeed, the court in this case acknowledged that Dorothy has been the "one person that Destiny has had as a constant in her life." In view of prior proceedings and the unique posture of the participants in this case, I would conclude that it was an abuse of discretion not to allow equitable intervention by Dorothy.

WRIGHT and MCCORMACK, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
TRAVIS J. BISHOP, APPELLANT.

639 N.W.2d 409

Filed February 22, 2002. No. S-01-291.

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. **Criminal Law: Penalties and Forfeitures: Double Jeopardy.** Neb. Rev. Stat. § 28-431 (Cum. Supp. 2000) is criminal in nature, and in forfeiture proceedings brought pursuant to the statute, jeopardy attaches when evidence is first presented to the trier of fact.
4. **Criminal Law: Effectiveness of Counsel.** A criminal defendant's right to effective assistance of counsel is one of the foundations upon which our criminal justice system is built.
5. **Convictions: Right to Counsel.** A conviction obtained in violation of a defendant's right to counsel is void.
6. **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 the defense.
7. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.

8. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
9. **Rules of the Supreme Court: Judgments: Final Orders: Appeal and Error: Words and Phrases.** 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. Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order.
10. **Postconviction: Constitutional Law: Right to Counsel: Appeal and Error.** The Nebraska Postconviction Act provides that if a court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the state or federal Constitution, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or her or grant a new trial as may appear appropriate. Where the evidence establishes that such denial or infringement occurred only at the appeal stage of the former criminal proceedings, the postconviction remedy may be limited to a new direct appeal only.
11. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a person seeking postconviction relief has different counsel on appeal than at trial, the motion for postconviction relief is procedurally barred if the person seeking relief (1) knew of the issues assigned in the postconviction motion at the time of the 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.
12. ____: ____: ____. A determination of whether or not a defendant was prejudiced by appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal necessarily requires a court in a postconviction proceeding to consider whether or not trial counsel was actually ineffective.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael D. Nelson, of Nelson McClellan, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

Travis J. Bishop appeals from an order of the district court for Douglas County granting him postconviction relief in the form of a new direct appeal. He contends that because he received ineffective assistance of counsel at both the trial and appellate levels, his conviction and sentence should be vacated.

FACTS

On December 10, 1998, Bishop was arrested in Douglas County and charged with various offenses, including unlawful possession of cocaine with intent to deliver and possession of money used or intended to be used to facilitate a violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 1998). The police seized $835 in cash from Bishop at the time of his arrest. On December 14, Bishop appeared with counsel before the Douglas County Court on the criminal charges and a date for a preliminary hearing was set.

On December 16, 1998, the State filed a "Petition for Disposition of Seized Property" in the district court for Douglas County pursuant to Neb. Rev. Stat. § 28-431 (Cum. Supp. 2000). The petition was captioned "The State of Nebraska, Plaintiff, vs. Eight Hundred Thirty Five Dollars in U.S. Currency, Defendant, and Travis J. Bishop, Interested Party." The State alleged that the money seized from Bishop on December 10 was intended for use to facilitate transactions involving controlled substances. The petition alleged that the "owner of the money is believed to be Travis J. Bishop."

Bishop was served with a copy of the petition by certified mail. The summons notified Bishop that he had been sued by the State and that he had 30 days to file an appropriate written response in answer to the petition "or such Petition will be taken as true and judgment entered accordingly for the relief demanded." Bishop did not answer or appear. Following an evidentiary hearing, the district court entered a decree on January 25, 1999, finding that the $835 seized from Bishop was used to facilitate a violation of § 28-416. The court ordered the $835 forfeited to the State.

On March 12, 1999, Bishop waived his right to a preliminary hearing and was bound over for trial on the criminal possession charges. On May 28, we decided *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), in which we held that forfeiture proceedings under § 28-431 are criminal in nature and that double jeopardy rights are violated when the State seeks to impose cumulative punishments for drug possession and forfeiture in separate proceedings.

Bishop's original attorney died on July 27, 1999, and the attorney's son, who was also an attorney and with whom the original attorney shared an office, assumed responsibility for Bishop's legal defense. On August 23, Bishop, while represented by this attorney, entered a plea of no contest to the charge of unlawful possession with intent to deliver a controlled substance. Before accepting the plea, the court asked defense counsel if he believed that the plea was consistent with the law and the facts and in Bishop's best interests. The attorney replied, "I believe it is in his best interests, and I can see no benefit to be obtained by proceeding to trial in this matter." On December 23, Bishop was sentenced to a term of 8 to 10 years' imprisonment.

On January 21, 2000, Bishop filed a pro se notice of appeal. The Douglas County public defender was appointed as his appellate counsel. The assistant public defender assigned to the case wrote to Bishop on February 11, informing him that the appellate brief was due April 12 and inviting Bishop to contact her with any questions or concerns. In a subsequent letter, this attorney informed Bishop that she had filed the brief on his behalf and enclosed a copy. Other than this correspondence, Bishop's appellate counsel had no contact with him before she filed his appellate brief. The only assignment of error set forth in the brief was a claim that Bishop's sentence was excessive.

Appellate counsel subsequently received a letter from Bishop dated May 18, 2000, in which he stated that he had been trying to contact her for a month. In the letter, Bishop asked counsel to contact him regarding additional issues he wished to include in his appellate brief. He also requested copies of various documents pertaining to his case including those from the forfeiture proceeding.

On or about April 20, 2000, Bishop filed a pro se motion in the Nebraska Court of Appeals requesting leave to file a supplemental brief. In this motion, Bishop stated that his appellate counsel had failed to communicate with him despite his efforts to contact her. Bishop further stated in the motion that he wished to argue on appeal that his trial counsel was ineffective, although he made no specific reference to a double jeopardy issue at that time.

On May 23, 2000, Bishop's appellate counsel received a copy of his motion and responded in a letter to him on the same date. She advised Bishop that his appeal was limited to matters which were reflected in the appellate record and that none of the additional issues he sought to raise in a supplemental brief were set forth in the record. She specifically advised him that "[t]he issues that you wish to raise regarding ineffective assistance of counsel are properly raised on a Motion for Postconviction Relief. This Motion can not [sic] be raised until your appeal to the Nebraska Court of Appeals is final." On May 26, the Nebraska Court of Appeals summarily affirmed Bishop's conviction and sentence and denied as moot his motion to file a supplemental brief. His appellate counsel notified him of this action by letter dated May 30, 2000, and advised him that he should begin the postconviction process.

On June 23, 2000, Bishop filed a verified motion for postconviction relief in which he alleged that his trial counsel was ineffective in failing to raise the issue of the prior forfeiture to the district court. With leave of court, he subsequently filed an amended motion in which he alleged facts pertaining to the seizure and forfeiture of the $835 in cash from his person at the time of his arrest on December 10, 1998. He alleged that he informed his trial counsel of these facts prior to entering his plea and that he entered his plea on the advice of said counsel. He further alleged that if he had been advised that the possession case was a separate criminal prosecution for the same offense involved in the forfeiture, he would have contested the charge. Bishop further alleged that his trial counsel was ineffective for failing to be fully informed of the facts and law and for failing to file a plea in bar or other appropriate motion to the charges in the possession case.

Bishop also alleged that his appellate counsel provided ineffective assistance because she failed to meet with him or otherwise discuss his case prior to filing the appellate brief and because she failed to assign as error the ineffective assistance of trial counsel in the direct appeal in order to preserve his right to postconviction relief. Bishop alleged that but for the ineffective assistance of his counsel, he would not have been convicted in the criminal possession case.

An evidentiary hearing on Bishop's amended postconviction motion was held on September 12, 2000. Bishop testified that all of the allegations in his amended motion were true. The attorney who represented him at the time of his plea testified via deposition that he represented Bishop only with respect to the possession charges and was not involved in any "money issue." He admitted that he had seen police reports indicating that $835 was seized from Bishop at the time of his arrest and that he was aware of the decision in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), prior to the date on which Bishop entered his plea. He testified, however, that at all times prior to Bishop's entering a plea to the possession charges, he was completely unaware of the forfeiture proceedings and had not been advised of their existence by either the county attorney or Bishop.

The deposition of Bishop's appellate counsel was received in evidence at the postconviction hearing. In her testimony, appellate counsel admitted that at the time of her May 23, 2000, letter to Bishop, she was aware of Nebraska cases holding that an issue which could have been but was not raised on direct appeal is procedurally barred in a postconviction action. She further testified that when she received Bishop's letter of May 18, 2000, requesting copies of documents from the forfeiture proceedings and stating his allegations of ineffective assistance of trial counsel, she did not recognize a potential issue for appeal because there was nothing in the appellate record to support his claims and the time for filing the appellate brief had already passed.

The district court entered a detailed order on February 5, 2001, finding that Bishop had received ineffective assistance of counsel and granting him postconviction relief in the form of a new direct appeal. The court held that Bishop's appellate counsel was deficient in failing to investigate issues outside the four corners of the recorded proceedings and thus failing to discover the prior forfeiture action. In addressing whether appellate counsel's performance was prejudicial to Bishop, the court analyzed "how the result of the proceeding would have been different had Appellate Counsel argued on appeal that the Defendant's trial counsel . . . rendered ineffective assistance." In this analysis, the court found that trial counsel admitted that a review of

the police reports would have made him aware of the seizure of the $835 and that he was admittedly aware of the holding in *State v. Franco, supra*, prior to the date on which Bishop entered his plea. The court concluded that there was a reasonable probability that had the double jeopardy defense been asserted by trial counsel prior to sentencing, the result of the proceeding would have been different and that thus, Bishop made a showing of ineffective assistance of appellate counsel for failing to raise the issue of ineffective assistance of trial counsel.

With respect to the remedy, the district court reasoned that because Bishop failed to raise the issue of ineffective assistance of trial counsel on direct appeal, he was procedurally barred from making such claim in a postconviction action. The court thus concluded that Bishop was only entitled "at this time" to a new direct appeal, in which he could raise the issue of ineffective assistance of his trial counsel. Bishop filed a motion for reconsideration, which the court denied. He then filed this timely appeal. We granted Bishop's petition to bypass.

ASSIGNMENTS OF ERROR

Bishop assigns that (1) his trial counsel was ineffective in failing to raise the double jeopardy defense after jeopardy attached at the prior forfeiture proceeding, (2) his appellate counsel was ineffective in failing to raise the issue of trial counsel's ineffective assistance in the direct appeal, (3) he was prejudiced by the deficient performance of both trial and appellate counsel, and (4) the district court erred by finding that he was procedurally barred from the full relief sought in his motion and therefore failing to vacate the conviction and sentence.

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. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (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, supra*.

ANALYSIS

[3] Section 28-431 is a component of the Uniform Controlled Substances Act as adopted in Nebraska. See Neb. Rev. Stat. § 28-401 et seq. (Reissue 1995, Cum. Supp. 2000 & Supp. 2001). The statute authorizes the seizure and forfeiture of various types of personal property used or intended to be used in connection with illegal trafficking of controlled substances, including "all money used, or intended to be used, to facilitate a violation of the act," § 28-431(1)(g). In *State v. Franco*, 257 Neb. 15, 24, 594 N.W.2d 633, 640 (1999), we held that § 28-431 was criminal in nature and that in forfeiture proceedings brought pursuant to the statute, "jeopardy attaches when evidence is first presented to the trier of fact." Applying these principles, we held that under the protection against double jeopardy afforded by the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution, a separate subsequent prosecution for possession of a controlled substance with intent to deliver in violation of § 28-416(1)(a) was barred. We reached the same conclusion on similar facts in *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

Franco and *Spotts* were decided after the forfeiture of the money seized from Bishop at the time of his arrest but before Bishop entered his no contest plea to a charge of unlawful possession of a controlled substance with intent to deliver. Reduced to its essence, Bishop's postconviction claim is that instead of advising him to enter a plea, his trial counsel should have informed him of the double jeopardy defense arising from the forfeiture and asserted it on his behalf in order to obtain a dismissal of the criminal charges filed against him. Bishop contends that his conviction was the product of a deprivation of his Sixth Amendment right to effective assistance of counsel and should therefore be vacated under the postconviction remedy afforded by Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995).

[4-8] A criminal defendant's right to effective assistance of counsel is one of the foundations upon which our criminal justice system is built. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). A conviction obtained in violation of a defendant's right to counsel is void. *State v. Stott*, 255 Neb. 438, 586 N.W.2d 436 (1998). 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 the defense. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). We apply this principle in this case because a plea of no contest is equivalent to a plea of guilty. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[9] Although the State has not filed a cross-appeal challenging the factual findings and conclusions of law made by the district court, the State argues in its brief that jeopardy did not attach in the forfeiture proceeding because Bishop did not file an answer and that therefore, neither his trial counsel nor his appellate counsel were ineffective in failing to raise the double jeopardy issue. We find this argument to be both improperly raised and without merit. 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). Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order. *Id.* In this proceeding, the district court concluded that Bishop had received ineffective assistance of appellate counsel. As will be more fully discussed, such a conclusion in this case necessarily included a determination that trial counsel also rendered ineffective assistance. Any argument advanced by the State on appeal that neither counsel was ineffective is thus requesting a reversal or a modification of the district court's holding. As such, the argument should properly have been made on cross-appeal. We note, however, that Bishop's brief assigns as error and argues that both his trial counsel and appellate counsel were ineffective, even though the district court found in his favor on those issues. The State in this regard is simply responding to arguments Bishop himself presents on appeal, and for this reason, we address the merits of the argument advanced by the State that

since Bishop was not a party to the forfeiture, jeopardy did not attach to him at that proceeding.

The State named Bishop as an "Interested Party" in the forfeiture petition and specifically alleged that the "owner of the [seized] money is believed to be Travis J. Bishop." The summons served upon Bishop stated that if no answer was filed within 30 days after service, "such Petition will be taken as true and judgment entered accordingly for the relief demanded." The record reflects that Bishop received the summons and copy of the petition but did not file an answer. Thus, Bishop was clearly a party to the forfeiture action, although he did not contest it. While it is true that the defendants in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999), appeared and contested the forfeiture proceedings, we did not rely on this fact in concluding that the proceedings were criminal in nature and resulted in the attachment of jeopardy. Although numerous courts have addressed similar issues, the State has not furnished, nor has our research disclosed, any authority in support of the State's argument that jeopardy does not attach in an uncontested forfeiture proceeding that is criminal in nature.

[10] We therefore turn to Bishop's primary contention on appeal, which is that the new direct appeal ordered by the district court constituted inadequate relief for the denial of his Sixth Amendment rights. The Nebraska Postconviction Act provides that if a court "finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable" under the state or federal Constitution, "the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate." § 29-3001. Where the evidence establishes that such denial or infringement occurred only at the appeal stage of the former criminal proceedings, however, we have held that the postconviction remedy may be limited to a new direct appeal only. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976).

[11,12] In the instant case, the district court reasoned that Bishop was procedurally barred from obtaining relief in this

postconviction proceeding based upon his ineffective assistance of trial counsel claim and thus awarded him a new direct appeal in which to litigate that claim. We disagree with this conclusion. It is clear from the record that the attorney who counseled Bishop at the time of his plea was not the same attorney who represented Bishop on his direct appeal. When a person seeking postconviction relief has different counsel on appeal than at trial, the motion for postconviction relief is procedurally barred if the person seeking relief (1) knew of the issues assigned in the postconviction motion at the time of the 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); *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999). Here, the record reflects that by the time of his direct appeal, Bishop was aware of the factual basis for his claim that his trial counsel was ineffective in not asserting the double jeopardy defense on his behalf. His appellate counsel did not assert this issue in his direct appeal. Because Bishop has alleged that appellate counsel was ineffective for not doing so, however, the issue was presented at the earliest opportunity in this postconviction proceeding and is not procedurally barred. See *State v. Williams, supra*. Compare *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998) (holding postconviction claim of ineffective assistance of trial counsel procedurally barred where there was different counsel at trial than on direct appeal, trial counsel's performance was not raised on direct appeal, and no claim of ineffective assistance of appellate counsel was made in the postconviction proceeding). As we noted in *Williams*, a determination of whether or not a defendant was prejudiced by appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal necessarily requires a court in a postconviction proceeding to consider whether or not trial counsel was actually ineffective.

In this case, it cannot be said that the infringement of Bishop's right to counsel occurred "only at the appeal stage." While the district court correctly concluded that Bishop received ineffective assistance from appellate counsel, the very nature of the ineffective assistance found was the failure to assert, on direct appeal,

trial counsel's failure to properly advise Bishop regarding the double jeopardy defense before entry of the plea. The district court thus determined that trial counsel was ineffective. A new direct appeal could only reestablish what has already been established in this postconviction proceeding, i.e., that trial counsel should have advised Bishop concerning the double jeopardy defense before he entered his plea and that appellate counsel should have asserted this failure as grounds for reversal on direct appeal. If Bishop had received effective assistance of counsel with respect to his meritorious double jeopardy defense, he would not have been convicted or his conviction would have been vacated on direct appeal. Accordingly, the district court erred in granting Bishop a new direct appeal and should instead have vacated his conviction and discharged him from custody.

CONCLUSION

For the reasons discussed, we affirm the determination of the district court that Bishop is entitled to postconviction relief, but reverse the court's determination that such relief should be in the form of a new direct appeal. Instead, we remand the cause to the district court with directions to vacate the judgment of conviction and discharge Bishop from custody.

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

GARY A. REITER, APPELLANT, V. EDWARD D. WIMES, DIRECTOR OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

640 N.W.2d 19

Filed March 1, 2002. No. S-99-1392.

1. **Administrative Law: Motor Vehicles: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the

decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

4. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. ____: ____. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
7. **Venue: Waiver.** Venue provisions confer a personal privilege which may be waived by the defendant.
8. ____: ____. A claim of improper venue is a matter that may be waived by failure to make a timely objection.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe, Jodi M. Fenner, and, on brief, Kyle C. Dahl for appellee.

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

WRIGHT, J.

NATURE OF CASE

Gary A. Reiter appeals the district court's order affirming the revocation of his driver's license by the director of the Nebraska Department of Motor Vehicles (Department). For the reasons set forth herein, we affirm.

SCOPE OF REVIEW

[1] Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act (APA). *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000). See Neb. Rev. Stat. § 60-6,208 (Reissue 1998).

[2] A final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Muir v. Nebraska Dept. of Motor Vehicles, supra*.

[3] When reviewing an order of the district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4] An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[5] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

FACTS

On June 21, 1999, at approximately 12:10 a.m., Nebraska State Patrol Trooper Robert G. Neel was southbound on Highway 9 in Cuming County when he noticed Reiter's vehicle traveling on the centerline. Neel watched the vehicle weave over to the shoulder and then back over the centerline. When Neel stopped the vehicle and asked for Reiter's license and registration, he noticed the odor of alcohol on Reiter's breath.

Neel asked Reiter to perform field sobriety tests and a preliminary breath test, which Reiter failed. Reiter was then arrested pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1998) and transported to the Thurston County sheriff's office, which was the nearest testing facility. From there, Reiter was taken to a local hospital, where a blood alcohol test was administered. The test showed that Reiter had a blood alcohol content of .153 grams of alcohol per 100 milliliters of blood.

Following the arrest, Reiter was subject to having his driver's license revoked pursuant to Neb. Rev. Stat. § 60-6,205 (Reissue 1998). On June 24, 1999, Reiter filed a petition requesting a hearing to contest the administrative license revocation. Reiter was notified that the hearing would be held on July 12 and that teleconference hearing procedures would be used. Upon Reiter's request, the hearing was continued to July 16. Reiter did not object to the use of teleconference hearing procedures at this time.

On July 16, 1999, a telephonic hearing was held. During the hearing, the hearing officer was located in Lancaster County, the

arresting officer was in Wayne County, and Reiter and his counsel were in Dawes County. None of the parties were present in Cuming County, where the arrest had occurred.

After several exhibits were received, but prior to the receipt of testimony, Reiter objected to the hearing officer's holding a telephonic hearing rather than a hearing by videoconference. Reiter claimed that because videoconferencing was available in Dawes County, the hearing officer should have ordered that videoconferencing be used pursuant to Neb. Rev. Stat. § 84-913.03 (Reissue 1999). The hearing officer overruled the motion, noting that even if the hearing were held by videoconference, no one would be present in Cuming County. At the end of the hearing, Reiter claimed that the hearing should have been conducted in Cuming County, the county where the arrest occurred, or in any other county agreed to by the parties, as set forth in § 60-6,205(6)(a).

The hearing officer recommended that Reiter's objection based on § 60-6,205(6)(a) be overruled and found that § 84-913.03 permitted a telephonic hearing. The director reviewed the proposed findings of fact and conclusions of law recommended by the hearing officer, adopted the recommendations as the official and final order of the Department, and ordered that Reiter's driver's license be revoked for 90 days effective July 21, 1999.

Reiter timely appealed to the district court for Cuming County. The district court found that Reiter had failed to object to the fact that none of the parties were physically present in Cuming County during the hearing. The district court concluded that Reiter was not prejudiced and affirmed the decision of the director. Reiter timely appealed, and we transferred this case to our docket.

ASSIGNMENTS OF ERROR

Reiter assigns as error that the district court erred in finding that the director did not commit error in overruling Reiter's objection to conducting the license revocation hearing in a county other than the one in which the arrest occurred and that the court erred in not reinstating Reiter's driver's license because the hearing was not held pursuant to § 60-6,205(6)(a).

ANALYSIS

We first consider whether the district court for Cuming County had jurisdiction over this matter. The director asserts

that Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999) is a jurisdictional requirement for obtaining judicial review of a final administrative decision under the APA. Section 84-917(2)(a) provides in part: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency."

We have previously held that the phrase "county where the action is taken," as used in § 84-917(2)(a), is defined as " 'the site of the first adjudicated hearing of a disputed claim.' " See *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 351, 562 N.W.2d 355, 358 (1997). The director argues that if we determine that the license revocation hearing did not take place in Cuming County, then the district court for Cuming County lacked jurisdiction. The director claims that because none of the parties to the hearing were present in Cuming County, there is no support for a finding that Cuming County was the site of the first adjudicated hearing of a disputed claim.

The fact that the license revocation hearing did not take place in Cuming County does not mean that the district court for Cuming County lacked jurisdiction. Section 60-6,208 refers specifically to license revocation hearings and provides: "Any person who feels himself or herself aggrieved because of such revocation may appeal therefrom to the district court of the county where the alleged events occurred for which he or she was arrested in accordance with the Administrative Procedure Act." Here, the alleged events for which Reiter was arrested occurred in Cuming County. Administrative license revocation hearings may also be held in a location other than where the arrest occurred. See § 60-6,205(6)(a).

[6] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). Neither § 60-6,208 nor § 84-917(2)(a) provides that its jurisdictional provisions are exclusive. Section 60-6,208 deals specifically with license revocation hearings, and § 84-917 applies to appeals from all administrative hearings. If we interpret these two statutes to be conflicting, then to the extent that a conflict existed, the specific statute

would control over the general. See *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). Since § 60-6,208 deals specifically with license revocation hearings, it controls over the general statute dealing with administrative hearings. Therefore, the district court for Cuming County had jurisdiction over the matter at issue.

Having concluded that the district court for Cuming County had jurisdiction, we proceed to discuss the merits. Reiter's assignments of error are based on the claim that his license should have been reinstated because the license revocation hearing was not held in compliance with § 60-6,205(6)(a), which provides in part: "The hearing shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." Reiter claims this section requires that the hearing be held in Cuming County, where the arrest occurred, and that because his hearing was not held in Cuming County, the revocation was invalid.

In *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000), we addressed the significance of § 60-6,205(6)(a). There, Muir objected to holding the license revocation hearing by teleconference. He appealed to the district court, which reversed his license revocation. The Department appealed that order.

In *Muir*, we concluded that § 60-6,205(6)(a) was a venue provision. We noted that Muir never objected to the venue, or location, of the hearing, nor did he request that the hearing be transferred to another county. We concluded that because Muir participated in the telephonic hearing without objecting to the location, he waived any objection to venue under § 60-6,205(6)(a).

The same reasoning applies to the case at bar. Before any testimony was received, Reiter objected to holding the hearing by teleconference rather than by videoconference. An objection to the use of teleconference hearing procedures is not an objection to venue. See *Muir v. Nebraska Dept. of Motor Vehicles, supra*.

After the testimony had been received and the hearing was essentially completed, Reiter objected based on § 60-6,205(6)(a). The objection to venue after the hearing was completed was not a timely objection. See *State ex rel. Bauersachs v. Williams*, 215

Neb. 757, 340 N.W.2d 431 (1983) (objection to venue at conclusion of evidence is untimely).

[7,8] Venue provisions confer a personal privilege which may be waived by the defendant. *Muir v. Nebraska Dept. of Motor Vehicles, supra*. A claim of improper venue is a matter that may be waived by failure to make a timely objection. *Id*. Reiter failed to make a timely objection to the location of the hearing, and therefore waived his objection to venue.

CONCLUSION

The decision of the district court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Therefore, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD J. DAVLIN, APPELLANT.

639 N.W.2d 631

Filed March 1, 2002. No. S-00-958.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Statutes.** The meaning of a statute is a question of law.
3. **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.
4. **Rules of Evidence: Appeal and Error.** 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 discretion a factor in determining admissibility.
5. ____: ____. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
6. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
7. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
8. **Judgments: Constitutional Law: Criminal Law: Statutes: Due Process.** 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.

9. **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.
10. **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.
11. **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 indicative of a probable miscarriage of justice.
12. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
13. ____. An appellate court always reserves the right to note plain error which was not complained of at trial.
14. **Appeal and Error: Words and Phrases.** Plain error exists where there is 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.
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. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury; it is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence; rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
17. **Trial: Evidence.** When a court overrules a motion in limine, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered.
18. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial.
19. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
20. **Constitutional Law: Due Process: Evidence.** Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant.
21. **Due Process: Evidence: Police Officers and Sheriffs.** It is uncontroverted that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

22. **Judgments: Due Process: Evidence: Appeal and Error.** A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error.
23. **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.
24. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
25. **Jury Instructions: Evidence.** An instruction on the inference that may be drawn from spoliation of evidence is appropriate only where substantial evidence exists to support findings that the evidence had been in existence, in the possession or under the control of the party against whom the inference may be drawn; that the evidence would have been admissible at trial; and that the party responsible for the destruction of the evidence did so intentionally and in bad faith.
26. **Trial: Evidence: Appeal and Error.** On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court.
27. **Rules of Evidence.** The question whether evidence is relevant for any purpose, pursuant to Neb. Evid. R. 401 and 402, is preliminary to the question whether the evidence is relevant for a proper purpose as determined pursuant to Neb. Evid. R. 404.
28. **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.
29. **Evidence.** Evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case.
30. ____. If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.
31. **Trial: Evidence: Appeal and Error.** If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
32. **Expert Witnesses.** An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
33. **Expert Witnesses: Trial.** As a general rule, the opinion of an expert witness is properly admitted into evidence where the basis of the opinion and the facts on which it is based are before the jury, and the opposing party has the opportunity to cross-examine the witness as to these foundational matters.
34. **Expert Witnesses: Appeal and Error.** 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.
35. **Habitual Criminals: Sentences: Time.** The statutory reference in Neb. Rev. Stat. § 29-2221(1) (Reissue 1995) is to the "term" to which a defendant is sentenced, not the time or number of days the defendant is actually incarcerated. Therefore, it is the term of a defendant's prior sentences, not time actually served, which controls applicability of the habitual criminal penalty.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Jerry L. Soucie and Robert W. Kortus, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Clifford Davlin was convicted, pursuant to jury verdicts, of second degree murder and first degree arson. Davlin was found to be a habitual criminal and sentenced to life imprisonment for the murder conviction and 20 to 60 years' imprisonment for the arson conviction, the sentences to be served consecutively. Davlin appeals, claiming errors in the jury instructions, the State's destruction of physical evidence, the admission of expert testimony on the cause of the fire, the exclusion of evidence proffered by Davlin intended to implicate another suspect, and the finding that Davlin was a habitual criminal.

II. BACKGROUND

Tamara Ligenza, also known as Tamara Martin, was found dead in her Lincoln apartment after a fire on September 7, 1993. Ligenza was legally blind and was 6 months pregnant at the time of her death. Ligenza had been living with Davlin, but on September 6, Ligenza told Davlin to leave the apartment. The State adduced evidence at trial which generally indicated that Davlin remained at or near the apartment building on September 6 and into the morning of September 7.

Ligenza was last seen alive, by her roommate, at about 1 a.m. on September 7, 1993. Ligenza lived in a house that had been converted to a duplex with one entrance that led to both apartments. Witnesses who lived in the building testified that they were awakened at approximately 4:30 a.m. by reports of a fire in the building. Davlin was identified as being in the duplex at

the time of the fire, staying in the other apartment. Firefighters removed a severely burned body from the bedroom of Ligenza's apartment; the body was later identified by dental records as Ligenza's. An autopsy was performed, and the coroner's physician concluded that Ligenza had been killed by manual strangulation prior to the fire.

Davlin was charged by amended information on March 24, 1997. After a plea in abatement was overruled, Davlin filed an interlocutory appeal that was summarily dismissed by the Nebraska Court of Appeals. See *State v. Davlin*, 6 Neb. App. xliii (case No. A-97-1094, Mar. 27, 1998), *petition for further review overruled* 254 Neb. xxviii (May 29, 1998). Trial commenced on March 10, 2000. In addition to the evidence summarized above, the State presented testimony regarding admissions that Davlin allegedly made regarding his responsibility for Ligenza's death. Two of the witnesses lived in the same apartment building as Davlin after the fire, and one was a cellmate of Davlin in late November and early December 1993 when both were incarcerated in Sarpy County on unrelated charges. The State also adduced evidence that an accelerant had been used to set the fire in Ligenza's apartment.

The jury returned guilty verdicts for second degree murder and first degree arson. Davlin's motion for new trial was overruled, and he was sentenced as set forth above. Other factual details will be set forth below as they relate to the issues presented.

III. ASSIGNMENTS OF ERROR

Davlin assigns that the district court erred when it (1) retroactively applied this court's decision in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), and did not instruct the jury that malice was an essential element of the crime of second degree murder; (2) instructed the jury that an essential element of the crime of second degree murder was that the killing was done "intentionally, but without *malice*," instead of "premeditation"; (3) failed to provide redress under Neb. Rev. Stat. § 29-1913 (Reissue 1995) because of the State's destruction of evidence required for scientific testing; (4) failed to dismiss the case pursuant to *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), because Davlin's rights under the Due

Process Clauses of the state and federal Constitutions were violated by the State's destruction of evidence; (5) failed to instruct the jury that missing evidence could be inferred to be unfavorable to the State; (6) prohibited the introduction of evidence that a third person committed the charged offenses; (7) admitted the testimony of the State's fire experts with insufficient foundation for the evidence; and (8) found Davlin to be a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221(1) (Reissue 1995).

IV. STANDARD OF REVIEW

[1-3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Gartner, ante* p. 153, 638 N.W.2d 849 (2002). The meaning of a statute is a question of law. *Id.* On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

[4-7] 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 discretion a factor in determining admissibility. *State v. Pruett, ante* p. 99, 638 N.W.2d 809 (2002). 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. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

V. ANALYSIS

1. Jury Instructions

The district court's instruction No. 3 was a step instruction which included instructions regarding first degree murder, second degree murder, and manslaughter. The instruction stated, in part:

> Regarding second degree murder, the elements of the state's case are:

(1) That Clifford J. Davlin caused the death of Tamara Ligenza, a/k/a Tamara Martin; and

(2) that Mr. Davlin did so intentionally, but without malice; and

(3) that Mr. Davlin did so on or about September 7, 1993, in Lancaster County, Nebraska.

(a) Retroactive Application of *Burlison*

[8-10] Davlin's first assignment of error is that the district court erred in not instructing the jury that malice was an element of second degree murder, thus retroactively applying this court's decision in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). We recently addressed this issue in *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001), *cert. denied* 534 U.S. 1033, 122 S. Ct. 573, 151 L. Ed. 2d 445. We stated:

> Under *Rogers* [*v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001)], 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." . . . Thus, in a case such as *Bouie* [*v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)], 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.
>
> The basis of the *Burlison* decision was the plain language of [Neb. Rev. Stat.] § 28-304 [(Reissue 1995)]. 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. . . . 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. . . . 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.

(Emphasis in original.) (Citations omitted.) *Redmond*, 262 Neb. at 420-21, 631 N.W.2d at 508.

Davlin argues that our decision in *Redmond, supra*, was in error because we failed to determine that our decision in *Burlison, supra*, was both unexpected and indefensible. In the first place, our decision in *Redmond* clearly states that our decision in *Burlison* was not unexpected, because the line of cases that *Burlison* overruled was not without obvious disagreement and was in direct contradiction to the plain language of Neb. Rev. Stat. § 28-304 (Reissue 1995).

Second, Davlin misreads *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). *Rogers* establishes that a judicial decision interpreting a statute may "not be given retroactive effect, only where it is 'unexpected *and* indefensible.' " (Emphasis supplied.) *Rogers*, 532 U.S. at 462. In other words, *Rogers* sets forth a two-pronged test for whether a retroactive application of a judicial decision violates due process, and both prongs must be satisfied for a constitutional violation to be proved. If one prong of the test is unsatisfied, then the inquiry can end.

Davlin also argues that his case is distinguishable from *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001), *cert. denied* 534 U.S. 1033, 122 S. Ct. 573, 151 L. Ed. 2d 445, because the

crime alleged in the instant case took place prior to the line of dissenting opinions that foreshadowed *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Davlin argues that because Ligenza's alleged murder took place before the publication of those dissenting opinions, the decision in *Burlison* was still unexpected at the time the crime was alleged to have been committed.

Davlin's argument fails for two reasons. First, we stated in *Redmond, supra*, that the decision in *Burlison, supra*, was not unexpected both because of the disagreement among the members of this court and because the decisions of this court were contradicted by the plain language of § 28-304. The statutory language upon which *Burlison* was based was obviously in effect at the time that the crime in the instant case was alleged to have been committed.

Moreover, Davlin's argument is directed solely at whether the *Burlison* decision was unexpected. As noted previously, a judicial decision interpreting a statute violates due process when applied retroactively only where the decision is *both* unexpected *and* indefensible. Davlin's argument does not distinguish this case from our conclusion in *Redmond, supra*, that the decision in *Burlison, supra*, was not indefensible. Consequently, Davlin's attempt to distinguish this case from *Redmond, supra*, is without merit.

For the foregoing reasons, the district court did not err in failing to instruct the jury that malice was an essential element of the offense of second degree murder.

(b) Instruction No. 3

Section 28-304(1) states that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but *without premeditation*." (Emphasis supplied.) As noted above, the district court mistakenly instructed the jury that to convict Davlin of second degree murder, it must find that Davlin caused Ligenza's death "intentionally, but *without malice*." (Emphasis supplied.) Davlin argues, and the State concedes, that the district court's instruction was erroneous in that regard. The district court reached the same conclusion, but determined that the error was harmless. The issue contested on appeal is whether the district court's erroneous instruction requires a new trial.

[11,12] We first note that the only objection raised at the jury instruction conference regarding instruction No. 3 related to the retroactive application of *Burlison, supra*. Davlin did not object to instruction No. 3 on any other basis. 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 indicative of a probable miscarriage of justice. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). In this case, while Davlin complained about the "without malice" element of instruction No. 3 in the context of his motion for new trial, the record does not reflect a timely objection on that basis to the proposed instruction before the case was submitted to the jury.

[13-15] However, an appellate court always reserves the right to note plain error which was not complained of at trial. *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). Plain error exists where there is 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. *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999). Moreover, 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. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

The prejudice inherent in the district court's erroneous instruction is evident when instruction No. 3 is examined with reference to the definitions set forth in instruction No. 4. Instruction No. 4 correctly defined "malice" as that "condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." See, e.g., *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). Thus, the phrase "intentionally, but without malice" instructed the jury that second degree murder must be

intentional, but without a state of mind that is in part characterized by the presence of intent. In essence, the jury was instructed that second degree murder is committed both intentionally and without intent. Arguably, the jury could have concluded that the State was not required to prove an essential element of the offense of second degree murder, i.e., intent.

The effect of this instructional discord was evidenced by the fact that during deliberation, the jury sent the following question to the district court: "Does the word 'malice' in second degree murder refer only to 'premeditated and deliberate malice' as in instruction no. 3 - pg 2?" The district court's answer was that "[t]he word 'malice,' as used in the elements of second degree murder, is defined in Instruction No. 4(4)." While it is impossible to be certain what prompted the jury to ask this question, one potential explanation is that the jury was confused by the conflict between the requirement that second degree murder be intentional and the requirement that second degree murder be without "malice" as defined in the jury instructions.

We are not persuaded by the State's argument that Davlin was not prejudiced because the presence or absence of premeditation is relevant only to the difference between first and second degree murder, and Davlin was convicted of the lesser of those offenses. While this argument might answer Davlin's claim that he was prejudiced by the omission of the words "without premeditation," the State's argument does not address the prejudice created by the insertion of the language that second degree murder be committed intentionally, but "without malice." While malice is not an element of the offense of second degree murder, an instruction to the jury that the State was required to prove, as an element of the offense, that the defendant acted "without malice" creates uncertainty regarding the essential element of intent, which is important to distinguishing between second degree murder and at least one prong of the lesser offense of manslaughter. See, *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001), *cert. denied* 534 U.S. 1033, 122 S. Ct. 573, 151 L. Ed. 2d 445; *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

Because of both the potential for confusion created by the misstated jury instruction No. 3 and the actual confusion exhibited by the question from the jury, we conclude that the district

court's error is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. See *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999). This plain error on the part of the district court requires that Davlin's conviction for second degree murder be reversed and the cause remanded for a new trial on that charge.

The district court's error with respect to second degree murder, however, does not affect Davlin's conviction and sentence for first degree arson. We therefore proceed to consider Davlin's remaining assignments of error, as they relate to that charge.

2. Destruction of Evidence

The initial autopsy was performed by Dr. John Porterfield, who subsequently retired, but at the time, was a Lancaster County coroner's physician. Porterfield testified that his initial opinion, after gross inspection of the body, had been that Ligenza died in the fire, but that he changed his mind after seeing microscopic slides and the toxicology report and concluded that Ligenza had been killed by manual strangulation before the fire. The key question underlying this issue is whether or not Ligenza was alive at the time of the fire or was killed before the fire. Davlin contends that examination of Ligenza's larynx and trachea, which were lost, would reveal that Ligenza died in the fire and not before it. Davlin argues that proof Ligenza died in the fire is essential support for Davlin's theory that the fire was not intentionally set, but was an accident caused by Ligenza's smoking in bed.

After the autopsy, Ligenza's body was recalled from the funeral home to be sent to Dr. Thomas Bennett in Iowa for further testing. Dr. Matthias Okoye, another Lancaster County coroner's physician, was responsible for the transfer because Porterfield was out of town at the time. Okoye testified that as a matter of procedure, certain internal organs were removed during autopsies and stored in Formalin in a "gross specimen bucket." Okoye testified that the bucket was available to Bennett, but that Bennett did not ask for it. The larynx and trachea were not with the body when it was delivered to Bennett and have not been found since then. Microscopic slides of sections of the trachea are available, but no slides or photographs of the larynx were taken.

Porterfield testified that the larynx would have been dissected out of the body as a matter of procedure, but that Porterfield did not know what happened to it. Okoye testified that organs stored in Formalin in the gross specimen bucket were kept, in forensic cases, for 3 years, and then were disposed of as a matter of procedure because they represented a biohazard. Okoye testified that he had looked for the bucket in Ligenza's case on request and that it was no longer available. Since the autopsy had been performed in September 1993, Okoye testified that the removed organs would have been routinely destroyed some time in 1996. Okoye testified at trial that the missing evidence might have been in a bag sewn inside the body before the body was sent to the funeral home, but that he did not know if that was the case. Elgin Kuhlman, then a detective sergeant with the criminal division of the Lincoln Police Department, testified at trial that he was the officer who accompanied the body to Iowa for Bennett's examination and that it was his understanding that the larynx had remained at the then Lincoln General Hospital.

The record contains a draft report dictated by Michael Avery, the pathologist's assistant who participated in the autopsy. A typewritten entry on the report indicated Ligenza's aspiration of soot, which would indicate Ligenza was breathing at the time of the fire. This entry on the draft report was crossed out by Porterfield, who testified that he crossed it out because he never made that observation.

The draft also shows a handwritten entry indicating "marked laryngeal edema and blistering," which would be consistent with aspiration of hot gases and death in the fire. This entry was also crossed out by Porterfield, who could not recall why he would have written that observation. Porterfield testified that the routine procedure in preparing such reports was for the pathologist's assistant to prepare and edit a draft report, which was then brought to the coroner's physician for edits and changes that the physician thought appropriate. Porterfield testified at trial that the handwritten entry had been made as he and Avery were going over the report and that Porterfield had made the entry at Avery's suggestion but immediately crossed it out because Porterfield had not made such an observation. Porterfield noted at trial that allergies can cause an edemic look in the larynx and

that mucous in the larynx can be confused with blistering, and he thought that that was what had happened in this case.

In addition, the record contains an affidavit used to obtain a search warrant, in which the averring officer states that Porterfield had concluded that Ligenza had died of a laryngeal spasm as a result of the fire. Porterfield did not recall making a statement to that effect, but again stated that his preliminary conclusion that Ligenza had been killed in the fire was later superseded by closer inspection of the body.

The record contains conflicting evidence regarding the cause of Ligenza's death and the importance of examining the larynx and trachea. Porterfield and Bennett concluded that Ligenza had been killed by manual strangulation prior to the fire. Dr. Robert Bux, deputy chief medical examiner for Bexar County, Texas, was hired by Davlin's counsel and examined the records of Porterfield's and Bennett's autopsies and Okoye's prior testimony. Bux opined that the evidence was insufficient to reach any conclusions regarding the cause of death, but that in his opinion, manual strangulation could not have been the cause of death. Bux stated that he would have liked to examine the larynx for more evidence. Bux testified at trial that he could not rule out a death due to laryngeal spasm because neither the larynx nor photographs of the larynx were available to review.

In contrast, Dr. Robert Gillespie, director of the burn center at the combined University of Nebraska and Clarkson hospitals in Omaha, testified that it was unnecessary to examine the larynx to rule out death by fire or laryngeal spasm. Gillespie was asked by the Lincoln Police Department to examine Ligenza's body at the funeral home. Gillespie testified that based on this examination and his review of the autopsy records, he had concluded that Ligenza was dead before the fire. Gillespie testified that it was unnecessary to examine the larynx because there was no evidence of soot or burns inside the mouth or nose, which ruled out inhalation of hot gases as a cause of death. Gillespie stated that evidence of the inhalation of hot gas would be visible on the microscopic slides of the trachea which had been preserved, but that the slides showed no such evidence. Gillespie also noted the lack of swelling in Ligenza's extremities and the condition of melted blue plastic material found on Ligenza's body; Gillespie

stated that these indicated that during the fire, the skin had no circulation and was unable to respond to the heat. Gillespie testified at trial that the fire had been caused by a flammable liquid.

(a) § 29-1913

Section 29-1913 provides:

> (1) When in any felony prosecution or any prosecution for a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, the evidence of the prosecuting authority consists of scientific tests or analyses of ballistics, firearms identification, fingerprints, blood, semen, or other stains, upon motion of the defendant the court where the case is to be tried may order the prosecuting attorney to make available to the defense such evidence necessary to allow the defense to conduct like tests or analyses with its own experts. The order shall specify the time, place, and manner of making such tests or analyses by the defense. Such an order shall not be entered if the tests or analyses by the defense cannot be made because of the natural deterioration of the evidence.
>
> (2) If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority shall not be admitted into evidence.

We first note that the only objections raised at trial to the admission of the State's expert medical testimony regarding the cause of Ligenza's death were on the basis of foundation. Davlin made a motion in limine on the basis of § 29-1913 and again presented the issue in the context of his motion for new trial, but did not make a timely objection at trial to the State's evidence on the basis of § 29-1913.

[16-18] A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury; it is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence; rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the

matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). As a consequence, when a court overrules a motion in limine, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered. *Id.* Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *Id.*

The relief sought in connection with Davlin's motion in limine was the exclusion of the State's evidence regarding the autopsies conducted on Ligenza's body. As noted, however, Davlin did not object to that evidence at trial on the basis of § 29-1913. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Consequently, Davlin did not properly preserve the issue of whether the evidence should have been excluded on that basis.

We nonetheless observe that even had Davlin properly preserved his claim of error, it would be without merit. Davlin sought to exclude the whole of the State's autopsy evidence on the basis that some parts of the body were unavailable. However, the statutory language clearly refers to exclusion of the "tests or analyses" performed on the evidence that is unavailable to the defense. Consequently, because Ligenza's larynx was unavailable to the defense, the remedy provided by § 29-1913(2) would be to exclude the State's use of tests or analyses of the missing evidence—specifically, the larynx.

Thus, even if the unavailable evidence in this case was within the scope of § 29-1913, the remedy provided by the statute was not the exclusion of the entire autopsy, but simply the exclusion of testing or analysis of the unavailable evidence. The effect of § 29-1913(2) is to level the playing field when evidence is unavailable and prevent the prosecuting authority from making use of evidence that was not available to the defense. As noted above, however, the State's experts did not rely on evidence of the condition of the larynx specifically and based their conclusions on

examination of other parts of the body. Only Porterfield had the opportunity to view the larynx before it was lost, and Porterfield's conclusion that Ligenza died by manual strangulation prior to the fire was based on injuries found by microscopic examination of the strap muscles of the neck, the lack of soot or staining in the mouth and nose, a lack of the cherry red discoloration of internal tissues usually associated with carbon monoxide inhalation, and toxicology reports showing no significant amount of carbon dioxide in the blood. The "tests or analyses" presented by the State at trial did not rely on the evidence that Davlin complains was unavailable. Davlin was not entitled to the broad relief he requested, and the State did not present tests or analyses of the unavailable evidence that would have been subject to exclusion under § 29-1913(2).

Even if Davlin had preserved the issue of exclusion under § 29-1913(2), the district court did not err in refusing to grant Davlin the relief he requested. Compare *Merrill, supra* (objection to exhibit as whole properly overruled where part of exhibit is admissible). Davlin's third assignment of error is without merit.

(b) Due Process

[19] Davlin argues that the charges against him should have been dismissed because his right to due process under the state and federal Constitutions was violated by the State's failure to preserve relevant evidence. Because the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution, we apply the same analysis to Davlin's state and federal constitutional claims. See, *State v. Hookstra, ante* p. 116, 638 N.W.2d 829 (2002); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

[20-22] Under certain circumstances, the Due Process Clause of the 14th Amendment may require that the State preserve potentially exculpatory evidence on behalf of a defendant. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999), citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). It is uncontroverted, however, that " 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " *Castor*, 257 Neb. at 590,

599 N.W.2d at 214, quoting *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). See, also, *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989). A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error. See, *U.S. v. Gomez*, 191 F.3d 1214 (10th Cir. 1999); *U.S. v. Weise*, 89 F.3d 502 (8th Cir. 1996).

In the instant case, the district court's determination that Davlin failed to show bad faith on the part of the State was not clearly erroneous. As set forth above, the record indicates that the missing evidence in this case was destroyed as a matter of routine procedure for medical reasons. This procedure, while certainly unwise in cases where a criminal investigation is ongoing, shows no evidence of bad faith on the part of the State, nor is there any other indication in the record that the missing evidence was misplaced or destroyed in bad faith.

Moreover, Davlin provides no explanation of why the State would have intentionally destroyed the evidence at issue. Even had the missing evidence shown that Ligenza was killed in the fire, instead of before the fire began, the State would still have been able to present evidence that the fire was intentionally set and that Davlin was the person responsible. In other words, while the missing evidence might have changed the State's theory of the case, it would have done little to undermine the evidence presented by the State that established Davlin's culpability for the killing. If anything, Davlin would have been prejudiced, and not exculpated, by the suggestion that Ligenza was alive when doused with a liquid accelerant and set on fire.

Because Davlin did not show that the destruction of the evidence was done in bad faith, he did not show that his constitutional rights to due process were violated by the State's failure to preserve the evidence. The district court's determination to that effect was not clearly erroneous. Davlin's fourth assignment of error is without merit.

(c) Missing Evidence Instruction

Davlin requested the following jury instruction, which was refused by the district court:

> If you find that the state has has [sic] lost evidence important to your determination in this case, then you may infer that the missing evidence would have been unfavorable to the state. However, you are not required to do so. You should consider the degree of negligence or bad faith involved, the importance of the evidence lost, and other evidence that may have been adduce [sic] at trial.

[23,24] 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. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. *Id.*

The intentional destruction of evidence is usually referred to as "spoliation." See *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979). When spoliation is established, the factfinder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction. *Id.* The rationale of the rule is that intentional destruction amounts to an admission by conduct of the weakness of one's own case; thus, only intentional destruction supports the rationale of the rule. See *id.* An adverse inference drawn from the destruction of evidence is predicated on bad conduct. *U.S. v. Wise*, 221 F.3d 140 (5th Cir. 2000), *cert. denied* 532 U.S. 959, 121 S. Ct. 1488, 149 L. Ed. 2d 375 (2001).

Thus, courts that have considered the issue have generally concluded that the spoliation inference is not appropriate when the destruction was not intentional. See, e.g., *U.S. v. Wise, supra*; *Randolph v. State*, 36 P.3d 424 (Nev. 2001); *Jackson v. State*, 791 So. 2d 830 (Miss. 2001); *Patterson v. State*, 356 Md. 677, 741 A.2d 1119 (1999); *State v. Vanover*, 721 A.2d 430 (R.I. 1998); *State v. Steffes*, 500 N.W.2d 608 (N.D. 1993); *People v. Cooper*, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (1991) (en banc); *State v. Langlet, supra*; *Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998). The same rule has been applied in criminal and civil cases. See, e.g., *Spesco v. General Elec. Co.*, 719 F.2d 233 (7th Cir. 1983). But see, e.g., *State v. Fulminante*, 193 Ariz. 485, 975 P.2d 75 (1999); *Lolly v. State*, 611 A.2d 956 (Del. 1992).

> "It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator. *Such a presumption or inference arises, however, only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent*."

(Emphasis in original.) *Jackson*, 791 So. 2d at 838, quoting *Tolbert v. State*, 511 So. 2d 1368 (Miss. 1987).

The defendant is still permitted, when relevant evidence has been destroyed or is not presented, to use the absence of that evidence against the State. Davlin made such arguments to the jury in this case and used the missing evidence as a basis for cross-examining the State's witnesses and as foundation for the testimony of his own expert witness. Many inferences may be drawn from a missing piece of evidence; however, emphasis on one possible inference, communicated to the jury as part of the court's binding jury instructions, creates the danger that the jury may give that inference undue weight. See *Patterson, supra*. At the very least, a trial judge's jury instruction may have the effect of overemphasizing just one of the many proper inferences that a jury may draw. *Id.* Absent a showing of bad faith on the part of the State, such emphasis is unwarranted.

[25] We hold that an instruction on the inference that may be drawn from spoliation of evidence is appropriate only where substantial evidence exists to support findings that the evidence had been in existence, in the possession or under the control of the party against whom the inference may be drawn; that the evidence would have been admissible at trial; and that the party responsible for the destruction of the evidence did so intentionally and in bad faith. See *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979). In the instant case, assuming that Davlin's proffered instruction was a correct statement of the law, Davlin has failed to meet his burden of showing that the instruction was warranted by the evidence.

As discussed above, the record did not indicate that the destruction of the missing evidence was intentional or made in

bad faith. Instead, the record indicates that the evidence was destroyed for safety reasons as a matter of hospital routine. Consequently, the evidence did not support an inference that the destroyed evidence would have been unfavorable to the State, and the district court did not err in refusing Davlin's requested instruction to that effect. Davlin's fifth assignment of error is without merit.

3. Exclusion of Evidence

Davlin sought to present evidence that R.G., a resident of the other apartment in the duplex, had been accused of breaking into Ligenza's apartment in July 1993 for the purpose of sexually assaulting another woman, since deceased, who was at the time Ligenza's roommate. During cross-examination of R.G., Davlin sought to question R.G. regarding the allegation. Davlin's offer of proof, generally, indicated that Davlin sought to adduce testimony that Ligenza's former roommate had reported a break-in to the police and that R.G. had been accused. Furthermore, R.G.'s fingerprints were found on a container of charcoal lighter fluid in the shared entryway of the building. R.G. admitted ownership of the charcoal lighter fluid and testified that he used it to grill on the patio. Davlin argued that R.G.'s testimony regarding the allegation would be relevant to R.G.'s motive and opportunity to kill Ligenza. The district court sustained the State's relevancy objection.

[26,27] It should be noted that although the parties' briefs discuss Neb. Evid. R. 404, the only issue presented at trial was whether the proffered evidence was relevant. On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court. See *State v. Bray*, 243 Neb. 886, 503 N.W.2d 221 (1993). Furthermore, the question whether evidence is relevant for any purpose, pursuant to Neb. Evid. R. 401 and 402, is preliminary to the question whether the evidence is relevant for a proper purpose as determined pursuant to rule 404. See, *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998); *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). We therefore consider the issue presented to the district court—whether the proffered evidence was relevant.

[28-30] 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. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001). Evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant. *Id.*

Davlin sought to cross-examine R.G. in an attempt to implicate R.G. for killing Ligenza. Obviously, facts which effectively implicated another person for the crime of which Davlin was accused would exculpate Davlin and be relevant to facts at issue in the case. However, the facts Davlin sought to adduce from R.G. did not implicate R.G. in the death of Ligenza and thus were not relevant for that purpose.

Davlin sought to adduce testimony from R.G. that R.G. had been accused of breaking into Ligenza's apartment for the purpose of assaulting Ligenza's former roommate, who was deceased by the time of trial in this case. Davlin did not proffer any evidence establishing that such a break-in had actually taken place, nor did Davlin proffer evidence that R.G. actually committed a break-in or had been charged with such an offense. Davlin only proffered testimony that R.G. had been accused, by someone else, of a break-in directed at Ligenza's former roommate. Even if Davlin proved that the accusation had been made, the existence of such an accusation is simply not relevant to whether someone other than Davlin committed the offenses charged in the instant case.

The district court did not abuse its discretion in excluding Davlin's proffered evidence on the basis of relevance. Davlin's sixth assignment of error is without merit.

4. Fire Experts' Testimony

The State presented testimony from Ken Scurto, a fire investigator for the State Fire Marshal's office, and Brian Nehe, who was then a fire inspector for the city of Lincoln. Both opined that the fire in this case started on the mattress in the bedroom and was intentionally set. Scurto had been trained in fire investigation, including several classes at the National Fire

Academy in Emmitsburg, Maryland. Scurto testified that he was an expert in fire investigation and postblast scene investigation. Nehe testified that he had been trained as a fire investigator by the National Fire Academy and at seminars provided by the International Association of Arson Investigators; the Bureau of Alcohol, Tobacco, and Firearms; and the Omaha Fire Department.

Scurto stated that he arrived at the scene of this fire before any debris had been removed from the room. Scurto testified that based on the heat lines visible throughout the bedroom, he determined that the fire centered on the bed. Scurto observed that the carpet was generally intact and that nothing was wrong with the building's furnace. He noted the absence of reactive chemicals, the lack of explosives or explosive devices, and the lack of evidence of any electrical source of ignition. The mattress, however, was almost completely consumed except for the springs and metal frame.

Scurto testified that after a 3- or 4-hour observation of the room, he and Nehe obtained a search warrant because they felt they had eliminated accidental sources of ignition for the fire. Scurto concluded, because the mattress was too fully consumed and because the fire had burned too hot for an accidental fire given the available fuel, that the fire had started on the bed and had been intentionally set.

Scurto specifically testified that there was no smoke damage in the room that was consistent with the smoldering fire that would have been expected from an accident such as smoking in bed. Scurto stated that because of the severe fire damage to the mattress and body, the fire must have been quick and hot and could not have been a smoldering fire.

Scurto further testified that the pattern of heat concentration around the center of the mattress meant something had concentrated the heat and that the pattern indicated an ignitable liquid. The State also presented evidence that accelerant traces were found on samples of material taken from the mattress and bedroom and that the traces were chemically very similar to the container of charcoal lighter fluid found in the building entranceway.

Nehe testified that it was evident from the burn damage in the room that the fire had started on the bed. Nehe confirmed

Scurto's testimony that there was not evidence of the soot and smoke that would be expected from a fire started by a cigarette. Nehe stated that the damage and fire patterns pointed to the bed as the area of origin and that the fire had burned too quickly for an ordinary mattress fire; thus, in his opinion, the fire had been started intentionally.

[31] We first note that at trial, Davlin's objections to the opinion testimony of Scurto and Nehe were general objections on the basis of insufficient foundation and did not specify which aspects of foundation Davlin thought were lacking. Given several hundred transcribed pages of foundational testimony, Davlin's general objections are far from helpful. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994). Neither of those criteria is met in the instant case, and it is not the function of an appellate court to scour a sizable record looking for unidentified foundational defects.

Even when the inquiry is confined to the argument set forth in Davlin's appellate brief, it is evident that Davlin's complaints go to the weight, and not the admissibility, of the questioned testimony. Davlin argues primarily that Scurto and Nehe formed their opinions without considering certain evidence that was found at the scene of the fire, particularly a cigarette lighter, aerosol can, and foam that may have come from a polyurethane mattress. Davlin also argues that Scurto and Nehe did not properly consider the fact that Ligenza was a smoker.

[32-34] An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000). As a general rule, however, the opinion of an expert witness is properly admitted into evidence where the basis of the opinion and the facts on which it is based are before the jury, and the opposing party has the opportunity to cross-examine the witness as to these foundational matters. See, *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899

(1984). 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. See, *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998).

Our review of the record leads us to conclude that the opinions of Scurto and Nehe were adequately supported by the foundation summarized above. The fact that there is evidence in the record that could lead to a different conclusion does not render the opinions inadmissible; rather, it provided Davlin with a basis for cross-examination of the expert witnesses and argument to the jury regarding the weight to be given to their opinions. Davlin presented no expert testimony to either contradict the conclusions reached by Scurto and Nehe or criticize the way in which Scurto and Nehe reached those conclusions.

Considering all of the circumstances, we cannot say the district court abused its discretion in overruling Davlin's general objections to the foundation for the testimony of Scurto and Nehe. Davlin's attacks on that foundation were properly directed at the weight to be given the testimony by the trier of fact, and not the admissibility of the evidence. Davlin's seventh assignment of error is without merit.

5. Habitual Criminal

Section 29-2221(1) provides, as relevant:

> 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 . . . .

One of the felonies on which the district court's habitual criminal finding was based in the instant case was a 1981 Iowa

conviction for sexual assault in the second degree. With respect to the term of imprisonment, the sentencing order provides that Davlin was committed to the Iowa Division of Adult Corrections "for a period not to exceed twenty-five years." Because the Iowa sentence did not specify a minimum term, Davlin argues that it is not a sentence for a term of "not less than one year" within the meaning of § 29-2221(1).

[35] The statutory reference in § 29-2221(1) is to the "term" to which a defendant is sentenced, not the time or number of days the defendant is actually incarcerated. Therefore, it is the term of a defendant's prior sentences, not time actually served, which controls applicability of the habitual criminal penalty. *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), *overruled on other grounds, State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990).

In *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982), the defendant was sentenced as a habitual criminal on the basis of two convictions, one from Idaho and one from Oregon, neither of which established a minimum term of at least 1 year. This court affirmed the sentence, stating:

> The habitual criminal act is not a separate offense but, by its terms, provides for the enhancement of the sentence on the principal charge with a minimum sentence of 10 years and a maximum sentence of 60 years for each conviction committed by one found to be an habitual criminal even though, absent conviction as an habitual criminal, the minimum or maximum sentence might be less. . . .
>
> . . . [I]t is clear the fact that the Idaho and Oregon sentences and commitments do not set a minimum of at least 1 year does not disqualify them from consideration in determining whether defendant is an habitual criminal. The statute provides only that a pardon on the basis of innocence results in the exclusion of a conviction and commitment of at least a year. No showing was made that defendant was pardoned by either Idaho or Oregon for any reason whatsoever.
>
> We agree with the rationale of *Haley v. Hollowell*, 208 Iowa 1205, 227 N.W. 165 (1929), that a prior sentence of 1 to 7 years' imprisonment satisfied Iowa's habitual crimi-

> nal statute's requirement that a prior sentence be for a term of "not less than three years," inasmuch as the defendant "might have served the full seven years." We find no error in this case. The proceedings before the trial court were fair and reasonable and established defendant's identity as an habitual offender. We determine that the judgment of the trial court must be affirmed.

(Citations omitted.) *Luna*, 211 Neb. at 635, 319 N.W.2d at 740.

Davlin concedes that *Luna* is controlling in the instant case and suggests that *Luna* should be overruled. We decline to do so. Based on *Luna*, the district court did not err in relying on Davlin's Iowa conviction in sentencing Davlin as a habitual criminal. Davlin's final assignment of error is without merit.

VI. CONCLUSION

Because the district court committed plain error in incorrectly instructing the jury on the essential elements of second degree murder, Davlin's conviction on that count is reversed and the cause is remanded for a new trial consistent with this opinion. We note that because the jury acquitted Davlin of first degree murder, the Double Jeopardy Clause bars the State from retrying Davlin for that offense, but does not prevent the State from proceeding with a new trial on a charge of second degree murder, as the evidence at this trial was sufficient to support Davlin's conviction. See, *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *cert. denied* 532 U.S. 1019, 121 S. Ct. 1957, 149 L. Ed. 2d 753 (2001); *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). Because Davlin's other assignments of error are without merit, his conviction for first degree arson and resultant sentence of 20 to 60 years' imprisonment are affirmed.

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

STATE OF NEBRASKA, APPELLEE, V. CAROL HYNEK, APPELLANT.

640 N.W.2d 1

Filed March 1, 2002. No. S-01-106.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **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. **Constitutional Law: Statutes: Proof.** The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
6. **Constitutional Law: Criminal Law: Statutes: Presumptions.** In affording a presumption of constitutionality to legislative enactments, the Nebraska Supreme Court, while construing penal statutes strictly, nonetheless gives them 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. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash.
8. ____: ____. A motion to quash is not appropriate when attacking the constitutionality of a statute as applied.
9. **Constitutional Law: Criminal Law.** The protection provided by the excessive fines clause of Neb. Const. art. I, § 9, is coextensive with that provided by the Eighth Amendment to the U.S. Constitution.
10. ____: ____. The provision in Neb. Rev. Stat. § 60-6,196(8) (Supp. 1999) requiring the convicted person to pay the expense for the treatment which is a portion of the sentencing order is not intended to be a punishment and therefore provides for neither a fine nor a penalty and does not on its face violate the constitutional prohibitions against excessive fines under Neb. Const. art. I, § 9, or disproportionate penalties under Neb. Const. art. I, § 15.

Appeal from the District Court for Dodge County, F.A. GOSSETT III, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed.

William G. Line for appellant.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Carol Hynek was convicted in the Dodge County Court of driving under the influence of alcoholic liquor (DUI). Judgment was entered. Hynek appealed to the district court for Dodge County which noted plain error in the sentencing and remanded the case to the county court. On remand, the county court on October 31, 2000, resentenced Hynek to probation for a period of 6 months and directed her to follow the recommendations contained in a previously administered alcohol assessment and to pay associated costs. Hynek again appealed to the district court which affirmed the conviction and sentence of the county court. Hynek appeals the decision of the district court and challenges the constitutionality of Neb. Rev. Stat. § 60-6,196(8) (Supp. 1999) claiming that § 60-6,196(8) provides for excessive fines and disproportionate penalties. We reject Hynek's facial challenge and affirm the decision of the district court.

STATEMENT OF FACTS

On March 22, 2000, the State filed a complaint against Hynek in county court charging her with DUI in violation of § 60-6,196. On May 9, Hynek filed a motion to quash the complaint. Hynek claimed that § 60-6,196(8) was in violation of various federal and state constitutional provisions including the state constitutional provision against excessive fines, article I, § 9, and the state constitutional provision that penalties must be proportionate to the offense, article I, § 15. On June 20, the county court denied Hynek's motion to quash and entered a plea of not guilty for Hynek. A bench trial was held June 23 on stipulated facts. Hynek was found guilty. Hynek was ordered to report to the probation office for a presentence evaluation and alcohol assessment. The alcohol assessment was completed and recommendations were issued by the counselor on July 7. Hynek was

sentenced on July 11 to 6 months' probation. With respect to treatment, the July 11 order required in general terms that Hynek follow treatment as directed by the probation officer.

Hynek appealed to the district court. The district court found plain error because the sentencing order did not set out the specific assessment recommendations Hynek would be required to successfully complete. On September 8, 2000, the district court vacated the sentence and remanded the case to the county court for further proceedings. On October 31, Hynek was again sentenced by the county court to 6 months' probation. The October 31 order, which gives rise to this appeal, stated that Hynek was to follow the recommendations set forth in the alcohol assessment dated July 7, 2000, which was prepared as part of the presentence evaluation. The assessment recommended outpatient chemical dependency treatment, including 12 individual sessions, 12 to 18 group therapy sessions, and 2 Alcoholics Anonymous meetings per week. The assessment further indicated that the cost of such treatment would be between $2,616 and $3,336 depending on the number of group therapy sessions attended.

Hynek again appealed to the district court. In her statement of errors to the district court, Hynek asserted that the county court erred in failing to sustain her motion to quash and repeated her argument that § 60-6,196(8) was in violation of various constitutional provisions including article I, §§ 9 and 15, of the Nebraska Constitution. She also asserted that the county court erred in "[i]mposing an excessive penalty in requiring [her] to complete the recommendations of the recommended treatment at the approximate cost of $3,036 [sic] which is a penalty grossly disproportionate to the nature of the offense . . . ." The appeal was heard in district court on December 4, 2000. On January 9, 2001, the district court affirmed the conviction and sentence of the county court. Hynek appeals the order of the district court and has filed a notice of constitutional challenge to § 60-6,196(8). On appeal to this court, Hynek limits her constitutional challenge to the state constitutional provisions found at article I, §§ 9 and 15.

ASSIGNMENTS OF ERROR

Hynek asserts that the district court erred in failing to find § 60-6,196(8) in violation of Neb. Const. art. I, §§ 9 and 15.

STANDARDS OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (2000).

[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. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001).

ANALYSIS

We first note that the arguments presented by Hynek regarding the constitutionality of § 60-6,196(8) were posed in *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000). In *Hansen*, however, we concluded that such issues were not ripe for appellate review because at the time of the defendant's sentencing, she had not yet been assessed for alcohol abuse or been ordered to follow through on any alcohol assessment recommendations. In *Hansen*, the county court ordered, as part of the sentencing, that the defendant submit to a substance abuse evaluation and follow the treatment recommendations as directed by her probation officer. We concluded in *Hansen* that because the sentencing order did not specify what treatment the defendant would be directed to undergo or the costs she might incur, we could not determine whether her sentence constituted a disproportionate penalty or other purported constitutional violation. We further concluded in *Hansen* that given the language of § 60-6,196(8), it was plain error for the county court to order an alcohol assessment and to direct compliance with the treatment recommendations as part of the sentencing order without the court's prior approval of the specific recommendations. Instead, we noted that § 60-6,196(8) requires the court to order an alcohol assessment to be completed prior to sentencing and to review the alcohol assessment results prior to sentencing in order to aid in an effective sentencing decision of whether to order the defendant to follow through on the specific treatment recommendations.

The present case does not suffer the same procedural defects as *Hansen*. In this case, following remand, the county court ordered an alcohol assessment to be completed as part of the presentence

evaluation and the assessment results were presented to the county court prior to sentencing. The county court's sentencing order on remand, dated October 31, 2000, which gives rise to this appeal, used language which specified that Hynek was ordered to follow the recommendations contained in the alcohol assessment which had been completed prior to sentencing and to pay the costs associated with treatment. Because the probation sentencing order in the present case refers to the alcohol assessment, which specifies what treatment Hynek was directed to undergo, including the costs of such treatment, the constitutional issues raised by Hynek, if otherwise properly presented, are properly before this court. In this regard, we note that Hynek filed a motion to quash challenging the constitutionality of § 60-6,196(8) prior to entering her plea, thus preserving the constitutional issue in this case. Compare *State v. Kubin, ante* p. 58, 638 N.W.2d 236 (2002).

Hynek challenges the constitutionality of § 60-6,196(8). Section 60-6,196(8) provides as follows:

> Any person who has been convicted of driving while intoxicated shall, during a presentence evaluation, submit to and participate in an alcohol assessment. The alcohol assessment shall be paid for by the person convicted of driving while intoxicated. At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment results at the convicted person's expense in lieu of or in addition to any penalties deemed necessary.

Hynek argues that § 60-6,196(8) violates Neb. Const. art. I, § 9, which provides that no "excessive fines [shall be] imposed," and art. I, § 15, which provides that "[a]ll penalties shall be proportioned to the nature of the offense . . . ." Hynek asserts generally that the statute provides no limit on the punishment that may be imposed by a sentencing judge who may order a convicted person to follow through on the alcohol assessment recommendations at the convicted person's expense. Hynek specifically claims that the statute is unconstitutional because it gives the courts discretion to impose any amount of monetary punishment in the form of costs for treatment without providing any dollar limits to ensure the courts do not impose excessive fines or disproportionate penalties.

[3-6] The burden to clearly demonstrate that a statute is unconstitutional rests upon the party making the claim of unconstitutionality. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *State v. Divis, supra*. In affording a presumption of constitutionality to legislative enactments, we, while construing penal statutes strictly, nonetheless give them 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. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987).

[7,8] A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash. *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). A motion to quash is not appropriate when attacking the constitutionality of a statute as applied. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996).

Hynek has raised a facial challenge to the validity of § 60-6,196(8). She raised the issue in a motion to quash filed prior to her plea, conviction, and sentencing at a time when she did not know what, if any, treatment recommendations she would be ordered to follow or what, if any, expense would be associated with such treatment. On appeal, Hynek does not argue that the treatment, the cost of treatment, or the probation specifically imposed upon her constitute excessive fines or penalties not proportionate to the offense. Instead, she makes a facial challenge that by allowing a judge to order a defendant to follow a treatment program at the defendant's expense, § 60-6,196(8) gives a court "unlimited discretion" to impose a monetary or financial punishment "without any maximum limit." Brief for appellant at 5. Hynek's challenge is a facial challenge to § 60-6,196(8), and her argument is essentially that there is no valid application of the portion of § 60-6,196(8)

which permits the sentencing judge to order the convicted person to pay the expense of treatment.

Hynek argues that § 60-6,196(8) provides "no range, other than infinity," brief for appellant at 6, for the amount of expense a convicted person may be required to bear and that such expense would constitute an "excessive fine" or a "penalty" not in proportion to the nature of the offense. In response, the State argues that the provisions of § 60-6,196(8) pertaining to the expenses of treatment which are challenged by Hynek impose neither a "fine" nor a "penalty," and that therefore, Hynek's constitutional claims based on article I, §§ 9 and 15, are without merit. We agree with the State.

Hynek challenges the portion of § 60-6,196(8) which provides that the sentencing judge may "order the convicted person to follow through on the alcohol assessment results at the convicted person's expense . . . ." We have previously observed that the Legislature's clear intent in passing § 60-6,196(8) was to provide for treatment " 'in lieu of or in addition to any penalties deemed necessary' " and that thus, treatment is an alternative to or in addition to penalties imposed by the sentencing judge. *State v. Divis*, 256 Neb. 328, 334, 589 N.W.2d 537, 541 (1999). We stated in *Divis* that the legislative intent was to allow such imposition "with the objective of treatment rather than punishment." *Id.*

We are obliged to give § 60-6,196(8) 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. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). Reading § 60-6,196(8) in a sensible fashion, the reference to "expense" in § 60-6,196(8) pertains to the "follow through on the alcohol assessment," and, thus, the "expense" in § 60-6,196(8) is incurred by the convicted person to cover the cost of treatment and is ultimately payable to the treatment provider. Rather than a punishment or penalty, the imposition of such cost is "compensatory in nature." See *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 856, 443 N.W.2d 566, 574 (1989).

[9] The state constitutional provision against excessive fines is found at Neb. Const. art I, § 9. The Excessive Fines Clause is found in the Eighth Amendment to the U.S. Constitution. We conclude that the protection provided by the excessive fines

clause of the Nebraska Constitution is coextensive with that provided by the U.S. Constitution. The U.S. Supreme Court has held that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 268, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989). See, also, *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). See, also, *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). We similarly hold that the excessive fines clause in Neb. Const. art. I, § 9, is limited to those fines directly imposed by, and payable to, the State. In the instant case, the "expense" Hynek has been directed to pay is payable to the treatment provider, not to the State, and is not a fine and, a fortiori, not an excessive fine.

We note that Neb. Const. art. VII, § 5, provides that all "fines" and "penalties" shall be apportioned exclusively to the use and support of the common schools. The "expense" incurred under § 60-6,196(8) covers the cost of treatment, is not apportioned to the use of the common schools, and is not imposed on a convicted person as either a monetary "fine" or a monetary "penalty." Although not dispositive, the fact that the Legislature in § 60-6,196(8) did not direct that the moneys therein be apportioned to the schools indicates that it did not intend the "expense" of treatment to be a "fine" or "penalty." See, also, Black's Law Dictionary 647, 1153 (7th ed. 1999) (defining "fine" as "pecuniary criminal punishment or civil penalty payable to the public treasury" and defining "penalty" as "[p]unishment imposed on a wrongdoer, esp. in the form of [a] fine"). Compare *id.* at 598 (defining "expense" as "[a]n expenditure of money . . . to accomplish a result").

[10] The provision in § 60-6,196(8) requiring the convicted person to pay the "expense" for the treatment which is a portion of the sentencing order is not intended to be a punishment, nor does it require a payment to the State. The challenged subsection provides for neither a "fine" nor a "penalty." Such "expense" is accordingly neither an "excessive fine" nor a "disproportionate penalty." Therefore, the provision that the convicted person pay the "expense" of the "follow through on the alcohol assessment" in § 60-6,196(8) does not on its face violate the constitutional

prohibitions against "excessive fines" under article I, § 9, or "disproportionate penalties" under article I, § 15.

CONCLUSION

In this DUI case, Hynek made a facial constitutional challenge to the portion of § 60-6,196(8) which requires the convicted person to pay the "expense" of alcohol treatment. Hynek claimed that such cost is an "excessive fine" under article I, § 9, and a "disproportionate penalty" under article I, § 15. Because the "expense" in § 60-6,196(8) is neither a "fine" nor a "penalty," § 60-6,196(8) does not on its face violate either article I, § 9, or article I, § 15, as claimed by Hynek. We reject Hynek's constitutional challenge and affirm the decision of the district court which affirmed the conviction and sentence for DUI imposed by the county court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT SCHNEIDER, APPELLANT.

640 N.W.2d 8

Filed March 1, 2002. No. S-01-270.

1. **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.
2. **Pleas.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must 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.
3. **Convicted Sex Offender: Sentences.** The duty to register as a sex offender under Nebraska's Sex Offender Registration Act, Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2000), is collateral to a defendant's sentence on the underlying conviction.
4. **Courts: Pleas: Convicted Sex Offender.** A trial court is not required to inform a defendant of the collateral consequence of his or her duty to register as a sex offender under Nebraska's Sex Offender Registration Act, Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2000), before accepting a plea of guilty or no contest, and such pleas are not rendered involuntary or unintelligent because the defendant was not aware of this requirement.
5. **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.

6. **Pleas: Proof.** The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
7. **Courts: Pleas.** A district court does not abuse its discretion by denying a motion to withdraw a plea when such motion is grounded on the court's failure to inform a defendant of a collateral consequence of his or her plea.
8. **Sentences: Appeal and Error.** Sentences within the 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 Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Gerald M. Stilmock, of Brandt, Horan, Hallstrom, Sedlacek & Stilmock, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CONNOLLY, J.

Scott Schneider appeals his convictions and sentences for two counts of attempted sexual contact with a child. The district court overruled his motion to withdraw his pleas of no contest and sentenced him to consecutive sentences of 1 year's imprisonment on each count. Schneider contends that because the court did not advise him that he would have to register as a sex offender, his pleas were not made intelligently, knowingly, and voluntarily. We affirm because the registration requirement under Nebraska's Sex Offender Registration Act (Act), Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2000), is a collateral consequence that did not render his pleas involuntary or unintelligent.

BACKGROUND

On March 6, 2000, Schneider was charged with two counts of sexual contact with a child, a Class IIIA felony. He stood mute on the charges, and his counsel asked that the district court enter pleas of not guilty on his behalf. After a plea agreement, the State filed an amended information charging Schneider with two

counts of attempted sexual contact with a child, a Class I misdemeanor, in exchange for which Schneider agreed to enter pleas of no contest.

At the arraignment on the misdemeanor charges, the court recited the substantive portions of the two counts and asked Schneider if he understood the charges against him. The court advised Schneider that each count constituted a Class I misdemeanor; that the range of penalties for each count was a fine up to $1,000, imprisonment up to 1 year, or both; and that the sentences could run consecutively. The court then asked Schneider if he understood that by pleading no contest, he would be waiving the following rights: the right to a jury trial, the right to confront and cross-examine witnesses, and the right to remain silent and require the State to prove his guilt beyond a reasonable doubt.

After this colloquy, Schneider stated that he was entering his pleas of no contest freely and voluntarily, that he had not been threatened, that no promises had been made to him apart from his plea agreement, and that he was satisfied with his counsel. The State then recited the victims' expected testimony, and Schneider agreed that there was a factual basis for the charges. The court then received Schneider's pleas and found him guilty of both counts of the amended information.

The court did not advise Schneider that he would be required to register as a sex offender before or after receiving his pleas. At the sentencing hearing, Schneider made a motion to withdraw his pleas because he had been advised by his counsel that he would be required to register as a convicted sex offender. Sentencing was deferred until after a hearing on the motion. At the hearing on the motion, Schneider's counsel argued that the court had failed to advise him of the registration requirement. Schneider's counsel did not say whether she had ever advised Schneider of the requirement, only that she thought it was reasonable for him to believe, because of the reduction in the charges from felonies to misdemeanors, that the registration would not apply to him. Counsel also argued there would be no prejudice to the State by allowing Schneider to withdraw the pleas. The State did not address the prejudice issue and argued only that the court was not obligated to advise Schneider of the registration requirement as a matter of law.

The court stated that it was required only to advise a defendant of the penal consequences of his or her plea. The court noted that other jurisdictions had found that the registration requirement was a collateral consequence of the plea and that the Act was not part of the criminal statutes in Nebraska. The court also found that *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998), supported a finding that the registration was a collateral consequence of Schneider's pleas. On these bases, the court overruled Schneider's motion. The court then found that Schneider's offenses were subject to the requirements of the Act and advised him of his duty to register under this law as set forth in his notification form.

Before sentencing Schneider, the court indicated that Schneider had a substantial criminal record, including a charge of contributing to the delinquency of a child which involved circumstances similar to the facts of his current charges. The court then sentenced Schneider to 1 year's imprisonment on each count, to be served consecutively, with credit for time served.

ASSIGNMENTS OF ERROR

Schneider assigns that the district court erred in accepting his no contest pleas and in failing to allow him to withdraw the pleas when he had not made them intelligently, knowingly, and voluntarily. He also assigns that the court abused its discretion in its imposition of excessive sentences.

STANDARD OF REVIEW

[1] 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. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

ANALYSIS

Constitutional Validity of Pleas

Schneider concedes that the court advised him of his constitutional rights and asked him a series of questions to confirm his understanding and waiver of those rights. But he contends that because the court failed to advise him that he would be required to register as a sex offender, the court erred in accepting his

pleas because they were not made intelligently, voluntarily, and understandingly. The State contends that the court's colloquy satisfied all of the criteria for determining that a plea is constitutionally valid.

Nebraska has adopted the U.S. Supreme Court's due process requirements for a validly entered guilty plea delineated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). See *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). Under *Boykin*, a guilty plea must be knowingly and voluntarily entered because the plea involves the waiver of certain constitutional rights. See, also, *State v. Silvers*, 255 Neb. 702, 714, 587 N.W.2d 325, 334 (1998) ("'[g]uilty pleas are "grave and solemn" acts which waive certain constitutional rights, and they therefore must be ". . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"'").

[2] We have held that to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must 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. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000).

Schneider asks this court to analyze the penal nature of the registration requirement under the Act using the intent-effects factors first set out by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). We decline to do so. Those factors set out the analytical framework for analyzing punishment under a double jeopardy or ex post facto challenge, neither of which is a part of this appeal. See, *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (applying intent-effects analysis to both double jeopardy and ex post facto challenges); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998) (explaining history and application of intent-effects analysis for double jeopardy purposes).

[3] We discussed the Act in *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998). In that case, the defendant pled no contest to third degree sexual assault and was sentenced to 1 year of probation. On appeal, he argued that the Act was a violation of the U.S. and State of Nebraska Ex Post Facto Clauses because it potentially increased his punishment for failing to register under the Act. This court held that the Act's "registration requirements are separate and collateral to any sexual offense which the act affects [and] come into play only *after* a conviction is secured." 254 Neb. at 94, 574 N.W.2d at 155. Under *Torres*, the registration requirement is collateral to a defendant's sentence on the underlying conviction.

We have not previously determined whether a trial court's failure to advise a defendant of a collateral consequence of his or her plea of guilty or no contest renders the plea constitutionally invalid. Federal courts and many state courts have adopted a direct-collateral analysis for determining which consequences of a guilty plea a court must advise a defendant of before accepting his or her guilty plea. See, 22 C.J.S. *Criminal Law* § 404 (1989); 5 Wayne R. LaFave et al., Criminal Procedure § 21.4(d) (2d ed. 1999). Under *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), a plea of guilty must stand if entered by a defendant fully aware of the direct consequences of the plea. Direct consequences are those which result in a " 'definite, immediate and largely automatic effect on the range of the defendant's punishment.' " *U.S. v. Amador-Leal*, 276 F.3d 511, 514 (9th Cir. 2002). Trial courts are free to advise defendants of the collateral consequences of their plea, but are obligated only to advise them of the direct consequences, and the failure to inform a defendant of a collateral consequence does not render the plea involuntary or unintelligent. See *State v. Bollig*, 232 Wis. 2d 561, 605 N.W.2d 199 (2000).

We have never adopted this direct-collateral terminology, although we have held that a court is not required to advise a defendant of the possibility of consecutive sentences, probation restrictions, or the possibility of a conviction's being used in a future proceeding to terminate parental rights. See, *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991) (probation restrictions); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879

(1986) (consecutive sentences); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996) (subsequent termination of parental rights).

Conversely, we have held that a court must inform a defendant of the possibility of an increased sentence imposed because of a habitual criminal statute. We have also held that a court must inform a defendant of a mandatory minimum sentence even if the incarceration is mandatory under a probation provision. See, *State v. Van Ackeren*, 234 Neb. 535, 451 N.W.2d 707 (1990) (habitual criminal enhancement of sentence); *State v. Stastny*, 223 Neb. 903, 395 N.W.2d 492 (1986) (mandatory minimum incarceration period under probation provision). Similarly, we have held that trial courts must also advise a defendant if restitution to a victim is a possible consequence of a plea because this type of restitution is a criminal penalty. *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). In general, under Nebraska law, a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of a sentence.

Other jurisdictions have determined that the duty to register under the Act is a collateral consequence of a plea of guilty or no contest and that the court's failure to advise a defendant of this requirement does not invalidate the plea. See, e.g., *State v. Young*, 112 Ariz. 361, 542 P.2d 20 (1975); *People v. Montaine*, 7 P.3d 1065 (Colo. App. 1999); *Nelson v. State*, 780 So. 2d 294 (Fla. App. 2001); *State v. Timperley*, 599 N.W.2d 866 (S.D. 1999).

[4] We conclude that the district court was not required to inform Schneider of the collateral consequence of the duties imposed under the Act before accepting his pleas of no contest and that his pleas were not rendered involuntary or unintelligent because he was not aware of this requirement.

Fair and Just Reason to Withdraw Pleas

Schneider also contends that the district court's failure to inform him of the registration requirement under the Act established a fair and just reason for withdrawing his pleas. He argues that the court erred in denying his motion because it imposed the wrong standard in its disposition of the motion—whether his

plea was constitutionally valid—instead of whether he presented a fair and just reason. The State does not dispute that Schneider was not aware of the registration requirement but contends that the court did not err in denying Schneider's motion to withdraw his plea after finding that the plea was constitutionally valid.

[5,6] 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); *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000). The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Carlson, supra*.

In *Carlson*, we specifically rejected the more liberal disposition standard suggested by the American Bar Association for motions to withdraw a plea before sentencing and stated that a trial court *may in its discretion* permit the withdrawal of a plea before sentencing. See *id*. (noting that American Bar Association suggests that trial court *should* allow defendant to withdraw plea for any fair and just reason before sentencing). See, also, *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

In *Carlson, supra*, the defendant assigned that the district court erred in failing to find that he had established a fair and just reason to withdraw the plea because the court did not ask him if his plea had been induced by any promises. This court held that the colloquy between the court and the defendant was in compliance with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and, therefore, was sufficient to support the district court's determination that the plea was entered freely, intelligently, voluntarily, and understandingly.

> To the extent that [the defendant] claims that the district court failed to make the proper inquiry prior to the time the plea was entered and accepted, the claim is without merit. Accordingly, the district court did not abuse its discretion in denying [the defendant]'s motion to withdraw the plea on the basis of an inadequate allocution . . . .

Carlson, 260 Neb. at 824, 619 N.W.2d at 838.

[7] In this case, we have determined that the district court was not required to inform Schneider of the sex offender registration requirement before accepting his pleas of no contest. In accordance with *Carlson*, the district court did not abuse its discretion by denying Schneider's motion to withdraw his pleas.

Excessive Sentences

Finally, Schneider contends that the court abused its discretion by imposing excessive sentences.

[8] 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. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

Schneider was convicted of two counts of attempted sexual contact with a child, a Class I misdemeanor under Neb. Rev. Stat. §§ 28-201(4)(e) and 28-320.01 (Cum. Supp. 2000). The penalty for a Class I misdemeanor is a maximum of 1 year's imprisonment, a $1,000 fine, or both, with no minimum. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2000). Schneider was sentenced to a term of 1 year's imprisonment on each count, to be served consecutively. His sentences were within the statutory limits. Although Schneider argues that the imposition of consecutive sentences was excessive, the district court noted that the presentence investigation showed that Schneider had a substantial criminal record, including a charge of contributing to the delinquency of a child which involved circumstances similar to facts of his current charges. The district court did not abuse its discretion.

CONCLUSION

We conclude that the district court did not abuse its discretion in denying Schneider's motion to withdraw his pleas or in sentencing him. His convictions and sentences are affirmed.

Affirmed.

SCHWAN'S SALES ENTEREPRISES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY, APPELLANTS, V. ROBERT J. HITZ AND STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEES.

640 N.W.2d 15

Filed March 1, 2002. No. S-01-494.

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 the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation: Second Injury Fund: Records.** Where the evidence is undisputed that an employer had actual knowledge of an obvious preexisting permanent partial disability at the time the worker was employed, the written records provision of Neb. Rev. Stat. § 48-128 (Reissue 1993) does not apply.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded.

Thomas D. Wulff, of Welch, White & Wulff, for appellants.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellee State of Nebraska, Second Injury Fund.

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

CONNOLLY, J.

Schwan's Sales Enterprises, Inc. (Schwan's), and Liberty Mutual Insurance Company (Liberty Mutual) appeal from a decision of a review panel of the Nebraska Workers' Compensation Court determining that the State of Nebraska, Second Injury Fund, was not liable to Robert J. Hitz, who was injured in the course of his employment with Schwan's. The trial judge determined that the Second Injury Fund was liable because Hitz had an amputation below the right knee at the time he was hired by Schwan's and Schwan's had actual knowledge of the amputation. The review panel reversed because Schwan's did not make a

written record of the amputation in accordance with Neb. Rev. Stat. § 48-128(2) (Reissue 1993), and the amputation was not obvious. Because it is undisputed that Schwan's had actual knowledge of the amputation, we reverse the review panel's order determining that the Second Injury Fund was not liable.

BACKGROUND

The facts of this case are undisputed. In 1990, Hitz' right leg was amputated below the knee, and he has worn a prosthesis since that time. In 1995, Hitz applied to Schwan's for a position as a sales route driver. Hitz initially interviewed with Byron R. Lane, a sales manager. Lane observed that Hitz walked with a slight limp, and Hitz explained to him that his leg was amputated below the knee. Lane asked Hitz if he could physically perform the job, and Hitz assured him that he could. Lane also checked to see if Hitz' condition would prevent him from driving under federal Department of Transportation guidelines and found that it did not. In his deposition, Lane stated that he never actually observed Hitz' prosthesis.

After the initial interview, Lane and Robert J. Ludewig, a division manager for Schwan's, met with Hitz at Hitz' home. In his deposition, Ludewig stated that at the time of the meeting, he was aware that Hitz wore a prosthetic limb. The record indicates that although he was aware of it, Ludewig did not actually see the prosthesis. Hitz was hired by Schwan's in November 1995. The record shows that Schwan's did not make a written record in accordance with § 48-128(2), documenting that Hitz had a below-the-knee amputation.

On December 8, 1995, Hitz was injured when he fell while adding oil to the truck that he drove for Schwan's. As a result of the fall, he fractured his right femur and several surgeries were performed on his right leg. Hitz was later diagnosed with reflex sympathetic dystrophy. In June 1998, Dr. Michael H. McGuire, an orthopedic surgeon who treated Hitz, stated that it was unlikely that Hitz would ever regain functional use of his right lower extremity. In addition, he stated that Hitz had reached maximum medical improvement and that he had a disorder that produced a 40-percent whole person impairment and a 100-percent lower extremity impairment. In November 1998, Dr. Michael T.

O'Neil, another orthopedic surgeon who treated Hitz, stated that Hitz was 100 percent permanently disabled. O'Neil stated that Hitz would not have sustained the type of fracture that he did if he had not had a below-the-knee amputation at the time he fell. Hitz has not worked since the day of his accident.

Schwan's and Liberty Mutual brought suit in the Workers' Compensation Court against Hitz and the Second Injury Fund seeking a determination of the rights and liabilities of the parties. The trial judge concluded that Schwan's and Liberty Mutual were liable for all of Hitz' temporary total disability payments and his permanent partial disability payments as a result of his member impairment. The trial judge determined that the Second Injury Fund was liable for all of Hitz' permanent partial disability payments, and the Second Injury Fund sought review. In a two-to-one decision, the review panel reversed, determining that the Second Injury Fund was not liable for any of Hitz' workers' compensation payments because Schwan's did not make a written record to document that Hitz was an amputee. Applying this court's decision in *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981), the review panel concluded that actual knowledge of Hitz' amputation could not support liability on the part of the Second Injury Fund because the amputation was not "obvious." Schwan's and Liberty Mutual appeal.

ASSIGNMENTS OF ERROR

Schwan's and Liberty Mutual assign, rephrased, that the review panel erred in reversing the trial judge's findings regarding the liability of the Second Injury Fund.

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 do not support the order or award. *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

ANALYSIS

Schwan's and Liberty Mutual contend that the Second Injury Fund is liable for Hitz' permanent partial disability. The Second Injury Fund, however, contends that because Hitz' amputation was not obvious, Schwan's was required to document the condition with written records.

At the time of Hitz' date of hire, § 48-128(2), now codified at § 48-128(1)(b), provided:

> In order to qualify under this section, the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.

[3] Both parties rely on our decision in *Akins, supra*. In *Akins*, an employee's arm was amputated at the elbow. The employee was later injured in the course of his employment. Although the employer did not keep written records documenting the employee's injury, the compensation court found that the written records provision was inapplicable to a case where the injury and disability were so obvious as the amputation of an arm. We affirmed and held that when the evidence is undisputed that an employer did have actual knowledge of an obvious preexisting permanent partial disability—an amputation—at the time the worker was employed, the written records provision of § 48-128 does not apply.

In this case, the Second Injury Fund argues that because Hitz wore a prosthesis, his amputation was not obvious, thus necessitating documentation by written records under *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981). We do not read *Akins* so narrowly. Our holding in *Akins* focused on the fact

that there was no factual dispute over whether the employer had actual knowledge of the employee's amputation. As in *Akins*, in this case, there is no dispute that Hitz had an amputation resulting in an obvious limp the day he was hired and that Schwan's had actual knowledge of the permanent partial disability. Lane stated that he discussed the amputation with Hitz and that he checked to see if Hitz' condition would prevent him from driving under federal Department of Transportation guidelines. Likewise, Ludewig stated that he was aware of the amputation. That Hitz wore a prosthesis, thus making his amputation less noticeable, does not mean his employer lacked actual knowledge.

We determine that the findings of the trial judge were not clearly wrong and conclude that the review panel erred in reversing the decision of the trial judge. Accordingly, we reverse the review panel's order determining that the Second Injury Fund was not liable.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
JACK E. HARRIS, APPELLANT.

640 N.W.2d 24

Filed March 8, 2002. No. S-00-686.

1. **Motions to Suppress: Appeal and Error.** Because Neb. Rev. Stat. § 29-115 (Cum. Supp. 2000) commits the determination whether to entertain a motion to suppress made after the commencement of trial to the discretion of the trial court, an appellate court reviews such a determination for an abuse of discretion.
2. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
5. **Rules of Evidence: Other Acts.** The admissibility of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court.

6. **Confessions.** To be admissible, a statement or confession of an accused must have been freely and voluntarily made.
7. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
8. **Confessions.** A defendant objecting to the voluntariness of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his or her confession are actually and reliably determined.
9. **Motions to Suppress.** A person who is aggrieved by a statement taken from him or her which is claimed to be involuntary may move for suppression of that statement.
10. **Motions to Suppress: Waiver.** An objection to a statement which is claimed to be involuntary is waived if it is not raised by a motion prior to trial with the exception that a court may entertain such motions to suppress after the commencement of trial when the defendant is surprised by the introduction of such statements by the State.
11. **Criminal Law: Pretrial Procedure.** Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant.
12. ____: ____. In order that the defendant receive a fair trial, requested and material information must be disclosed to the defendant.
13. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
14. **Motions for Continuance: Evidence.** When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.
15. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
16. **Trial: Evidence: Appeal and Error.** On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
17. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
18. **Records: Appeal and Error.** It is incumbent upon an appellant to supply a record which supports his or her appeal.
19. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
20. **Trial: Evidence: Appeal and Error.** A prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds therefor, unless the grounds are apparent from the context.
21. **Trial: Motions to Strike: Appeal and Error.** The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
22. **Trial: Rules of Evidence.** A true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of evidence. In seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: Tell the court the reason why the evidence is inadmissible.

23. **Motions to Strike: Jury Instructions.** Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.

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

Emil M. Fabian and Barbara Thielen, of Fabian & Thielen, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Jack E. Harris was convicted of murder in the first degree and use of a deadly weapon to commit a felony. The primary issues presented in this appeal are whether Harris was entitled to a hearing on the voluntariness of a statement he gave to police in an unrelated investigation, whether Harris was entitled to a mistrial based on prosecutorial misconduct, and whether the district court erroneously admitted evidence of Harris' prior bad acts. Because we find Harris' claims of reversible error to be without merit, we affirm the judgment of the district court.

II. BACKGROUND

During the summer of 1995, Harris sold a green convertible automobile to Anthony Jones, an Omaha drug dealer. During the same summer, Harris was introduced to Howard "Homicide" Hicks through a mutual acquaintance, Corey Bass. On August 23, 1995, Jones was found dead inside his apartment. The cause of death was a gunshot wound to the head.

In 1996, Harris was incarcerated in the Douglas County Correctional Facility, at the same time as Lee Warren and Tony Bass, Corey Bass' brother. On December 8, 1996, Corey Bass was murdered. Tony Bass assisted authorities in investigating Corey Bass' murder, and during that investigation, Tony Bass told police that while in jail, Harris told Tony Bass that Harris had been involved in the murder of Jones. According to Tony

Bass, Harris said that Jones had been murdered by Harris and someone named "Homicide."

In February 1997, police investigating Jones' murder spoke to Warren. Warren told police that Harris had spoken to Warren about Jones' murder and had told Warren that Jones was killed because he recognized Harris while Harris was robbing Jones.

In May 1997, police arrested Hicks for the murder of Jones. Hicks confessed and said that he and Harris had planned to rob Jones. Hicks said that Harris had killed Jones when Jones recognized Harris during the robbery.

Harris was charged by information with murder in the first degree and use of a deadly weapon to commit a felony. After Harris' first trial ended in a mistrial, Harris was retried. Tony Bass, Warren, and Hicks testified at trial substantially in accord with the statements described above, as did Robert Paylor, another witness who claimed that Harris told him about the murder of Jones. Further pertinent facts will be set forth below in more detail.

Harris was convicted, pursuant to jury verdicts, of murder in the first degree and use of a deadly weapon to commit a felony and was sentenced to life imprisonment on the murder charge and 10 to 20 years' imprisonment on the weapons charge, sentences to be served consecutively. Harris appeals.

III. ASSIGNMENTS OF ERROR

Harris assigns that the district court erred in (1) failing to allow Harris a voluntariness hearing; (2) refusing to grant Harris a mistrial based upon the State's failure to provide Harris' statement pursuant to court-ordered discovery; (3) allowing evidence of other bad acts or crimes in violation of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), and its own prior order; and (4) failing to grant a mistrial based upon the admission of prior bad act evidence in violation of § 27-404 and its own prior order.

IV. STANDARD OF REVIEW

[1] Because Neb. Rev. Stat. § 29-115 (Cum. Supp. 2000) commits the determination whether to entertain a motion to suppress made after the commencement of trial to the discretion of the trial court, an appellate court reviews such a determination

for an abuse of discretion. See *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002).

[2] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Gartner, ante* p. 153, 638 N.W.2d 849 (2002).

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Davlin, supra*. 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. *Id.* The admissibility of evidence under rule 404(2), § 27-404(2), must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

V. ANALYSIS

1. Harris' Statement

Harris' first and second assignments of error relate to the testimony of Leland Cass, an Omaha police detective. Cass was investigating the murder of Corey Bass and, on December 10, 1996, participated with two FBI agents in an interview of Harris regarding Corey Bass' drug dealing activities. During the interview, Harris identified several individuals whom Harris said purchased drugs from Corey Bass. Among those individuals was Hicks, whom Harris indicated was also known as "Homicide." Cass testified at trial that Harris had identified Hicks by the nickname "Homicide" during the December 10 interview. Cass' trial testimony did not reveal the other substance of Harris' statements to police, beyond Harris' knowledge of Hicks and Hicks' nickname.

(a) Voluntariness Hearing

Harris objected to Cass' testimony and argued that he was entitled to a hearing on the voluntariness of this statement. Harris also moved for a mistrial. The district court did not hold a hearing or rule on the voluntariness of the statement. The district court determined initially that Harris had not made a showing

that the defense had not been provided with Cass' police report regarding the December 10, 1996, interview, and thus, the district court concluded that Harris' motion for a hearing was untimely. The district court also observed that the statement was innocuous and that its admission was not prejudicial to Harris. The district court offered Harris the choice of having Cass' testimony stricken from the record or cross-examining Cass on the issue.

Harris chose to cross-examine Cass instead of having the testimony stricken. On cross-examination, Harris elicited testimony from Cass that Harris had not, in the December 10, 1996, interview, admitted to knowing Hicks personally and that Harris had indicated only that he knew Hicks' nickname and knew that Hicks was involved with Corey Bass.

Harris' first assignment of error is that the district court erred in failing to conduct a hearing on the voluntariness of Harris' statement. Harris claims that he was entitled to such a hearing under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and § 29-115.

[6-10] To be admissible, a statement or confession of an accused must have been freely and voluntarily made. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000). A defendant objecting to the voluntariness of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his or her confession are actually and reliably determined. *Jackson, supra.* A person who is aggrieved by a statement taken from him or her which is claimed to be involuntary may move for suppression of that statement. *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). An objection to such a statement is waived if it is not raised by a motion prior to trial with the exception that a court may entertain such motions to suppress after the commencement of trial when the defendant is surprised by the introduction of such statements by the State. *Id.* Specifically, § 29-115 provides, in relevant part:

> Unless claims of a statement being involuntary . . . are raised by motion before trial as provided in this section, all objections to the use of such statements as evidence on

> these grounds shall be deemed waived, except that the court may entertain such motions to suppress after the commencement of trial when the defendant is surprised by the introduction of such statements by the state, and also the court in its discretion may entertain motions to suppress such statements when the defendant was not aware of the grounds for any such motion before the commencement of trial, or in such situations as the court deems that justice may require.

The district court determined that it would not entertain Harris' motion to suppress, as the district court was not satisfied that Harris lacked notice of Cass' testimony. Because § 29-115 clearly commits the determination whether to entertain a motion to suppress made after the commencement of trial to the discretion of the trial court, we will review such a determination for an abuse of such discretion. Compare *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002).

Based on the record before us, we conclude that the district court did not abuse its discretion in determining that Harris' untimely motion should not be considered. The district court was confronted with essentially a "he said, she said" scenario, as the prosecutor stated that Cass' police report regarding the December 10, 1996, interview had been provided to the defense, while defense counsel claimed that the defense had not received the report. Given the record before us, we have no basis to find that the district court abused its discretion in concluding that Harris' showing of surprise was insufficient, particularly given the court's greater familiarity with the course of the proceedings.

We are not in a position to question the veracity of either the prosecution or defense on their contradictory claims regarding the process of discovery. It is possible that the prosecution overlooked the police report of the December 10, 1996, interview and failed to provide it to the defense, and it is equally possible that the defense either misplaced or failed to appreciate the significance of the report once it was received. Given the absence of dispositive proof, we cannot conclude that the district court abused its discretion.

Therefore, Harris' first assignment of error is without merit.

(b) Discovery Violation

Harris' second assignment of error alleges that the State violated a discovery order. Cass authored a police report regarding the December 10, 1996, interview with Harris. The defense claims that this report was not provided to it, in violation of the district court's pretrial discovery order. See Neb. Rev. Stat. § 29-1912 (Reissue 1995). Harris claims that the district court abused its discretion in failing to grant a mistrial based upon the violation of the discovery order.

[11,12] Upon a defendant's proper request through discovery procedure, the State must disclose information which is material to the preparation of a defense to the charge against the defendant. *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). In order that the defendant receive a fair trial, requested and material information must be disclosed to the defendant. *Id.*

Assuming, without deciding, that Cass' report was within the scope of the district court's discovery order, we first note that the district court concluded that an insufficient showing had been made that Cass' report had not been provided to the defense. As above, the record does not provide this court with a basis for concluding that the district court's determination was an abuse of discretion. We conclude that the district court did not abuse its discretion in failing to grant Harris' motion for mistrial where the court was not persuaded that any prosecutorial misconduct had occurred.

[13,14] Second, Harris has failed to make a showing that a mistrial was necessary to cure the alleged misconduct on the part of the prosecutor. Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *cert. denied* 531 U.S. 843, 121 S. Ct. 109, 148 L. Ed. 2d 67. When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999).

Harris did not ask the district court for a continuance to respond to Cass' report of the December 10, 1996, interview, nor has Harris explained why a continuance would not have been

sufficient to cure any prejudice resulting from the allegedly belated disclosure of the report. Consequently, we conclude that Harris has not shown that a substantial miscarriage of justice has occurred to necessitate a mistrial. See *Bjorklund, supra*. Harris' failure to seek a continuance waived any rights he may have had pursuant to § 29-1912. See *Lotter, supra*.

The district court did not abuse its discretion in denying Harris' motion for mistrial. Harris' second assignment of error is without merit.

2. Prior Bad Acts

Harris' final two assignments of error relate to several colloquies, described below, in which Harris claims that witnesses testified to prior bad acts in violation of § 27-404(2).

[15-17] It should first be noted that none of the statements that Harris claims were admitted in violation of § 27-404(2) were objected to in the district court on those grounds. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). On appeal, the defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *Id*. While we proceed to consider in more detail each of the statements of which Harris complains, we first make clear that Harris has not properly preserved a § 27-404(2) issue with respect to any of the following statements:

(a) Robert Sklenar

Robert Sklenar, an Omaha police detective, testified that Sklenar and Cass had questioned Harris about "this case and another case." After the prosecuting attorney had asked Sklenar another question and Sklenar had answered that question, defense counsel said that he would "object at this point." An off-the-record discussion was held, and examination of Sklenar resumed without the court's making any statement for the record. The statement to which the objection was directed is not apparent from the record.

[18-20] It is incumbent upon an appellant to supply a record which supports his or her appeal. *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). In this instance, neither the basis for the objection nor any ruling on the objection appears in the record. This court has held that a party who fails to insist upon a ruling to a proffered objection waives that objection. *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991). We have also stated that a prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds therefor, unless the grounds are apparent from the context. *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992). As the record before us shows neither the basis for Harris' objection nor any ruling on the objection, we conclude that Harris has waived any error in this regard.

[21] We also note that no motion to strike any offending testimony is reflected in the record. The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. See *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

Furthermore, even if an objection based on § 27-404(2) had been properly preserved, it is apparent that such objection was without merit. Section 27-404(2) provides, as relevant, that "[e]vidence 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." Sklenar's testimony established only that Harris had been questioned regarding "this case and another case." This was not evidence of other "crimes, wrongs, or acts" within the meaning of § 27-404(2).

(b) Tony Bass

Tony Bass testified regarding conversations he had with Harris. The State asked Tony Bass whether Harris told Tony Bass about "other things" besides the murder of Jones. The State elicited testimony that Harris told Tony Bass about "other things" that involved Corey Bass and that Corey Bass was involved in drug sales. Harris objected based on a "[m]otion in limine previously filed and the Court's 402." The objection was overruled.

It should be noted that the record shows 14 pretrial motions that were made at a hearing on August 18, 1997. Among those

motions was a motion based on § 27-404; a motion evidently based on Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608 (Reissue 1995); a motion in limine relating to the subornation of perjury; and a motion in limine relating to the use of "Homicide" as Hicks' nickname. In addition, motions in limine were argued on July 19, 1999, relating to the mention of gang activity, Harris' statements to Sklenar, and the unavailability of certain witnesses. The record does not indicate to which "motion in limine" defense counsel was referring when objecting to Tony Bass' statement.

[22] Because Harris' objection does not identify § 27-404(2) as the basis for the objection, Harris cannot assert that ground for the objection on appeal. Harris' general objection based on the "motion in limine" does not identify which of the many previously filed motions provided the purported basis for Harris' objection. A true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of evidence. In seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: Tell the court the reason why the evidence is inadmissible. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

Furthermore, as with Sklenar's testimony above, Tony Bass' testimony established only that Harris told Tony Bass about "other things" involving Corey Bass, presumably Corey Bass' drug sales. This testimony did not establish any "crimes, wrongs, or acts" on Harris' part within the meaning of § 27-404(2) and was not inadmissible on that basis.

(c) Robert Paylor

Paylor testified that Paylor met with Harris so that Harris could "let [Paylor] know" who had shot Paylor. Harris objected, and an off-the-record discussion was had. Neither the basis for the objection nor any ruling of the court appears on the record. The State's examination of Paylor resumed with the State's instructing Paylor to tell the jury only what Harris said about the murder of Jones.

During Paylor's remaining testimony, Paylor made a comment indicating that Harris told Paylor that "Howard" had shot Paylor. Harris objected that the answer was "nonresponsive" and moved to strike it. Even though Harris did not have standing to

object to an answer being "nonresponsive," because the State was questioning Paylor, see *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966), the district court nonetheless struck the answer and instructed the jury to disregard it. Harris later made a motion for mistrial based on the "unresponsive answer," which was overruled.

[23] We again note, with reference to this testimony, that no § 27-404(2) objection appears in the record, and Harris cannot claim that ground on appeal as the basis for objection. No ruling on Harris' first objection appears in the record, nor does a motion to strike the objectionable testimony. Based on the same principles set forth above, Harris has also waived error in regard to this testimony. Furthermore, with respect to Paylor's second statement, Harris' objection on other grounds was sustained and the testimony stricken. Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). The record presents no basis for concluding that the district court's instruction to the jury to disregard the testimony was insufficient to dispel any prejudice to Harris.

(d) Lee Warren

Warren testified that when police spoke to Warren, Warren gave them "more information than just the incident with Anthony Jones." The record does not indicate what that other information was, or whether it even related to Harris. Harris objected "based on the previous motion in limine and the order of the Court." The objection was overruled. Based upon the reasoning set forth above, we similarly conclude that Harris has waived any claim of error pursuant to § 27-404(2) with respect to this testimony, and even if properly made and preserved, such claim of error would be without merit.

Warren later testified that pursuant to an agreement with the State, Warren's parole would be transferred to a different state "for purposes of safety." Harris objected that the State's question was "leading and suggestive," and the objection was sustained. Harris made no motion to strike Warren's testimony. Later, Warren testified that the State had agreed "[t]o transfer me to

protect myself so I wouldn't end up dead, you know, deceased." No objection was made to this testimony.

Again, Harris waived any claim pursuant to § 27-404(2) by failing to object on that basis. Furthermore, Harris made no motion to strike the offending testimony after his objection to that testimony was sustained, and thus, he has no basis for complaining about the testimony on appeal. See *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). With respect to the second statement made by Warren, Harris waived any claim of error by failing to object at all. In so doing, Harris also rendered harmless any error with respect to Warren's first statement, as it was rendered cumulative by the admission without objection of Warren's second statement to the same effect. See *State v. Kinser*, 259 Neb. 251, 609 N.W.2d 322 (2000).

During closing arguments, the State remarked that Warren was to be transferred to another state "so he doesn't end up dead." Harris objected that "that's improper," the objection was sustained, and the remark was stricken. As nothing in the record suggests that the striking of the State's remarks was insufficient to dispel any prejudice, we conclude that the remarks present no basis for reversal. See *McLemore, supra*.

We conclude that Harris has failed to preserve any objections pursuant to § 27-404(2), but even if preserved, those objections would present no basis for reversal. Having so concluded, we likewise conclude that the district court did not abuse its discretion in denying Harris' motion for mistrial based on the effect of the statements described above. Harris' third and fourth assignments of error are without merit.

VI. CONCLUSION

Harris' assignments of error being without merit, the judgment of the district court is affirmed.

AFFIRMED.

CONNOLLY, J., concurring.

I agree with the majority opinion. I write separately to note that any argument between the prosecution and defense regarding whether Harris was provided with a police report during discovery could have easily been prevented. As the opinion notes, the district court was confronted with a "he said, she

said" scenario. Although the prosecutor stated that the police report had been provided to the defense, Harris' attorney maintained that it had not been received. If the prosecutor had obtained a receipt showing items that were provided to defense counsel, the problem would not have arisen. At the very least, a cover letter sent to defense counsel memorializing items provided could have helped prevent the situation from arising. The prosecutor, by documenting the information provided to defense counsel, can verify that the items were actually delivered and can prevent later issues arising regarding whether the prosecution acted properly during discovery.

Under Neb. Rev. Stat. § 29-1915 (Reissue 1995), the trial court, after granting a discovery order, has some latitude in prescribing the manner, terms, and conditions of the order. The trial court, when issuing an order, should set out the manner in which compliance with the order can be verified. Such an order would impose no hardship on anyone and would eliminate any "swearing matches" between the parties regarding compliance.

First Data Corporation and the Members of the Unitary Group, appellants, v. State of Nebraska, Department of Revenue, and Nebraska State Tax Commissioner, appellees.

639 N.W.2d 898

Filed March 8, 2002. No. S-00-716.

1. **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.
2. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
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. **Federal Acts: Courts.** State courts are obligated to examine any existing federal court cases because, in the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts.

5. **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.
6. **Statutes: Taxation.** Nebraska law requires that tax credits and exemptions be strictly construed.
7. **Statutes: Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to that exemption.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Gerald P. Laughlin, Kent O. Littlejohn, and Frank J. Reida, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

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

GERRARD, J.

First Data Corporation and the Members of the Unitary Group appeal the district court's judgment affirming a ruling by the State of Nebraska, Department of Revenue (Department), concluding that the appellants were not entitled to a sales tax refund pursuant to Neb. Rev. Stat. § 77-4105(3)(a)(i) (Supp. 2001) because its computer software was not "qualified property" as defined by Neb. Rev. Stat. § 77-4103(13) (Cum. Supp. 2000). Because we determine that the definition of "qualified property" includes the computer software at issue, we reverse the judgment of the district court.

BACKGROUND

First Data Corporation, a Delaware corporation, is the parent company of First Data Resources, Inc., a Delaware corporation. First Data Corporation and its subsidiaries and sub-subsidiaries constitute the Members of the Unitary Group, hereinafter referred to collectively as "First Data." First Data is authorized to do business in Nebraska, conducts business in Nebraska, and has

executive offices located in Omaha, Nebraska. First Data is in the business of providing data processing services to its customers.

In 1987, the Nebraska Legislature enacted L.B. 775, codified as the Employment and Investment Growth Act, Neb. Rev. Stat. § 77-4101 et seq. (Reissue 1996, Cum. Supp. 2000 & Supp. 2001), to revise Nebraska's tax structure in order to encourage new business development in the State, retain and expand existing Nebraska businesses, promote the creation and retention of new Nebraska jobs, and attract and retain investment capital in the State. See § 77-4102. L.B. 775 specifically lists the performance of data processing services as a business to be encouraged under the act. § 77-4103(11)(ii).

In 1994, First Data submitted an application with the State through the State Tax Commissioner to utilize the tax incentives set forth in L.B. 775. Under L.B. 775, a taxpayer entering an agreement with the State receives certain income and sales tax benefits if the agreement contains one or more projects which together will result in the investment in qualified property of at least $10 million and the hiring of at least 100 new employees. § 77-4105(2). First Data and the State entered into a project agreement on July 6, 1994, under which First Data qualified to receive the L.B. 775 tax benefits. A letter from the Department indicates that First Data attained the minimum levels of investment and employment required by L.B. 775 in the tax year that ended December 31, 1994.

In 1996, First Data entered into a software enterprise license agreement with Computer Associates International, Inc. (CA), which provided First Data with a nonexclusive license for the use of certain computer software programs (CA software). First Data used the CA software in the performance of its data processing function. First Data received invoices for and paid sales tax with respect to payments made under the licensing agreement with CA.

In 1999, First Data filed a refund claim for overpayment of sales and use tax with the Department. For payments made with relation to the CA software, First Data claimed an overpayment of $1,435,581, which represents the amount of sales tax paid on the first four payments to CA for the CA software. First Data claimed a refund on the basis that the CA software constituted "qualified property" as defined by § 77-4103(12) (Reissue 1996).

The Department denied First Data's claim, concluding that the CA software did not constitute tangible property or a component of tangible property as required by the definition of "qualified property" under § 77-4103(12). On appeal, the Lancaster County District Court affirmed the Department's decision. First Data now appeals the district court's judgment, and pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals, we moved this appeal to our docket.

ASSIGNMENT OF ERROR

First Data assigns that the district court erred in affirming the Department's determination that the CA software, which was the subject of the refund claim, was not "qualified property" as defined in § 77-4103(12).

STANDARD OF REVIEW

[1] 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. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

ANALYSIS

The only issue on appeal is whether computer software is "qualified property" as defined by § 77-4103, such that the appellant is entitled to a sales tax refund pursuant to § 77-4105(3)(a)(i). "Qualified property," formerly defined under § 77-4103(12) (Reissue 1996), is now defined under § 77-4103(13) (Cum. Supp. 2000), though its definition has not changed. The statute defines "qualified property" as

> any tangible property of a type subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986, or the components of such property, that will be located and used at the project. Qualified property shall not include (a) aircraft, barges, motor vehicles, railroad rolling stock, or watercraft or (b) property that is rented by the taxpayer qualifying under the Employment and Investment Growth Act to another person.

§ 77-4103(13).

First Data argues that the CA software is qualified property under two alternatives, either (1) the software is tangible property subject to depreciation, amortization, or other recovery under the Internal Revenue Code of 1986 (the Code) or (2) the software is a component of tangible property subject to depreciation, amortization, or other recovery under the Code. The parties have stipulated that computer software, including the CA software at issue, is subject to depreciation, amortization, or other recovery under the Code and is not subject to any of the exceptions listed in § 77-4103. Thus, First Data's appeal centers solely on whether the CA software constitutes tangible property or is a component of tangible property.

The district court analyzed First Data's appeal by applying the definition of "tangible property" under Nebraska law, rather than the definition of "tangible property" under the Code. The district court based this interpretation on the provision in § 77-4103, which states that unless the context otherwise requires, any term in the statute shall have the same meaning as that used in chapter 77, article 27, of the Nebraska Revised Statutes, as well as on the idea that L.B. 775 merely supplements existing Nebraska tax law rather than rewrites it.

[2,3] First Data urges that the district court should have looked to the Code rather than Nebraska law to define "tangible property." We agree. L.B. 775's statement that it creates "[m]ajor revisions in Nebraska's tax structure" reveals that it supplants, not supplements, previous Nebraska tax law. § 77-4102(1)(b). Additionally, contrary to the district court's ruling, the Legislature clearly intended the term "tangible property" to be defined according to the Code. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). The language of § 77-4103 unambiguously refers to tangible property subject to depreciation, amortization, or other recovery under the Code. The context of

§ 77-4103 requires that we determine the definition of tangible property using the Code. Thus, we shall interpret the term "tangible property" under the Code, not under Nebraska tax law.

The Department concedes (in fact, agrees) that the district court should have characterized the CA software as "tangible" or "intangible" property under the Code rather than under Nebraska tax law. Nevertheless, the Department urges that the district court's decision was correct, even if analyzed incorrectly.

We now turn to the applicable provisions of the Code, I.R.C. §§ 167 and 197 (1994), which deal with the depreciation and amortization of property, respectively, and provide guidance on the definition of tangible property subject to depreciation, amortization, or other recovery for the purposes of § 77-4103.

Section 167 allows a depreciation deduction for the exhaustion, wear and tear, and obsolescence of property used in a trade or business. § 167(a). Section 167(f) contains a provision for the treatment of computer software as property excluded from § 197, but does not provide any guidance in the definition of computer software other than a reference to its definition in § 197(e)(3)(B), cited below, and a notation that the § 167 definition does not include software that qualifies as an amortizable "section 197 intangible."

Section 197 entitles a taxpayer to an amortization deduction with respect to any amortizable § 197 intangible. Section 197(e) states that for the purposes of § 197, the term "section 197 intangible" does not include computer software which "(i) . . . is readily available for purchase by the general public, is subject to a nonexclusive license, and has not been substantially modified, and (ii) . . . is not acquired in a transaction (or series of related transactions) involving the acquisition of assets constituting a trade or business or substantial portion thereof." § 197(e)(3)(A). Section 197(e)(3)(B) defines computer software, for the purposes of § 197(e)(3)(A), as any program designed to cause a computer to perform a desired function; the term "computer software" does not include any database or similar item unless the database or item is in the public domain and is incidental to the operation of otherwise qualifying computer software. The CA software at issue appears, under this definition, to be excluded from the category of § 197 intangibles—First Data

holds a nonexclusive license to use the CA software, and the CA software was not purchased as part of the assets of a trade or business, but, rather, through an enterprise licensing agreement. The Code, however, does not specifically classify software excluded from a "section 197 intangible" as tangible or intangible property.

The U.S. Tax Court's ruling in *Norwest Corp. & Subs. v. Commissioner*, 108 T.C. 358 (1997), is persuasive in resolving this question. In *Norwest Corp. & Subs.*, the Tax Court concluded that software is tangible property for the purposes of federal investment tax credits. The software that the *Norwest Corp. & Subs.* court determined to be tangible property was (1) operating and applications software for the mainframe computer, (2) developed by third parties and sold to Norwest Corporation and its subsidiaries (Norwest) by a nonexclusive license, and (3) delivered to Norwest encoded on magnetic tapes or disks. Similarly, in the instant case, the parties stipulated that First Data's CA software was acquired through a nonexclusive license, delivered on magnetic tapes, and installed and stored on First Data's mainframe computer.

Although the decision in *Norwest Corp. & Subs.* applies specifically to tax investment credits, First Data argues, and we agree, that the definition of software as tangible property in *Norwest Corp. & Subs.* applies equally to the characterization of property for depreciation, amortization, and other recovery through the decision in *Hospital Corp. of Am. v. Commissioner*, 109 T.C. 21 (1997). In *Hospital Corp. of Am.*, the Tax Court determined that tests developed under prior law for the purposes of investment tax credits are applicable in determining what constitutes tangible personal property. Thus, *Hospital Corp. of Am.* links federal investment tax credits to property characterization for depreciation, amortization, and other recovery purposes. Although the Department argues that *Hospital Corp. of Am.* uses the term "tangible property" to distinguish from real property rather than intangible property, this distinction does not defeat the proposition that investment tax credit tests apply equally to classification of property. Indeed, *Hospital Corp. of Am.* specifically holds that tests developed under prior law for purposes of investment tax credits apply when deciding whether, for the purpose of

depreciation recovery classes or periods, the property at issue constitutes tangible property.

[4] While such federal decisions are not binding on this court for the interpretation of the words "tangible property" as used in L.B. 775, we are persuaded by the Tax Court's decisions in *Norwest Corp. & Subs., supra*, and *Hospital Corp. of Am., supra*. " '[W]e are obligated to examine any existing federal court cases because, in the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts.' " *Darr v. Long*, 210 Neb. 57, 66-67, 313 N.W.2d 215, 220 (1981) (quoting *Anderson v. Wagner*, 207 Neb. 87, 296 N.W.2d 455 (1980)). Thus, based on the Tax Court's decisions in *Norwest Corp. & Subs., supra*, and *Hospital Corp. of Am., supra*, we conclude that the CA software, as tangible property, falls within the definition of "qualified property" in § 77-4103(13).

The Department argues that the Tax Court's *Norwest Corp. & Subs.* decision departed from prior decisions finding software to be intangible property for investment tax credit purposes, specifically citing *Ronnen v. Commissioner*, 90 T.C. 74 (1988). *Ronnen*, however, is factually distinguishable from *Norwest Corp. & Subs. v. Commissioner*, 108 T.C. 358 (1997). In *Norwest Corp. & Subs.*, the Tax Court stated that "[i]ntangible intellectual property rights and the tangible or physical manifestations or embodiments of those rights are distinct property interests." 108 T.C. at 375. The software user in *Norwest Corp. & Subs.*, like First Data, acquired only property rights in the manifestation or embodiment of the software, not the underlying intellectual property. The *Norwest Corp. & Subs.* court distinguished *Ronnen* by pointing out that the *Ronnen* software user received the right to commercially exploit and market the software in a particular territory, rather than just a limited license—an acquisition of quasi-intellectual property rights not present in *Norwest Corp. & Subs.*, nor in First Data's situation.

[5] Further, the investment tax credits considered in *Norwest Corp. & Subs., supra*, mirror the type of economic development the Legislature intended to encourage when it enacted L.B. 775. The *Norwest Corp. & Subs.* court stated that investment tax credits were enacted to encourage modernization and expansion

of the country's productive facilities, thereby improving the country's economic potential. Similarly, the Legislature stated that it enacted L.B. 775 "in order to encourage new businesses to relocate to Nebraska, retain existing businesses and aid in their expansion, promote the creation and retention of new jobs in Nebraska, and attract and retain investment capital in the State of Nebraska." § 77-4102(2). 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. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The statute above speaks plainly to the Legislature's intent—to promote economic investment and development in Nebraska.

[6,7] Nebraska law requires that we construe tax credits and exemptions strictly. See, *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to that exemption. *Id.* We conclude that First Data has done so; the Tax Court's decisions and the Legislature's intent in enacting L.B. 775 support First Data's entitlement to a sales tax refund relating to the CA software.

We note that this decision and those of the Tax Court are consistent with decisions made under state tax law in several states, including Nebraska, which concluded that computer software constitutes tangible personal property subject to sales and use tax. See *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000). First Data and the Department stipulated that the CA software was delivered to First Data on magnetic tapes and that the software, once loaded onto First Data's mainframe computer, remains physically detectable there as ordered sequences of binary code. Similarly, in *South Cent. Bell Telephone v. Barthelemy*, 643 So. 2d 1240 (La. 1994), the Louisiana Supreme Court determined that software is not merely an intangible idea but a product given physical existence by being recorded in a physical form that has a

physical manifestation. "The software at issue is not merely knowledge, but rather is knowledge recorded in a physical form which has physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses." *Id.* at 1246. Thus, the Louisiana Supreme Court concluded that software constitutes tangible personal property subject to sales and use tax. See, also, *Wal-Mart Stores, Inc. v. City of Mobile*, 696 So. 2d 290 (Ala. 1996) (software is tangible property subject to local gross receipts tax); *Mark O. Haroldsen, Inc. v. Tax Com'n*, 805 P.2d 176 (Utah 1990) (although information on computer tapes could be transferred without using tangible medium, lease or purchase of information on tapes is subject to use tax as transfer of tangible personal property); *Pa. and W. Va. Supply Corp. v. Rose*, 179 W. Va. 317, 368 S.E.2d 101 (1988) (standardized computer disks are tangible personal property within meaning of state excise tax); *Hasbro Industries, Inc. v. Norberg*, 487 A.2d 124 (R.I. 1985) (computer software is tangible personal property subject to use tax); *Measurex Systems, Inc. v. State Tax Assessor*, 490 A.2d 1192 (Me. 1985) ("canned" software, prepared for variety of uses and suitable for use without modification, is subject to use tax as tangible personal property); *C&S Systems Inc. v. S. C. Tax Com.*, 280 S.C. 138, 311 S.E.2d 717 (1984) (computer software, delivered to purchaser in form that could be seen, felt, and touched, is tangible property subject to sales and use tax); *Chittenden Trust Co. v. King, Comm. of Taxes*, 143 Vt. 271, 465 A.2d 1100 (1983) (computer software tape constitutes tangible personal property for purposes of use tax). We note, however, that none of these state decisions relied on an interpretation of the Code in classifying software as tangible or intangible.

Because of our determination that the CA software constitutes tangible property under the definition provided in L.B. 775, we need not address whether the CA software constitutes a component of tangible property.

CONCLUSION

We conclude that the district court erred in determining that the CA software did not constitute "qualified property" under § 77-4103(13). Therefore, we reverse the judgment of the district

court and remand the cause with directions that the district court enter a judgment that is consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

LAKE ARROWHEAD, INC., APPELLANT, V.
TONY JOLLIFFE, APPELLEE.

639 N.W.2d 905

Filed March 8, 2002. No. S-00-966.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
4. **Easements: Adverse Possession.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
5. **Easements: Proof.** A party claiming a prescriptive easement must show that his or her use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
6. ____: ____. The law treats a claim of prescriptive right with disfavor, and, accordingly, such a claim requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established.
7. **Easements.** A permissive use is not adverse and cannot ripen into an easement.
8. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.
9. **Restrictive Covenants: Property.** Use of a lot for ingress and egress to a residence on adjacent property does not violate restrictive covenants limiting the lot's use to residential purposes.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Mark L. Laughlin and Robert F. Peterson, of Laughlin, Peterson & Lang, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

At issue in this declaratory judgment case is access to an 11.5-acre parcel of land owned by appellee, Tony Jolliffe. The parcel is adjacent to but located outside Lakeland Estates, a gated residential housing subdivision in Blair, Nebraska. Appellant, Lake Arrowhead, Inc., owns and maintains the lake and roads within Lakeland Estates. Due to the existence of a creek along portions of its borders, the parcel can be accessed only from either Summit Drive in Lakeland Estates or Lot 4, Block 32 (Lot 4), in Lakeland Estates, which lot is owned by Jolliffe.

At trial, Lake Arrowhead claimed that (1) Jolliffe did not possess a prescriptive easement onto the parcel via the private road system of Lakeland Estates in general and via Summit Drive in particular and (2) access to the parcel via Lot 4 was in violation of the restrictive covenants of Lakeland Estates. Lake Arrowhead sought declaratory and injunctive relief. For his counterclaim and at trial, Jolliffe claimed that (1) he possessed a prescriptive easement over certain roadways located within Lakeland Estates from which he could properly access the parcel and (2) he did not breach the restrictive covenants of Lakeland Estates by accessing the parcel from Lot 4.

The district court for Washington County entered an order in which it concluded that Jolliffe possessed a permanent prescriptive easement over certain roadways located within Lakeland Estates from which Jolliffe could properly access the parcel and that access to the parcel from Lot 4 by Jolliffe did not breach the restrictive covenants of Lakeland Estates. Lake Arrowhead appeals.

Because Jolliffe failed to establish the element of adverse use, the district court erred in concluding that Jolliffe possessed a prescriptive easement, and we reverse that portion of the district court's order. Because the covenants are not breached by Jolliffe's use of Lot 4 to access the parcel, we affirm that portion of the district court's order.

II. STATEMENT OF FACTS

Lakeland Estates is a gated, residential housing subdivision developed around and surrounding a lake located in Blair, Washington County, Nebraska. Lakeland Estates was platted in the 1970's on farmland purchased from Jim Foley and his brother. Lake Arrowhead is a nonprofit organization consisting of members who own real estate in Lakeland Estates. Lake Arrowhead owns and maintains the lake and the road system within Lakeland Estates.

"Amended and Substituted Protective Covenants," recorded in August 1992, govern the use of lots within Lakeland Estates. Paragraph 1 of the restrictive covenants provides, inter alia, that "[a]ll lots shall be used as residential lots except Lot 1, Block 14, which may be used for commercial use." The covenants do not require that lot owners develop the lots.

In June 2000, the subdivision contained approximately 630 platted lots. The first home was constructed in approximately 1972. There are approximately 250 homes in Lakeland Estates. Some Lakeland Estates property owners own more than one adjoining lot. Many of these owners build their homes on one lot and use the additional lots for other purposes consistent with residential use, including the storage of boats and vehicles.

Jolliffe owns a residence on two adjoining lots in Lakeland Estates, where, at the time of trial, he had lived for approximately 11 years. This residence and these lots are not at issue in this case. In the summer of 1998, Jolliffe bought a separate third lot in the southeastern corner of the subdivision, Lot 4, located at the corner of East Street and Summit Drive in Lakeland Estates. Lot 4 is undeveloped, and its use to access the parcel in question is one of the issues in this case.

In 1999, Jolliffe purchased the approximately 11.5-acre parcel, to which access is the subject of this litigation. The parcel is not part of Lakeland Estates but is adjacent to the southeast portion of the subdivision. At issue in this appeal is Jolliffe's ability to access the parcel through Lakeland Estates, either from Summit Drive or from Lot 4, both of which are located in Lakeland Estates and both of which border the parcel to the north.

The parcel was originally part of a 110-acre tract of farmland. According to trial testimony, in the 1950's, the parcel became

separated from the remainder of the 110-acre tract when the banks of the creek bordering portions of the parcel eroded, widening and deepening the creek. The inaccessible borders of the parcel are currently bounded by a heavily vegetated creek approximately 20 to 30 feet deep and 60 to 100 feet wide. As a result of the changes to the creek, access to the parcel is limited to where it adjoins the southeast border of Lakeland Estates.

John Ehlers purchased the 110-acre tract containing the parcel in question in 1941 or 1942. Foley and his brother owned the farmland which was platted as Lakeland Estates in the 1970's. Foley testified that after the creek widened in the 1950's, the parcel became isolated, and that thereafter, Ehlers accessed the parcel by traveling across the Foleys' farmland where it bordered the northern edge of the parcel. Foley testified that his family would leave 4 to 8 rows of their property uncultivated to allow Ehlers to access the parcel. When asked at trial whether there was "any talk about blocking [Ehlers'] access to the parcel," Foley testified, "No, no, you didn't do that to a neighbor."

In 1977, the entire 110-acre tract including the parcel was sold to William Mammel. Mammel continued to use the parcel for agricultural purposes, and Mammel or someone working on his behalf used the same route Ehlers had used to access the parcel. When Mammel purchased the 110-acre tract including the parcel, the Foleys had sold their farmland and Lakeland Estates had been platted. Accordingly, in order to access the parcel, Mammel, or someone working for him, would drive the farm equipment along Lakeland Estates roads and access the parcel from Summit Drive, a Lakeland Estates road which abutted the northern border of the parcel. During his trial testimony, Mammel identified the route he would take through Lakeland Estates as being from "the east gate off . . . County Road 34 . . . [d]own Trout Street to the . . . end of Lakeshore Drive . . . [t]hen across the dam to the east end of South Lakeshore onto East Street and then [he] would access Summit and from Summit [he] would go onto the parcel." Mammel estimated that he or someone working for him would access the parcel along this same route somewhere from 10 to 40 times per year.

Mammel testified that Lakeland Estates gave him permission to use the subdivision's roads. When asked at trial whether he

had had "any specific discussion with anybody from Lakeland about this access, or did [he] just use it," Mammel responded, "if a gate was closed because it was the wrong time of year or something like that, there would be talk like that, you know, to open the gate." Mammel also testified that Lakeland Estates offered him a key to a gate on the subdivision, so that he could unlock the gate if he needed access to the parcel, "because it was an inconvenience to try to find somebody to unlock the gate."

In 1999, Mammel sold the parcel to Jolliffe. At trial, Jolliffe testified that he bought the parcel in order to construct a residence on the property and incidently to pasture horses and cultivate the land. On April 4, 1997, prior to his purchase of the parcel, Jolliffe attended a Lake Arrowhead board of directors meeting and sought an easement from Lake Arrowhead granting him access to the parcel from Summit Drive. The minutes from the April 4 meeting note Jolliffe's request and further state that "[i]f Tony continued to own a lot in Lakeland he would have automatic access to the [parcel]." However, on May 8, the board of directors voted to deny Jolliffe the requested easement.

Although he had been denied an easement from Lake Arrowhead's board of directors, in the spring of 1999, Jolliffe began to build a road from Summit Drive to the parcel to provide for access to the parcel. On May 4, 1999, the Lake Arrowhead board of directors sent Jolliffe a letter demanding that he stop work on the road and restore the Lake Arrowhead land to its original condition. The letter further stated that "[y]ou are the owner of Lot 4 in Block 32, which can be used for this purpose." After receiving the May 4 letter, Jolliffe accessed the parcel from Lot 4.

Lake Arrowhead filed this declaratory judgment action on November 16, 1999. In count I of its petition for declaratory judgment, Lake Arrowhead sought a declaration that Jolliffe's use of Lot 4 to access the parcel was in breach of paragraph 1 of the restrictive covenant requiring that " 'all lots shall be used as residential lots[.]' " In count II, Lake Arrowhead sought, inter alia, a declaration that Jolliffe did not have a prescriptive easement to use Lakeland Estates property to access the parcel. As part of its requested relief, Lake Arrowhead sought an injunction enjoining Jolliffe from using Lakeland Estates property and Lot 4 to access the parcel.

On December 20, 1999, Jolliffe filed his answer and counterclaim to Lake Arrowhead's petition. In his counterclaim, Jolliffe sought a determination that he had a prescriptive easement to access the parcel from Summit Drive in Lakeland Estates and further finding that he had a right to access the parcel from Lot 4.

On June 13, 2000, the matter came on for trial before the district court. Eight witnesses testified, including Mammel, Foley, and Jolliffe. The parties stipulated to certain facts. A total of 58 exhibits were received into evidence. On August 17, the district court entered its order in favor of Jolliffe and against Lake Arrowhead. The district court concluded that Jolliffe had a permanent prescriptive easement to access the parcel through Lakeland Estates. Specifically, the district court defined the easement as follows:

> [T]he Court finds that [Jolliffe] has established that he . . . as an incident of ownership of the Parcel, is the owner of an easement for ingress to and egress from the Parcel to County Road 34 in Washington County, Nebraska, the nearest public roadway[,] which easement runs, over and across the roadway extending from the east entrance to Lakeland Estates down Trout Lane to the east end of North Lakeshore Drive across the dam to South Lakeshore Drive and from East Street to the Parcel.

The district court ordered that Jolliffe was entitled to use the easement "for purposes of ingress and egress to the Parcel" and enjoined Lake Arrowhead from restricting or blocking Jolliffe's use of the easement. The district court also concluded that Jolliffe's use of Lot 4 to access the parcel did not violate the restrictive covenants of Lakeland Estates.

Lake Arrowhead appeals from the district court's August 17, 2000, order.

III. ASSIGNMENTS OF ERROR

On appeal, Lake Arrowhead has assigned four errors. Lake Arrowhead claims, restated, that the district court erred (1) in finding that Jolliffe had a permanent prescriptive easement across Lakeland Estates roadways for purposes of ingress and egress to the parcel, (2) in placing the burden on Lake Arrowhead to prove that Jolliffe's intended use of the parcel for

residential purposes would not be more burdensome to the servient estate than if used by farm equipment and trucks, (3) in determining the extent of the easement off Summit Drive awarded to Jolliffe, and (4) in finding that Jolliffe was entitled to use Lot 4 as a means of access to the parcel.

Our conclusion that the district court erred in determining that Jolliffe had proved the existence of a prescriptive easement resolves the first three assigned errors. The fourth assigned error is discussed separately.

IV. STANDARDS OF REVIEW

[1,2] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). An action for injunction sounds in equity. *Id.*

[3] In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996).

V. ANALYSIS

1. Prescriptive Easements

(a) Legal Principles Regarding Prescriptive Easements

[4-7] In considering Lake Arrowhead's assignments of error challenging the district court's conclusion that Jolliffe was entitled to a prescriptive easement, we are guided by certain principles. We have noted that " ' "[t]he use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. . . ." ' " *Harders v. Odvody*, 261 Neb. 887, 894, 626 N.W.2d 568, 574 (2001) (quoting *Svoboda v. Johnson*, 204 Neb. 57, 281 N.W.2d 892 (1979)). A party claiming a prescriptive easement must show that his or her

use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985). The law treats a claim of prescriptive right with disfavor, and, accordingly, such a claim requires that all the elements of such adverse use be clearly, convincingly, and satisfactorily established. *Id.*; *Svoboda, supra*. As for the element of adversity, this court has recognized that a permissive use is not adverse and cannot ripen into an easement. *Simacek, supra*.

(b) Jolliffe's Prescriptive Easement Claim

In his counterclaim and at trial, Jolliffe claimed a prescriptive easement over certain of Lakeland Estates' roads, and the district court agreed that Jolliffe was entitled to a prescriptive easement. On appeal, Jolliffe argues that the prescriptive easement was established by virtue of "at least 30 years of use" of such roads by prior owners of the parcel and that such use enures to Jolliffe's benefit. Brief for appellee at 20. Jolliffe bears the burden of proving, by clear, convincing, and satisfactory evidence, each of the elements of his claimed prescriptive easement. See, *Simacek, supra*; *Svoboda, supra*. A review of the record shows that the evidence fails to support the element of adverse use, and accordingly, Jolliffe failed to carry his burden of proving a prescriptive easement by clear, convincing, and satisfactory evidence.

Mammel acquired the parcel in 1977 and testified that he used Lakeland Estates roads to access the parcel from 10 to 40 times a year. However, Mammel testified that he was given permission by Lake Arrowhead to access the parcel by means of the subdivision's roads. When asked at trial whether "somebody from Lakeland Estates actually gave you permission to access the parcel using Lakeland roads," Mammel responded, "[t]hat's correct." Although Mammel further testified that he did not seek permission each time he accessed the parcel through Lakeland Estates, his failure to repeatedly request permission does not amount to adverse use. "[I]f the original use . . . is by permission, it is presumed to so continue; continuance of a use which was originally permissive does not become hostile or adverse by

a mere lapse of time." 25 Am. Jur. 2d *Easements and Licenses* § 65 at 633 (1996).

It is undisputed that Lake Arrowhead erected a locked gate which blocked part of Mammel's route to the parcel and that Mammel was required to wait for a representative of the subdivision to unlock the gate and allow him access. Mammel's request for permission to access the parcel using Lakeland Estates roads and his acquiescence to Lake Arrowhead's use of a locked gate are inconsistent with Jolliffe's claim that Mammel's access to the parcel through Lakeland Estates was adverse. See 25 Am. Jur. 2d, *supra*, § 62 at 630 (defining adverse use as "trespassory use . . . without permission asked or given, disregarding entirely the rights of others").

Permissive use is not adverse. 25 Am. Jur. 2d, *supra*, § 65. See, also, *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985) (stating that defendant did not acquire prescriptive easement when use of land was by permission). " 'To prove a prescriptive right to an easement, *all* the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. . . .' " (Emphasis supplied.) *Svoboda v. Johnson*, 204 Neb. 57, 62, 281 N.W.2d 892, 897 (1979), quoting *Jurgensen v. Ainscow*, 155 Neb. 701, 53 N.W.2d 196 (1952). Under our de novo standard of review, see *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996), we determine that Jolliffe has failed to establish by clear, convincing, and satisfactory evidence that Mammel's use of Lakeland Estates roads was adverse and that consequently, Jolliffe's use based on that of Mammel cannot be deemed a prescriptive easement. Accordingly, we conclude the district court erred in granting Jolliffe a prescriptive easement, and we reverse that portion of the district court's order.

2. Restrictive Covenants

Lake Arrowhead assigns as error the district court's conclusion that Jolliffe's use of Lot 4 to access the parcel did not violate the restrictive covenants of Lakeland Estates. Lake Arrowhead argues that use of Lot 4 as a "thoroughfare" to the parcel upon which Jolliffe is building a residence is not a "[r]esidential use." Brief for appellant at 25. We conclude that there is

nothing in the language of the covenants restricting Jolliffe from using Lot 4 to access the parcel, and accordingly, we affirm that portion of the district court's order.

[8] Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants. *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996). Lake Arrowhead argues that Jolliffe's use of Lot 4 to access the parcel is contrary to the terms of paragraph 1 of the restrictive covenants. Paragraph 1 provides that "[a]ll lots shall be used as residential lots except Lot 1, Block 14, which may be used for commercial use." Based on the language of paragraph 1, we reject Lake Arrowhead's argument that Jolliffe's access to the parcel from Lot 4 violated the covenants.

In *Reed v. Williamson*, 164 Neb. 99, 104, 82 N.W.2d 18, 22 (1957), this court construed the meaning of a restrictive covenant which provided that " '[n]o lot shall be used except for residential purposes.' " We determined that the quoted phrase prohibited the property from being used for a commercial purpose, namely the production of oil and gas. *Id*. In *Reed*, we cited with approval a Texas appellate court's decision which stated:

> "[T]he purpose of restricting lots in additions to cities to residential use is to establish an area free from commercial activity, and thereby enhance the value of such lots as residential property. The word 'residential' as used in a covenant restricting the use of property, is used in contradistinction to 'business' or 'commerce.' "

164 Neb. at 107, 82 N.W.2d at 23 (quoting *Briggs v. Hendricks*, 197 S.W.2d 511 (Tex. Civ. App. 1946)).

In the instant case, it is apparent that the purpose of paragraph 1 of the covenants was to restrict the use of Lakeland Estates lots to residential purposes as opposed to commercial development. Paragraph 1 of the covenants juxtaposes the two uses, "residential" and "commercial." Paragraph 1 restricts the use of all Lakeland Estates lots to residential uses, *except* Lot 1, Block 14, which the covenant specifically provides may be used for a commercial purpose. Furthermore, Lake Arrowhead representatives testified at trial that the restrictive covenants of Lakeland Estates do not require Lakeland Estates lot owners to construct residences on each lot they own or to develop the lots and that

many Lakeland Estates property owners who own more than one adjoining lot construct their homes on one lot and use the adjoining lot for purposes consistent with residential use, including access to their homes, with the apparent acquiescence of the Lake Arrowhead board of directors.

The record reflects that the Lake Arrowhead board of directors twice advised Jolliffe that he could use Lot 4 to access the parcel. In April 1997, when Jolliffe attended a board of directors meeting to request an easement from Lake Arrowhead, the minutes from that meeting note Jolliffe's request and further state that "[i]f Tony continued to own a lot in Lakeland he would have automatic access to the [parcel]." Furthermore, in a May 4, 1999, letter to Jolliffe demanding that he stop using Summit Drive to access the parcel, Lake Arrowhead's board of directors advised Jolliffe that he was "the owner of Lot 4 in Block 32, which can be used for this purpose."

[9] In the instant case, Jolliffe seeks to use Lot 4 to access the parcel on which he proposes to build a residence. Jolliffe is not proposing to use or develop Lot 4 for a commercial purpose, but, rather, for ingress and egress to his residence. There is nothing in Jolliffe's proposed use of Lot 4 which violates the terms of the restrictive covenants. Accordingly, we affirm the portion of the district court's order which concluded that access to the parcel from Lot 4 by Jolliffe did not breach the restrictive covenants.

VI. CONCLUSION

We conclude that Jolliffe failed to offer clear, convincing, and satisfactory evidence of adverse use of Lakeland Estates property for ingress and egress to the parcel, and accordingly, we reverse the portion of the district court's order which granted Jolliffe a prescriptive easement. We further conclude that Jolliffe's use of Lot 4 to access the parcel on which he proposes to build a residence does not violate the restrictive covenants of Lakeland Estates, and accordingly, we affirm that portion of the district court's order which concluded that Jolliffe could access the parcel from Lot 4 without violating the covenant.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE ADOPTION OF LUKE.
B.P. AND A.E., APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.

640 N.W.2d 374

Filed March 8, 2002. No. S-01-053.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **Adoption: Statutes.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
3. **Statutes: Appeal and Error.** 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 lower court.
4. **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.
5. **Adoption.** For an adoption to be valid under Nebraska's adoption statutes, the record must show the following factors: (1) the existence of an adult person or persons entitled to adopt, (2) the existence of a child eligible for adoption, (3) compliance with statutory procedures providing for adoption, and (4) evidence that the proposed adoption is in the child's best interests.
6. **Adoption: Parental Rights.** Reading the adoption statutes in their entirety, it is clear that aside from the stepparent adoption scenario, the parents' parental rights must be terminated or the existing nonterminated parent or parents must relinquish in order for the child to be eligible for adoption by any adult person or persons under Neb. Rev. Stat. § 43-101 (Cum. Supp. 2000).

Appeal from the County Court for Lancaster County: JAMES L. FOSTER, Judge. Affirmed.

Amy A. Miller, of American Civil Liberties Union Foundation of Nebraska, for appellants.

Don Stenberg, Attorney General, and L. Steven Grasz for appellee.

David S. Buckel, Adam L. Aronson, Patricia M. Logue, and Susan Sommer, of Lambda Legal Defense and Education Fund, Inc., Robert F. Bartle, of Bartle & Geier, and G. Michael Fenner for amicus curiae Lambda Legal Defense and Education Fund.

Siegfried H. Brauer, of Brauer Law Office, for amicus curiae Family Research Institute.

James D. McFarland, of McFarland Law Office, for amicus curiae Nonpartisan Family Coalition.

W. Craig Howell, of Domina Law, and Nory Miller and Nichole G. Berner, of Jenner & Block, L.L.C., for amici curiae American Psychological Association et al.

Susan Ann Koenig, of Law Office of Susan Ann Koenig, P.C., L.L.O., for amici curiae The Alliance for Children's Rights et al.

David T. Bydalek for amicus curiae Family First.

Rocky C. Weber, of Crosby Guenzel, L.L.P., and Robert J. Muise, of Thomas More Law Center, for amicus curiae The Nebraska Catholic Conference.

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

PER CURIAM.

NATURE OF CASE

B.P. and A.E. (collectively appellants) appeal from the order of the Lancaster County Court which denied the adoption petition jointly filed by appellants, two nonmarried persons, in which A.E. sought to adopt Luke, the minor biological son of B.P. The outcome of this appeal is controlled by the provisions of the Nebraska adoption statutes, Neb. Rev. Stat. § 43-101 et seq. (Reissue 1998 & Cum. Supp. 2000). The county court correctly concluded that on the record made in this case, Luke was not eligible for adoption due to the absence of a valid relinquishment by B.P. Accordingly, we affirm.

STATEMENT OF FACTS

B.P. is the biological mother of Luke, a minor child born on December 20, 1997. Luke was conceived by artificial insemination using semen from an anonymous donor from the University of Nebraska Medical Center's genetic semen bank. Accordingly, Luke's biological father is unknown and is not a party to this action. For purposes of the Nebraska adoption statutes, Luke was born "out of wedlock."

On October 2, 2000, appellants jointly filed a verified petition in which A.E. sought to adopt Luke. B.P. indicated her "consent"

in the petition and in other supporting documents. B.P. did not file a relinquishment of her parental rights to Luke. To the contrary, she indicated on an affidavit attached to the petition that she did not intend to relinquish Luke. The only relief sought in this proceeding was the adoption of Luke by A.E.

A home study of appellants' household was conducted by an adoption specialist. The specialist recommended A.E.'s adoption of Luke be approved by the court.

On November 14, 2000, trial was held on the adoption petition. Appellants testified in support of the petition. A file, consisting of several documents including the home study, was admitted into evidence. No one entered an appearance, and no evidence was offered in opposition to the petition.

In an order filed December 1, 2000, the county court denied the petition for adoption. The county court concluded that Nebraska's adoption statutes do not provide for "two non-married persons to adopt a minor child, no matter how qualified they are." The county court also concluded that "the statu[t]es permit a single adult person to adopt a child after all necessary consents and relinquishments have been filed." Appellants timely appeal the county court's order denying the adoption petition.

ASSIGNMENT OF ERROR

On appeal, appellants have assigned three errors, which we consolidate and restate as one: The county court erred in denying the adoption petition jointly filed by appellants in which A.E. sought to adopt Luke.

STANDARD OF REVIEW

[1-3] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record. *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990); *In re Adoption of Leslie P.*, 8 Neb. App. 954, 604 N.W.2d 853 (2000). The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. *In re Adoption of Hemmer*, 260 Neb. 827, 619 N.W.2d 848 (2000); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). 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 lower court. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

ANALYSIS

Constitutional Claims Not at Issue

[4] Appellants and the State devote considerable analyses in their briefs to the potential federal and state constitutional issues which may be implicated in this case. The constitutional issues addressed by appellants and the State on appeal were neither presented nor ruled on in the county court. We have stated that 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. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). Accordingly, we do not consider the constitutional claims of appellants and the State and our analysis is limited to application of the Nebraska adoption statutes to this case.

Positions of Appellants and State

Contending that the county court erred, appellants argue that the plain language of the adoption statute at § 43-101(1), which provides that "any minor child may be adopted by any adult person or persons," permits adoption of the minor child, Luke, by A.E.; the biological parent B.P. need not relinquish her parental rights in order for A.E. to adopt Luke; and the proposed adoption is in Luke's best interests. Appellants advance various constitutional arguments not considered here for the reasons outlined above.

Contending that the county court was correct, the State argues that the adoption statutes read as a whole do not provide that two nonmarried persons may jointly adopt a minor child and that the adoption statutes only provide for adoption of a child without the relinquishment of a biological parent's rights in the case of a stepparent where a spouse is the adopting party. The State advances various constitutional arguments not considered here for the reasons outlined above.

Adoption Is Statutory

We have long recognized that "statutes providing for adoption are of civil and not common law origin. . . . Adoption proceedings

were unknown to the common law." (Citations omitted.) *In re Petition of Ritchie*, 155 Neb. 824, 827-28, 53 N.W.2d 753, 755 (1952). The adoption laws were first codified in 1897 and have been amended in 1943, 1984, 1985, and 1999. See, § 43-101 et seq.; *Neil v. Masterson*, 187 Neb. 364, 191 N.W.2d 448 (1971). We have stated that "the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed." *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 918, 540 N.W.2d 554, 558 (1995). We have recently noted that it is inappropriate for this court to " 'extend the rights of adoption beyond the plain terms of the statutes.' " *In re Adoption of Hemmer*, 260 Neb. 827, 830, 619 N.W.2d 848, 851 (2000) (quoting *In re Petition of Ritchie, supra*). Although the numerous amendments to the adoption statutes could have been crafted with greater precision, the adoption statutes as a whole are cogent and workable. Accordingly, in the instant case, the plain terms and manner of procedure of the Nebraska adoption statutes must be followed.

Application of Statutes to This Case

[5] For an adoption to be valid under Nebraska's adoption statutes, the record must show the following factors: (1) the existence of an adult person or persons entitled to adopt, (2) the existence of a child eligible for adoption, (3) compliance with statutory procedures providing for adoption, and (4) evidence that the proposed adoption is in the child's best interests. Neb. Rev. Stat. § 43-101 et seq. See *In re Adoption of Kassandra B. & Nicholas B., supra.* The absence of any one of the necessary factors will preclude the adoption. In this case, Luke was not eligible for adoption, the county court determined that his adoption by A.E. was precluded on this basis, and we affirm on this basis.

The county court stated that "the statu[t]es permit a single adult person to adopt a child after all necessary consents and relinquishments have been filed." On this record, B.P. did not relinquish her parental rights to Luke, and therefore, he was not eligible for adoption by A.E. The county court's denial of the petition due to an absence of a relinquishment was correct. The county court also stated that Nebraska's adoption statutes do not provide for "two non-married persons to adopt a minor child, no

matter how qualified they are." Because A.E. alone sought to adopt Luke, the issue of whether two nonmarried persons are entitled to adopt was not presented to the county court in this case. Thus, that issue is not before this court on appeal, and we do not consider it.

Appellants argue that the county court erred in concluding that it could not grant the adoption of Luke by A.E. as an additional parent without a relinquishment of the parental rights of B.P. Appellants contend that "consent is an alternative to a relinquishment," brief for appellant at 12, and that where B.P. intended to preserve her parental rights upon the adoption of Luke by A.E., only B.P.'s consent, which was given, was required. Appellants refer the court to various cases in other states which concluded under the language of their adoption statutes that the biological parent need not relinquish parental rights in order to facilitate the adoption by a second adult to whom the biological parent was not married. See, e.g., *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re Petition of K.M.*, 274 Ill. App. 3d 189, 653 N.E.2d 888, 210 Ill. Dec. 693 (1995); *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993); *Matter of Adoption of Child by J.M.G.*, 267 N.J. Super. 622, 632 A.2d 550 (1993); *Matter of Adoption of Evan*, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (1992); *Adoption of B.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (1993).

The State responds that the Nebraska adoption statutory scheme does not provide for adoption without relinquishment except in the case of a stepparent where "an adult husband or wife" seeks to "adopt a child of the other spouse." § 43-101(1). See, also, § 43-104(3). The State contends that stepparent adoption is the only explicit adoption scenario outlined in the Nebraska adoption statutes and that it is implicit in this statutorily permitted scenario that the existing parent intends to continue parenting and, therefore, need not relinquish his or her parental rights to the child in question. The State refers the court to various cases in other states which concluded under the language of their adoption statutes that the biological parent's parental rights would terminate upon adoption of the child by the nonmarried partner of the biological parent or that an adoption was precluded because the biological parent had not relinquished

parental rights. See, e.g., *Sharon S. v. Superior Court of San Diego County*, 93 Cal. App. 4th 218, 113 Cal. Rptr. 2d 107 (2001) (modified on denial of rehearing), *review granted* 116 Cal. Rptr. 2d 49, 39 P.3d 512 (2002); Adoption *of T.K.J.*, 931 P.2d 488 (Colo. App. 1996); *In re Baby Z.*, 247 Conn. 474, 724 A.2d 1035 (1999); *In re Adoption of Doe*, 130 Ohio App. 3d 288, 719 N.E.2d 1071 (1998); *In re Adoption of R.B.F.*, 762 A.2d 739 (Pa. Super. 2000); *In Interest of Angel Lace M.*, 184 Wis. 2d 492, 516 N.W.2d 678 (1994).

Section 43-101 is entitled "Children eligible for adoption." Section 43-101(1) provides as follows:

> Except as otherwise provided in the Nebraska Indian Child Welfare Act, any minor child may be adopted by any adult person or persons and any adult child may be adopted by the spouse of such child's parent in the cases and subject to sections 43-101 to 43-115, except that no person having a husband or wife may adopt a minor child unless the husband or wife joins in the petition therefor. If the husband or wife so joins in the petition therefor, the adoption shall be by them jointly, except that an adult husband or wife may adopt a child of the other spouse whether born in or out of wedlock.

With respect to the non-Indian minor child, Luke, who is the subject of this case, § 43-101 provides that "any minor child may be adopted." Elsewhere in chapter 43, however, numerous statutory substantive and procedural provisions are set forth which must be read together with § 43-101 and met before "any minor child," § 43-101, is in fact eligible for adoption and a decree of adoption may be properly entered. The statutes which provide for the consequences of adoption also bear on the issue of Luke's eligibility. Reading the various provisions of chapter 43 in pari materia, *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001), we conclude that with the exception of the stepparent adoption, the parent or parents possessing existing parental rights must relinquish the child before "any minor child may be adopted by any adult person or persons." Under Nebraska's statutory adoption scheme, the minor child, Luke, was not eligible for adoption by A.E. because B.P. had not relinquished him and the county court's reading of the statute was correct.

In *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 918, 540 N.W.2d 554, 558 (1995), we observed that as to the biological parent, "termination of his or her parental rights is the foundation of our adoption statutes." This pronouncement is reflected in the adoption statutes, which require relinquishment or termination prior to adoption, except when a stepparent adopts, and is further reflected in case law interpreting the adoption statutes.

Appellants argue that B.P.'s consent was the equivalent of relinquishment for purposes of the present case. We do not agree. Section § 43-104 provides that "no adoption shall be decreed unless written consents thereto are filed in the court of the county in which the person or persons desiring to adopt reside." Under § 43-104, such consent must be executed by

> (1) the minor child, if over fourteen years of age, or the adult child, (2) any district court, county court, or separate juvenile court in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court, county court, or separate juvenile court in the State of Nebraska or by virtue of section 43-1203, and (3) both parents of a child born in lawful wedlock if living, the surviving parent of a child born in lawful wedlock, the mother of a child born out of wedlock, or both the mother and father of a child born out of wedlock as determined pursuant to sections 43-104.08 to 43-104.24, except that consent shall not be required of any parent who (a) has relinquished the child for adoption by a written instrument, (b) has abandoned the child for at least six months next preceding the filing of the adoption petition, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

A consent to the proceedings by a parent or parents under § 43-104 is not required when a relinquishment has been executed. § 43-104(3)(a). A relinquishment would preclude the necessity of a consent. B.P. did not sign a relinquishment in this case, and her "consent" is not the equivalent of relinquishment.

We have stated that the consent granted by a court under § 43-104 does nothing more than permit the trial court to entertain

the adoption proceedings. *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988). We read "consent" in § 43-104 to mean that the person, persons, or entity authorized to consent to the proceedings has agreed that the proposed adoption should be entertained by the trial court. See, also, *In re adoption of Kassandra B. & Nicholas B., supra*. In the instant case, B.P. "consented" to the proceedings and Luke is not ineligible for adoption due to a lack of such consent; however, B.P.'s consent to the proceedings was not tantamount to a relinquishment of parental rights.

The importance of "relinquishment" in the adoption statutes is apparent in § 43-109, which provides in relevant part:

> If, upon the hearing, the court finds that such adoption is for the best interests of such minor child or such adult child, a decree of adoption shall be entered. No decree of adoption shall be entered unless (a) it appears that the child has resided with the person or persons petitioning for such adoption for at least six months next preceding the entering of the decree of adoption, except that such residency requirement shall not apply in an adoption of an adult child, (b) the medical histories required by subsection (2) of section 43-107 have been made a part of the court record, and (c) the court record includes an affidavit or affidavits signed by the *relinquishing biological parent*, or parents if both are available, in which it is affirmed that, pursuant to section 43-106.02, prior to the relinquishment of the child for adoption, the *relinquishing parent* was, or parents if both are available were, (i) presented a copy or copies of the nonconsent form provided for in section 43-146.06 and (ii) given an explanation of the effects of filing or not filing the nonconsent form.

(Emphasis supplied.) The affidavit noted in § 43-109(c) refers to the form completed by the relinquishing parent or parents which indicates whether the parent or parents agree to the release of information about the relinquishing parent or parents to the adopted child.

Under § 43-109, "[n]o decree of adoption shall be entered unless . . . (c) the court record includes an affidavit [pertaining to whether or not information regarding the *relinquishing biological parent* should be released to the adopted person] signed by

the *relinquishing biological parent*." (Emphasis supplied.) Thus, under § 43-109, an adoption is not authorized unless the biological parent relinquishes the child and files the particular affidavit identified in the statute. Although the effect of a relinquishment in terms of finality is not the same in private adoptions as in agency adoptions, see *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980), and, notwithstanding that a relinquishment of parental rights in a private adoption is not totally extinguished until the child is adopted, *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991), a relinquishment is nevertheless required.

We have held that in a private adoption case where the prospective adoptive parent was not a spouse of the biological parent, there must be a relinquishment by the biological parent and the relinquishment must be valid in order for the child to become eligible for adoption. See *Gray v. Maxwell, supra* (stating that where biological mother was paid sum of money in excess of legitimate expenses of confinement and birth in consideration for executing relinquishment, such relinquishment was against public policy and was invalid). In the instant case, B.P. swore in the affidavit required under § 43-109 that "I do not intend to relinquish [Luke] for the ultimate purpose of adoption." Having refused to relinquish Luke, B.P. is not a "relinquishing biological parent." The affidavit B.P. signed did not meet the requirements of § 43-109. Therefore, Luke was not eligible for adoption and "[n]o decree of adoption shall be entered."

The provisions contained in the adoption statutes found at §§ 43-110 and 43-111, pertaining to the consequences of adoption, further buttress our conclusion that "termination" of existing parental rights is the foundation of our adoption statutes. See *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). Section 43-110, entitled "Decree; effect as between parties," provides as follows:

> After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.

We have stated that the "purpose of § 43-110 is to terminate any relationship which existed between the natural parent and the

child and to create a new relationship between the adoptive parent and the child." *In re Estate of Luckey. Bailey v. Luckey*, 206 Neb. 53, 56, 291 N.W.2d 235, 237-38 (1980).

Section 43-111, entitled "Decree; effect as to natural parents," provides:

> Except as provided in section 43-106.01 and the Nebraska Indian Child Welfare Act, after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution.

We have read this section as requiring a relinquishment prior to a private placement adoption. *Gray v. Maxwell, supra*.

Thus, under Nebraska's adoption statutes, the legal consequence of an adoption is that "the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child," § 43-110, and the adoption serves to relieve the natural parents of "all parental duties toward and all responsibilities for such child and have no rights over such adopted child," § 43-111. The pleadings in this case indicate that only A.E. sought to adopt Luke. Had the county court permitted the adoption of Luke by A.E., a new relationship between A.E. and Luke would have been created pursuant to § 43-110, and, as an unintended consequence, B.P. would have been relieved of her natural rights to Luke pursuant to § 43-111. In the instant case, B.P. manifestly did not want the consequences ordained by § 43-111 to attach had the county court granted the petition for adoption of Luke by A.E.

In order for A.E. to adopt Luke, he must be eligible for adoption. With the exception of stepparent adoptions, which are statutorily permitted, the Nebraska adoption statutes provide that an eligible child is one over whom parental rights have been relinquished or terminated and with respect to whom, upon entry of the adoption decree, a new relationship between the child and adoptive parent is created and the natural parents are relieved of all parental duties. In the instant case, Luke was not eligible for adoption by A.E. because B.P. had not relinquished her parental rights, and the county court's determination that the

absence of such relinquishment precluded adoption of Luke by A.E. is not error.

Appellants urge this court to ignore the language of § 43-111 and to interpret the adoption statutes as permitting the adoption of Luke by A.E. as a parent in addition to the existing parent, B.P., without consequence to the parental rights of B.P. Appellants acknowledge that the exception providing for a stepparent adoption under § 43-101 permits the addition of a stepparent without relieving the natural parent of rights which would otherwise result under § 43-111. Appellants urge this court to read into the adoption statutes an additional exception for second-parent adoptions and to disregard the fact that the adoption statutes explicitly provide for stepparent adoptions and do not explicitly provide for second-parent adoptions.

[6] The adoption statutes permit only the paradigms which are explicit. With the exception of the statutory stepparent adoption scenario outlined in § 43-101, the adoption statutes neither provide for nor expressly designate who may adopt. When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting a statute. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). Because the Nebraska adoption statutes explicitly provide for a stepparent adoption following which the existing parent will inherently continue raising the child, we conclude it would be an absurd result under the statutes as written to require relinquishment by the existing parent in the explicit statutorily permitted case of a stepparent adoption. As compared to a stepparent adoption, however, it is not inherent in § 43-101 that the "person or persons" seeking to adopt will necessarily be in addition to the existing parent who will continue to raise the child. Reading the adoption statutes in their entirety, it is clear that aside from the stepparent adoption scenario, the parents' parental rights must be terminated or the child must be relinquished in order for the child to be eligible for adoption by "any adult person or persons" under § 43-101.

For the reasons given above, we conclude that the county court did not err when it concluded on this record that A.E. could not adopt Luke for the reason that Luke was not eligible for adoption because B.P. had not relinquished her parental rights to him.

CONCLUSION

Adoption is statutory in Nebraska, and the outcome of this case is controlled by the Nebraska adoption statutes, § 43-101 et seq. The constitutional issues which may be implicated in this case were neither presented to nor ruled upon at trial and are not considered for the first time on appeal.

For an adoption to be properly decreed, the following factors must be met: There must be a person or persons entitled to adopt, a child must be eligible for adoption, the procedures and terms of the Nebraska adoption statutes must be followed, and the adoption must be in the child's best interests. In this case, because Luke was not eligible for adoption, a decree could not be properly entered, the denial of the petition on this basis was correct, and we need not consider the existence of the other factors.

According to the record, appellants, two nonmarried adults, jointly petitioned the county court of Lancaster County. The only relief sought in the proceeding was the adoption of Luke, B.P.'s biological minor son, by A.E. B.P. did not sign a relinquishment of Luke.

The county court ruled that Nebraska's adoption statutes do not provide for "two non-married persons to adopt a minor child, no matter how qualified they are." The issue of whether two nonmarried persons are entitled to adopt was not before the county court nor before this court on appeal.

The county court also concluded that a single adult person could adopt only when the child had been relinquished and that therefore, since B.P. had not relinquished Luke, A.E. could not adopt Luke because he was not eligible for adoption. With the exception of a stepparent adoption which is explicitly provided for in the Nebraska adoption statutes and for which no relinquishment is required, when the parent or parents' rights have not been terminated, a child must be relinquished by the existing parent or parents to be eligible for adoption "by any adult person or persons." § 43-101(1). Because B.P. had not relinquished her parental rights to Luke, he was not eligible for adoption by A.E. Because Luke was not eligible for adoption due to the absence of a relinquishment, on the record in this case, the county court did not err in denying the petition for adoption.

AFFIRMED.

WRIGHT, J., not participating.

GERRARD, J., dissenting.

The holding of the majority opinion is that Nebraska law requires a biological parent to relinquish his or her parental rights in order for a child to be eligible for adoption by a party other than the biological parent's spouse. The majority bases this determination in part on the conclusion that A.E. cannot adopt Luke without extinguishing B.P.'s parental rights. I disagree. In my view, the dispositive issue in this case is whether Nebraska law permits a second-parent adoption when the adoptive parent is not married to the minor child's biological parent. I believe that it does and would therefore reverse the judgment of the county court.

COUNTY COURT JUDGMENT

First, I disagree with the majority's representation of the county court's order denying the petition for adoption. The majority states that "Luke was not eligible for adoption, the county court determined that his adoption by A.E. was precluded on this basis, and we affirm on this basis." The majority further states, "[t]he county court also concluded that a single adult person could adopt only when the child had been relinquished and that therefore, since B.P. had not relinquished Luke, A.E. could not adopt Luke because he was not eligible for adoption."

The majority indicates that the county court denied the adoption petition on two alternative bases: (1) Luke was a child ineligible for adoption because B.P.'s relinquishment of Luke was ineffective and (2) two nonmarried persons are not permitted to adopt under Nebraska law. The county court's order, however, states the following:

> It is this Judge's opinion that everyone with the potential to successfully parent a child in foster care or adoption should be entitled to a fair and equal consideration regardless of sexual orientation or differing lifestyle. The statutes in effect in Nebraska say different. I believe the statues [sic] permit a single adult person to adopt a child after all necessary consents and relinquishments have been filed; and in such cases the consent acts also as a relinquishment, or a spouse may adopt upon consent of the other spouse.

> There is no provision in Nebraska law that allow [sic] two non-married persons to adopt a minor child, no matter how qualified they are to be an adoptive parent.
>
> The petition for adoption is denied.

I cannot read the county court's order to support the construction placed upon it by the majority. The county court simply did not make a determination regarding B.P.'s relinquishment of Luke, or lack thereof. The sole basis stated for the county court's denial of the petition was the county court's conclusion that an unmarried couple cannot adopt under Nebraska law.

NECESSITY OF RELINQUISHMENT

Even if the county court had reached the issue whether B.P.'s relinquishment of Luke was valid, I do not agree with the majority's affirmance of the county court's judgment on that basis. In my opinion, the Nebraska adoption statutes do not support the majority's conclusion that B.P. was required to relinquish Luke before Luke was eligible for adoption by A.E.

Neb. Rev. Stat. § 43-102 (Cum. Supp. 2000) provides, in relevant part, that "any person or persons desiring to adopt a minor child or an adult child shall file a petition for adoption signed and sworn to by the person or persons desiring to adopt. The consent or consents required by sections 43-104 and 43-105 . . . shall be filed prior to the hearing." Neb. Rev. Stat. § 43-104 (Cum. Supp. 2000) in turn provides, in relevant part, that

> no adoption shall be decreed unless written consents thereto are filed in the court of the county in which the person or persons desiring to adopt reside and the written consents are executed by . . . the mother of a child born out of wedlock . . . except that consent shall not be required of any parent who (a) has relinquished the child for adoption by a written instrument . . . .

This section establishes a distinction between a consent and a relinquishment. Moreover, the statute clearly contemplates that there will be circumstances under which there is a consent to an adoption, but not a relinquishment. The statute states that a consent is required *except* when the biological parent has executed a relinquishment. If a relinquishment by a biological parent is

necessary in all cases, then the statutory language requiring consent in all other cases would be a redundancy.

The effect of a parental relinquishment is set forth in Neb. Rev. Stat. § 43-106.01 (Reissue 1998), which provides in relevant part:

> When a child shall have been relinquished by written instrument . . . to the Department of Health and Human Services or to a licensed child placement agency . . . the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child.

In addition, this court has held that in the case of private adoptions, a biological parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment. *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991). See, also, *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998).

While § 43-106.01 and *Yopp, supra*, establish the legal effect of a voluntary relinquishment, they do not, however, provide that a relinquishment is required from a biological parent for a petition for a decree of adoption to be considered when that biological parent is one of the parties to the adoption petition. In the search for such a requirement, the majority relies on Neb. Rev. Stat. § 43-109 (Cum. Supp. 2000), which provides in relevant part:

> If, upon the hearing, the court finds that such adoption is for the best interests of such minor child or such adult child, a decree of adoption shall be entered. No decree of adoption shall be entered unless (a) it appears that the child has resided with the person or persons petitioning for such adoption for at least six months next preceding the entering of the decree of adoption . . . (c) the court record includes an affidavit or affidavits signed by the relinquishing biological parent, or parents if both are available, in which it is affirmed that, pursuant to section 43-106.02, prior to the relinquishment of the child for adoption, the relinquishing parent was, or parents if both are available were, (i) presented a copy or copies of the nonconsent form provided for in section 43-146.06 and (ii) given an explanation of the effects of filing or not filing the nonconsent form.

The majority reads this section to imply that a relinquishment from a biological parent must be present in all cases. However, there are clearly circumstances in which there will not be such a relinquishment. The majority acknowledges that there need be—indeed, can be—no relinquishment when the biological parent's parental rights have been terminated and concludes that relinquishment is unnecessary in the case of a spousal second-parent adoption. There can also obviously be no relinquishment when the child's biological parents are deceased or the child has been abandoned. Because the Legislature could not have been unaware of these situations, it is evident that the Legislature could not have intended § 43-109 to require an affidavit from a relinquishing parent where there is no relinquishing parent. While § 43-109 requires that the record include affidavits from the relinquishing parents if there are relinquishing parents, the statute does not address when relinquishment is and is not necessary. Simply put, if there is a statutory source for the majority's conclusion that a relinquishment from a biological parent is required before a child is eligible for adoption, that source is not § 43-109.

The majority further relies on *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980), to support the conclusion that relinquishment is required. *Gray* does not support the construction placed upon it by the majority. In *Gray*, the biological mother brought a habeas corpus action seeking to regain custody of her minor child. The biological mother alleged that the relinquishment she had executed was invalid. The district court agreed and granted habeas relief. On appeal, we concluded that the biological mother's relinquishment had been given for consideration beyond the payment of her medical expenses and that the promise to pay for the child was against public policy and vitiated the relinquishment. *Id.* We remanded the cause for a hearing on the fitness of the biological mother. *Id.*

The majority describes *Gray* as holding that "in a private adoption case where the prospective adoptive parent was not a spouse of the biological parent, there must be a relinquishment by the biological parent and the relinquishment must be valid in order for the child to become eligible for adoption." Our opinion in *Gray* contains no basis for this assertion.

Nebraska law provides that an adoption cannot go forward without the consent of the biological parent or a substitute for that consent, one possible form of which is relinquishment of parental rights. See § 43-104. In *Gray, supra*, the relinquishment was not valid and the biological mother obviously did not consent to the adoption. The question whether relinquishment was a jurisdictional prerequisite, with or without the consent of the biological parent, was not at issue. Not only does *Gray* not support the construction placed upon it by the majority, but *Gray* is inapposite to the instant case.

In fact, the language used throughout the statutes and this court's jurisprudence dictate a conclusion contrary to that of the majority: *Either* a valid relinquishment *or* a consent to adoption suffices to permit a county court to entertain an adoption proceeding. See, e.g., Neb. Rev. Stat. §§ 43-107 (Cum. Supp. 2000) and 43-104.09, 43-146.01, 43-164, and 43-1411 (Reissue 1998) (statutes referring to "consent or relinquishment" for purposes of adoption). Although "or" is not always used in the disjunctive, it is usually so considered, and that is its commonly accepted meaning. *State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc.*, 178 Neb. 87, 132 N.W.2d 302 (1964).

Based on this statutory language, we stated in *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 922, 540 N.W.2d 554, 560 (1995), that "[c]hildren are not legally free for adoption unless both biological parents consent or one of the statutory exceptions to the need for their consent has been met." See, also, e.g., *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981); *Batt v. Nebraska Children's Home Society*, 185 Neb. 124, 174 N.W.2d 88 (1970) (referring to requirement of "consent or relinquishment"). Thus, our cases have followed the general rule that while parental consent to an adoption of one's biological child is normally required for a valid adoption, such consent may not be required of a parent who has forfeited his or her parental rights by voluntary relinquishment. See 2 Am. Jur. 2d *Adoption* § 74 (1994).

This court's jurisprudence has previously been consistent with the scheme established by the adoption statutes, which permit an adoption to proceed if the biological parents consent or an exception to the consent requirement is present, with

relinquishment of parental rights serving, not as an independent requirement, but simply as an exception to the consent requirement. If a biological parent relinquishes his or her parental rights, that relinquishment is immediately effective and irrevocable. See *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). If there is no relinquishment but there is consent to the adoption, then the adoption proceeds to entry of the decree of adoption, at which point, the parental rights of the biological parent are, under most circumstances, extinguished. See Neb. Rev. Stat. §§ 43-106 and 43-111 (Reissue 1998). The statutes permit adoption without a relinquishment of parental rights where the biological parent is a party to the adoption petition, so long as the biological parent consents to the adoption or a substitute for that consent is provided. The majority's creation of a "relinquishment requirement" is contrary to the explicit language of the statutes and the dictates of our established jurisprudence.

Furthermore, the majority expressly disclaims any ruling on the issue whether appellants could adopt "jointly" if B.P. actually relinquished her parental rights. The majority thus appears to leave the door open for appellants to effectively accomplish a second-parent adoption, but only by virtue of an unwieldy and illogical process. If the end result of an unmarried second-parent adoption is permitted, then it makes little sense to insist that the biological parent "relinquish" his or her rights—when the parent has no real intention of doing so—only to further require that he or she ask in the petition for adoption to have those rights restored by the decree when they never should have been relinquished in the first place. Not only would this rule value form over substance, but it would expose the biological parent to a substantial risk. A relinquishment is irrevocable from its execution, and a conditional relinquishment is invalid. See, *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991); *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985). The mandate of relinquishment prior to adoption would require the biological parent to surrender his or her rights without any assurance that those rights would be restored. Since a biological parent is unlikely to assume that risk, a mandate of "relinquishment" in effect precludes many such adoptions from taking place.

Moreover, there is no purpose to requiring a relinquishment to be given under such circumstances. Notably, the majority opines regarding the "importance of 'relinquishment' in the adoption statutes," but at no point endeavors to justify *why* relinquishment may be important, or explain how the purposes of the adoption statutes are advanced by the majority's interpretation of the statutes and application of that interpretation to the instant case.

For instance, it is certainly appropriate to require that a parent expressly relinquish parental rights where an adoption is intended to completely sever the child's relationship with his or her birth parent and provide the child with a new family. Refusing to allow a parent to consent to an adoption while maintaining his or her own parental status, however, does not further the important goal of finality. Unlike other adoptions, second-parent adoptions are not subject to later attack by the consenting parent because that consenting parent neither has lost parental rights nor wishes to lose those rights through the adoption. See, generally, Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 Temp. Pol. & Civ. Rts. L. Rev. 255 (1998). It simply serves no legitimate purpose to require a biological mother to relinquish her parental rights prior to the entry of a second-parent adoption under these circumstances.

That, however, begs consideration of the other justification for the majority's holding: the conclusion that the termination provision of § 43-111 is inescapable unless the parties are married. I now turn to that analysis.

SECOND-PARENT ADOPTION BY UNMARRIED ADOPTIVE PARENT

The majority further bases its holding on the conclusion that B.P. must "relinquish" her parental rights because A.E. cannot adopt Luke without extinguishing B.P.'s parental rights. I also disagree with this conclusion, as an appropriate interpretation of Nebraska's adoption statutes reveals no basis for mandating this result.

Neb. Rev. Stat. § 43-101(1) (Cum. Supp. 2000) provides:

> Except as otherwise provided in the Nebraska Indian Child Welfare Act, any minor child may be adopted by any adult

> person or persons and any adult child may be adopted by the spouse of such child's parent in the cases and subject to sections 43-101 to 43-115, except that no person having a husband or wife may adopt a minor child unless the husband or wife joins in the petition therefor. If the husband or wife so joins in the petition therefor, the adoption shall be by them jointly, except that an adult husband or wife may adopt a child of the other spouse whether born in or out of wedlock.

Section 43-111 provides:

> Except as provided in section 43-106.01 . . . after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution.

In construing these statutes, the majority ignores the long-established rule that the adoption statutes should be given a liberal rather than a strict construction due to the humanitarian aspects and purposes of such statutes. See *Neil v. Masterson*, 187 Neb. 364, 191 N.W.2d 448 (1971). The tendency of all our decisions has been toward a liberal construction of the law in all cases of adoption. *In re Estate of Taylor*, 136 Neb. 227, 285 N.W. 538 (1939).

> "The adoption statute is a humane provision, which looks to the interest of children primarily. This is its controlling idea and policy. Therefore, every reasonable intendment should be indulged, in case of doubt, in the line of promoting that object. Other courts have taken the same view, but, if it were otherwise, our duty to carry out an obvious legislative intent would be the same. . . . It has made, and is making, a multitude of happy homes, happy parents, happy children, and valuable members of society, and no narrow construction should be indulged in that will tend to defeat a result so obviously intended and in every way so beneficial."

Ferguson v. Herr, 64 Neb. 649, 665, 94 N.W. 542, 545 (1903). The best interests of the child should be kept at the forefront of such an inquiry. See *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991).

With that understanding in mind, the statutory scheme as a whole serves to advance two fundamental purposes: (1) ensuring that biological parents are informed of their rights and consent to the adoption proceedings and (2) providing for the best interests of the child. See, e.g., § 43-109. The majority analyzes the wrong issue: the question is not whether the statutes specifically permit a second-parent adoption where the adoptive parent and biological parent are not married, but instead whether the statutes explicitly prohibit such an adoption.

The statutes provide, in extremely broad language, that "any minor child may be adopted by any adult person or persons," § 43-101(1), if the county court "finds that such adoption is for the best interests of such minor child," § 43-109(1). Our Legislature, like many others, has declined to make categorical assumptions about what adoptive parents or familial relationships are preferable and has instead left it to the county court to conduct a fact-specific inquiry into whether a particular adoption is in the best interests of the child. As stated by one commentator:

> [W]hat is unmistakably clear from looking at adoption statutes is the legislative delegation of decision-making power in individual cases to judges. Compelling functional justifications support this institutional design. Adoption law is built on a premise of delegation: the legislature grants broad powers to courts to make case by case decisions and to decide what arrangement is in a child's best interests. This sort of delegation, of course, goes beyond the adoption context and describes much of family law affecting children, such as custody and visitation decisions.
>
> . . . The highly individualized and proceduralized fact-finding procedures used by judges enable them to engage closely with the specific circumstances in which children find themselves.

Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 Chi.-Kent L. Rev. 933, 942-43 (2000).

It is plainly inconsistent with such a scheme to interpret § 43-111 as requiring the extinguishment of a biological parent's parental rights under circumstances such as those presented in this case. As stated by the Supreme Judicial Court of Massachusetts:

> The purpose of the termination provision is to protect the security of the child's newly-created family unit by eliminating involvement with the child's natural parents. Although it is not uncommon for a natural parent to join in the adoption petition of a spouse who is not the child's natural parent . . . the statute has never been construed to require the termination of the natural parent's legal relationship to the child in these circumstances. . . . Reading the adoption statute as a whole, we conclude that the termination provision . . . was intended to apply only when the natural parents (or parent) are not parties to the adoption petition.

(Citations omitted.) *Adoption of Tammy*, 416 Mass. 205, 216, 619 N.E.2d 315, 321 (1993). The termination provision was "designed as a shield to protect new adoptive families, [but] was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents." *Matter of Jacob*, 86 N.Y.2d 651, 669, 660 N.E.2d 397, 405, 636 N.Y.S.2d 716, 724 (1995). Compare *In re Estate of Luckey. Bailey v. Luckey*, 206 Neb. 53, 291 N.W.2d 235 (1980).

The majority implicitly acknowledges as much when it concedes that § 43-111 is not operative when the adoptive parent is the spouse of the child's biological parent. This concession is made, however, despite the fact that when read literally, § 43-111 sets forth no exception to the termination provision, regardless of whether the adoptive parent is married to the biological parent. The majority makes little effort to explain why an exception is warranted under one circumstance, but not the other. Notably absent from the majority's analysis is any consideration of what this court has previously held to be the primary interpretive principle applicable to the adoption statutes: the best interests of children. By prioritizing the relationship between the adults, the majority relegates to the shadows the relationship most directly at issue—that of parent and child. We are not called upon to pass judgment on the relationship between A.E. and B.P. or to make a policy determination regarding the advantages or disadvantages of second-parent adoptions in general. If any policy determination is to be made in that regard, it is a decision for the Legislature to make within the bounds of the constitution—and the Legislature has thus far been silent on the question.

The adoption statutes, properly construed, permit any person or persons, married or unmarried, to petition the county court for a decree of adoption, but require them to obtain the necessary consents and to show that such adoption is in the best interests of the child. There is no bar in the statutes to unmarried couples seeking to jointly adopt, or seeking a second-parent adoption, to both join in such a petition. In the case of a second-parent adoption, whether the couple is married or not, when the adoption is shown to be in the best interests of the child, the county court may specify that both parties to the petition are decreed to be the parents of the minor child; that is, permit the adoptive parent to adopt the child while allowing the biological parent to retain all his or her parental rights and obligations. This result is consistent with the statutory language; is the most flexible and sensible approach to interpreting statutes that will be applied to a wide variety of unforeseeable circumstances; and, most importantly, maintains the longstanding rule that the adoption statutes must be reasonably interpreted to effectuate the best interests of adoptive children.

Given our long-established principle of interpreting the adoption statutes liberally to effectuate the best interests of the child, I conclude that there must be an unequivocal indication of legislative intent to abandon the best interests of the child standard before limiting who can be an adoptive parent. The Nebraska adoption statutes evidence no such unequivocal intent. I would hold that the statutes permit a second-parent adoption of a minor child by an adoptive parent who is not married to the child's biological parent, so long as the biological parent consents to the adoption and the adoption is found to be in the child's best interests.

CONCLUSION

Despite my disagreement with the majority's analysis, I agree with the majority insofar as it concludes that the constitutional claims raised in the parties' briefs are not pertinent to the dispositive issues on appeal. In spite of the efforts of the parties and various amici to turn this appeal into a forum for or against gay and lesbian rights, the question before this court is one of statutory interpretation, and that analysis is not affected by the gender

or sexual orientation of the biological or prospective adoptive parent. While some of the cases cited above involved circumstances, like those of the instant case, in which the biological and prospective adoptive parent were of the same gender, I emphasize that Nebraska's statutes make no distinction on that point; my analysis—and that of the majority—is not premised on any distinction involving the gender and sexual orientation of the couple seeking a second-parent adoption. That distinction or other distinctions (if any are to be made within the bounds of the constitution) are the province of the Legislature, and that body has not spoken on the issue.

I would reverse the judgment of the county court dismissing the adoption petition, because I believe the county court erroneously determined that it did not have the statutory authority to enter the requested adoption decree. Because the county court did not decide whether the adoption sought was in the best interests of Luke, I would remand the cause to the county court for further proceedings relating to that issue. I respectfully dissent.

ALAN SYDOW, APPELLEE, V. CITY OF GRAND ISLAND, NEBRASKA, ET AL., APPELLANTS.

639 N.W.2d 913

Filed March 8, 2002. No. S-01-611.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **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.
4. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
5. **Final Orders: Words and Phrases.** When no further action of the court is required to dispose of a pending case, the order is final.
6. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
7. **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.

8. **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.
9. **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.
10. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
11. **Statutes: Legislature: Intent.** 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. **Constitutional Law: Initiative and Referendum: Statutes.** The power of initiative must be liberally construed to promote the democratic process, and the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.
13. **Taxation: Initiative and Referendum.** A petition seeking to enact a sales tax for the purpose of creating an endowment fund is governed by chapter 77 of the Nebraska Revised Statutes, and the proposed allocation of the tax to create an endowment fund does not remove the proposal from being governed by Neb. Rev. Stat. § 77-27,142.03 (Reissue 1996).
14. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled.
15. **Pleadings: Words and Phrases.** Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses.
16. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
17. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
18. **Municipal Corporations: Declaratory Judgments: Initiative and Referendum.** Under Neb. Rev. Stat. § 18-2538 (Reissue 1997), if a municipality does not bring an action for declaratory judgment to determine whether a measure is subject to limited referendum or referendum or whether a measure may be enacted by initiative until after it receives notification pursuant to Neb. Rev. Stat § 18-2518 (Reissue 1997), it shall be required to proceed with the initiative or referendum election.
19. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
20. ____. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and vacated.

Charles J. Cuypers, Grand Island City Attorney, for appellants.

Vincent M. Powers and Adrienne S. Davis, of Vincent M. Powers & Associates, for appellee.

Howard E. Tracy, amicus curiae.

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

CONNOLLY, J.

In this bypass appeal, we are asked to determine which statute applies when determining the number of signatures required to place an initiative that seeks to enact a sales tax to create an endowment fund for a city on an election ballot. Neb. Rev. Stat. § 18-2524 (Reissue 1997) pertains to initiative petitions in general and requires valid signatures totaling at least 15 percent of the qualified electors of the city. Neb. Rev. Stat. § 77-27,142.03 (Reissue 1996) pertains to elections regarding sales taxes and requires 10 percent of the votes cast at the last preceding municipal election.

The appellee, Alan Sydow, circulated an initiative petition which proposed that a half-cent sales tax be enacted to create an endowment providing moneys to the City of Grand Island's general fund. He obtained sufficient valid signatures to meet the requirements of § 77-27,142.03, but not sufficient signatures to meet the requirements of § 18-2524. The appellants, the City of Grand Island, members of the city council, and the city clerk (collectively the City), refused to place the proposal on the ballot. The district court issued an alternative writ of mandamus requiring that the proposal be placed on the ballot. The City appeals. We affirm in part, and in part reverse and vacate.

BACKGROUND

Because of a stipulation, the facts of this case are undisputed. On April 8, 2000, Sydow, a citizen of Grand Island, filed an initiative petition for approval for circulation with the city clerk. The listed summary of the initiative stated that it was to enact a "½¢ sales tax for creating an endowment for the city." The measure's defined purpose stated that the proceeds of the tax "shall be used to purchase 12-month U.S. Treasury bills. The interest generated shall be used to fund the city's general budget. The

principal shall continue to accumulate and shall not be spent except as directed by voters at an election." Sydow's intent was that after a period of time, interest from the endowment would fully fund city services, thereby eliminating sales and property taxes. On April 10, the clerk advised Sydow that the initiative petition was in the proper form for circulation, and the petition was then circulated to obtain signatures.

On October 10, 2000, Sydow filed signed petitions with the city clerk. At a November 6 city council meeting, the council passed a resolution to request the election commissioner to verify the signatures on the petition and resolved that under § 18-2524, there must be valid signatures equal in number to at least 15 percent of the qualified electors of the city. According to records of the election commissioner, this number is 3,601. Sydow, however, maintained that he was proposing the enactment of a sales tax and that under § 77-27,142.03, the number of valid signatures required was 10 percent of the votes cast at the last preceding municipal election. According to the records of the election commissioner, this number is 1,248.

The parties stipulated that on November 27, 2000, the election commissioner formally notified the city council that the number of valid signatures on the petition totaled 1,449. The parties further stipulated that the election commissioner complied with the provisions of Neb. Rev. Stat. § 18-2518 (Reissue 1997) when she provided the notification. The election commissioner verified that the petition had 100 percent of the required signatures if § 77-27,142.03 applied and that it had less than 100 percent of the required signatures if § 18-2524 applied. The City then refused to proceed with an election on the proposal.

On December 29, 2000, Sydow filed a pleading entitled "Petition for Mandamus and Affidavit" seeking to compel the City to place the proposal on the ballot of the next election. The factual allegations set forth in the petition deal exclusively with the dispute between Sydow and the City regarding which statute governs the number of signatures required to place the measure on the ballot. Sydow alleged no facts regarding a dispute as to the validity of the measure if enacted. However, in addition to mandamus, Sydow's prayer for relief included a request that the court enter a declaratory judgment that the measure proposed by

the petition "is a subject, which may be enacted by the initiative petition process and is otherwise validly and lawfully proposed under the applicable provisions of law." The City raised no issue regarding the legality of the proposed endowment in its answer to Sydow's petition, nor did it affirmatively seek declaratory relief on this issue.

At the hearing on the show cause why an alternative writ of mandamus should not be issued, the City stated, "We're not here to show cause. We're here to evidence compliance with what's ordered." The district court found that the petition stated an initiative for a sales tax and that § 77-27,142.03 applied. The court concluded that there was a sufficient number of valid signatures to place the proposal on the ballot. The court then concluded that mandamus was a proper remedy and issued an alternative writ of mandamus. The court also granted Sydow's request for a declaratory judgment. The court made no determination on the validity of the actual creation of an endowment fund, stating that the endowment issue was not before the court.

At the show cause hearing on the alternative writ, the City argued that it would not have statutory authority to create the endowment proposed by Sydow. The City argued that Neb. Rev. Stat. § 77-27,146 (Reissue 1996) required that sales taxes be deposited in the general fund of the City and that Neb. Rev. Stat. § 13-504 (Cum. Supp. 2000) limited the amount of reserves the City could hold in its general fund. The City then stated, without presenting any formal evidence, that it was already near the statutory limit for holding reserves. Sydow protested to the court the City's raising of the validity of the proposal because the City had previously stated that it would waive any argument to show cause that it would not comply with the writ. Sydow also reminded the court that it had previously stated that it would not decide the issue of whether an endowment could be created unless the proposal were later enacted by the voters. Sydow argued that the validity issue would be dealt with if the proposal were enacted. Referring to the order dealing with the alternative writ, the court then stated:

> Previously I found that the initiative petition was a petition for a half-cent sales tax and that the relator obtained enough signatures to put the sales tax issue on the ballot. I made no

> determination at that time on whether the endowment fund would be created or that there was a required number of signatures for the creation of an endowment fund.

The City stated that it would comply with the writ by placing the proposal on the ballot but would reword the proposal's provision for an endowment fund to state that the tax would be enacted "with the proceeds collected therefrom to be used specifically for funding an endowment for the City's General Fund." The City then filed this appeal. We granted the City's motion to bypass and advance oral argument. An amicus brief was filed by a Grand Island attorney.

ASSIGNMENTS OF ERROR

The City assigns that the district court erred in (1) finding that the petition proposed a measure for a half-cent sales tax instead of a proposal to create an endowment fund, (2) determining that § 77-27,142.03 instead of § 18-2524 applied to the case, and (3) determining that it was exercising ministerial functions and that a writ of mandamus should be issued.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is a matter of law. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). Statutory interpretation presents a question of law. *Id.*

[3] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

JURISDICTION

Sydow contends that this court lacks jurisdiction because the district court stated that it did not determine any issues regarding the actual creation of an endowment fund. Sydow argues that the district court left an issue to be decided and that this appeal is not from a final order.

[4,5] A party may appeal from a court's order only if the decision is a final, appealable order. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000). When no further action of the court is required to dispose of a pending

case, the order is final. *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999).

Sydow sought two forms of relief: (1) a writ of mandamus and (2) a declaratory judgment that the measure proposed by the petition is a subject which may be enacted by the initiative petition process and is otherwise validly and legally proposed under the applicable provisions of law. Although the district court stated that it was not addressing the City's argument regarding the validity of the endowment fund, the district court granted Sydow's requests for mandamus and a declaratory judgment. The district court completely disposed of the case. We conclude that there is a final order and that we have jurisdiction.

Number of Signatures Required

The City contends that the district court erred in determining that the petition sought to enact a sales tax and was subject to § 77-27,142.03 instead of § 18-2524. The City argues that because the petition sought not only an enactment of a sales tax but also sought to create an endowment fund, it proposed a broader measure than is authorized under the Nebraska Revised Statutes by chapter 77 and is governed wholly by chapter 18. The City focuses on language from Neb. Rev. Stat. § 77-27,142.02 (Reissue 1996), which states that a sales tax proposal "may include any terms and conditions set forth in the resolution proposing the tax, such as a termination date or the specific project or program for which the revenue received from such tax will be allocated." The City argues that under this language, a sales tax proposal that is covered by chapter 77 and which states how the revenue will be used must be enacted to fund an existing program instead of creating a new program.

Section 18-2524 applies to initiative petitions in general and states in part:

> Whenever an initiative petition bearing signatures equal in number to at least fifteen percent of the qualified electors of a municipal subdivision has been filed with the city clerk and verified pursuant to section 18-2518, it shall be the duty of the municipal subdivision's governing body to consider passage of the measure contained in the petition, including an override of any veto, if necessary. If the governing body

> fails to pass the measure without amendment, including an override of any veto, if necessary, within thirty days from the date it received notification pursuant to section 18-2518, the city clerk shall cause the measure to be submitted to a vote of the people at the next regularly scheduled primary or general election held within the municipal subdivision.

Neb. Rev. Stat. § 77-27,142 (Reissue 1996) authorizes a city to increase sales and use taxes, provided that an election is held and a majority of voters approve the tax. Section 77-27,142.03 allows the electors to petition the government to submit a sales tax question and states in part:

> (1) Whenever, at least forty-five days prior to any city, county, or state election, the qualified electors of any municipality, equal in number to ten percent of the votes cast at the last preceding municipal election, shall petition the governing body to submit such question, it shall be the duty of the governing body to submit the question at the next primary, general, or special election.

Section 77-27,142.02 provides in part:

> Except as otherwise provided by section 77-27,142, after February 14, 1978, the power granted by section 77-27,142 shall not be exercised unless and until the question has been submitted at a primary, general, or special election held within the incorporated municipality and in which all qualified electors shall be entitled to vote on such question. The officials of the incorporated municipality shall order the submission of the question by submitting a certified copy of the resolution proposing the tax to the election commissioner or county clerk not later than forty-one days prior to the primary or general election, or within thirty days before a special election. *The question may include any terms and conditions set forth in the resolution proposing the tax, such as a termination date or the specific project or program for which the revenue received from such tax will be allocated . . . .*

(Emphasis supplied.)

[6] To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d

727 (2001); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). If the petition seeks to enact a sales tax under chapter 77, § 77-27,142.03 controls and there would be sufficient valid signatures for the measure to be placed on the ballot. If the petition did not seek to propose a sales tax governed by chapter 77, then under chapter 18, there would be insufficient valid signatures to place the proposed measure on the ballot.

[7-9] 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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (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. *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001). 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. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001); *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001).

[10,11] A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Fontenelle Equip. v. Pattlen Enters., supra*; *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). 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. *Fontenelle Equip. v. Pattlen Enters., supra*.

[12] Finally, we have stated:

> "The decisions [of the courts] almost universally hold that the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to i[t]s exercise."

State ex rel. Stenberg v. Moore, 258 Neb. at 212-13, 602 N.W.2d at 475.

Section 77-27,142.02 provides that a question for a sales tax may include terms or conditions proposing the tax, such as a termination date of "the specific project or program for which the revenue received from such tax will be allocated." The City argues the quoted language means that the legislative intent is that sales taxes enacted under chapter 77 must be allocated to an existing program. It could be inferred that chapter 77 does not apply to the enactment of a sales tax creating a new program. Accordingly, we conclude that § 77-27,142.02 requires interpretation and is reasonably considered ambiguous. We next consider the legislative history of chapter 77.

The language of § 77-27,142.02 was adopted in 1986. The legislative history shows that the Legislature was concerned that cities were facing problems meeting monetary needs for specific projects and that cities were seeking property tax relief. It was proposed that § 77-27,142.02 be amended to allow the enactment of a sales tax subject to any other terms, limitations, or conditions. Introducer's Statement of Intent, L.B. 890, Committee on Revenue, 89th Leg., 2d Sess. (Jan. 29, 1986). The legislative history as a whole makes clear that funding for a new project, not just an existing project, was contemplated under the amendment. Throughout the history, there are references to raising sales taxes to fund new projects, such as swimming pools, or to purchase new equipment, such as fire equipment. Allocation of sales taxes for property tax relief was specifically addressed. At a committee hearing, senators discussed whether it would be acceptable for a ballot proposal to seek to raise sales taxes for the specific purpose of relieving property taxes and agreed that it would be possible under the amendment. Committee Records, 89th Leg., 2d Sess. 53-54 (Jan. 29 1986). A similar discussion was held during floor debate. 89th Leg., 2d Sess. 12235-36 (April 15, 1986).

The legislative history shows an intent of the Legislature to allow a sales tax to be proposed by initiative petition and allows the proposal to allocate the tax to a new program or project. We further note that only chapter 77 authorizes a city to enact sales taxes by initiative petition. Chapter 18 does not provide authorization for a sales tax to be enacted. Any proposal that involves the enactment of a sales tax would logically be governed by chapter 77.

[13] We determine that the petition sought to enact a sales tax which is governed by chapter 77 and that the proposed allocation of the tax to create an endowment fund did not remove the proposal from being governed by § 77-27,142.03. Accordingly, § 77,27,142.03 dictates the number of valid signatures needed to place the proposal on the ballot. The City's assignment of error on this issue is without merit.

MANDAMUS

The City next argues that mandamus is not an appropriate remedy. In addition, at oral argument, the City and amicus argued that the City lacks statutory authority to create the endowment proposed by Sydow and that the decision of the district court should be reversed. The City's contention is that under Neb. Rev. Stat. § 18-2538 (Reissue 1997), the issue of whether the proposed measure would be valid if enacted was properly raised and before the court as part of Sydow's declaratory judgment action. The City argued at oral argument that under chapter 18, article 25, a proposed measure that would not be valid as enacted cannot be placed on the ballot and that a writ of mandamus cannot compel it to place an invalid proposal on the ballot. Sydow, however, contends that the issue of whether an endowment could be created if enacted by the voters was not presented to the court and is not ripe for appeal. Sydow argues that the issue before us is narrowly limited to whether he obtained sufficient signatures to place the proposal on the ballot and that any future validity of the proposal is irrelevant to an action for mandamus that is concerned only with the number of signatures required.

[14,15] The only issue raised by the pleadings was the number of signatures required to place the proposal on the ballot. The pleadings did not include factual statements regarding the validity of the proposal if it was later enacted. The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled. *Fackler v. Genetzky, ante* p. 68, 638 N.W.2d 521 (2002). Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses. *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993).

[16,17] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. Wieland v. Beermann, supra*. Although the issue as to the required number of signatures is controlled by § 77-27,142.03, chapter 18, article 25, controls the procedural requirements for the initiative process.

[18] Section 18-2538 provides in pertinent part:

> Any action brought for declaratory judgment for purposes of determining whether a measure is subject to limited referendum or referendum, or whether a measure may be enacted by initiative, may be filed in the district court at any time after the filing of a referendum or initiative petition with the city clerk for signature verification until forty days from the date the governing body received notification pursuant to section 18-2518. *If the municipality does not bring an action for declaratory judgment to determine whether the measure is subject to limited referendum or referendum, or whether the measure may be enacted by initiative until after it has received notification pursuant to section 18-2518, it shall be required to proceed with the initiative or referendum election in accordance with sections 18-2501 to 18-2537 and this section. If the municipality does file such an action prior to receiving notification pursuant to section 18-2518, it shall not be required to proceed to hold such election until a final decision has been rendered in the action.* Any action for a declaratory judgment shall be governed generally by sections 25-21,149 to 25-21,164, as amended from time to time . . . .

(Emphasis supplied.)

Section 18-2518 provides:

> (1) Signed petitions shall be filed with the city clerk for signature verification. Upon the filing of a petition, a city, upon passage of a resolution by the governing body of such city, and the county clerk or election commissioner of the county in which such city is located may by mutual agreement provide that the county clerk or election commissioner shall ascertain whether the petition is signed by the requisite number of voters. . . . When the verifying official has determined that one hundred percent of the necessary signatures required by sections 18-2501 to 18-2537 have been obtained, he or she shall notify the municipal subdivision's governing body of that fact, and shall immediately forward to the governing body a copy of the petition.

Under § 18-2538, either party may seek a declaratory judgment determining whether a proposed measure is a measure that may be enacted by initiative up to 40 days after the governing body receives notification of the verified signatures pursuant to § 18-2518. But, if a city does not bring an action before notification is received, it must proceed with an election on the initiative. If a city files a declaratory judgment action before notification is received, it will not be required to place the challenged proposal on the ballot until a final decision has been rendered in the action. Thus, the plain language of § 18-2538, which we are obligated to respect and enforce, specifically contemplates a circumstance in which a municipality may be required to place an initiative measure on the ballot before a court determines whether the measure would be legally valid if enacted by the voters. This concept is not foreign to our jurisprudence. See *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996) (holding constitutional amendment proposed by initiative measure properly challenged after enactment).

Here, the parties stipulated that the election commissioner formally notified the city council of the number of verified signatures in compliance with § 18-2518. The City did not at any time seek a declaratory judgment that the proposal was not a measure that may be enacted by initiative. Thus, under § 18-2538, the City was required to place the proposal on the ballot. Had the City wished to avoid placing the proposal on the

ballot while it challenged whether it could be enacted by initiative, it was required to file a declaratory judgment action before notification of the verified number of signatures was received. Because the City failed to seek a declaratory judgment before it received notification pursuant to § 18-2518, the City has a ministerial duty to place the proposal on the ballot.

We note that Sydow filed his own request for a declaratory judgment after notification was received by the City under § 18-2518. But by that time, the City was already required to place the proposal on the ballot. Further, the district court did not consider the issue of the validity of the proposal if enacted because it determined that the issue was not before it. On appeal, the parties do not address in their briefs whether the proposal would be valid if enacted by the voters and instead focus on the number of signatures required. Only the amicus brief addresses the issue of the validity of the proposal if enacted.

[19,20] We have routinely held that in appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Adams v. State*, 261 Neb. 680, 625 N.W.2d 190 (2001).

As we noted, Sydow's pleadings did not raise the issue of whether an endowment can be created; the only issue addressed by the court was the sufficiency of the signatures. Because the district court did not address the validity of the proposal if it were enacted by the voters and because the parties do not focus on that issue on appeal, we do not address it. We hold only that sufficient valid signatures were obtained to place the proposal on the ballot and that the City was required to proceed with an election on the proposal. Thus, we affirm the order of the court granting Sydow's request for a writ of mandamus.

Although we affirm the court's order entering a writ of mandamus, we do not affirm the declaratory judgment. The court specifically did not address the issue of whether the proposal would be valid if enacted, yet it entered a declaratory judgment

that the petition "is a subject which may be enacted by the initiative petition process and is otherwise validly and lawfully proposed under the applicable provisions [of law]." We determine that it was plain error for the court to enter this order after it had expressly determined that the issue was not before it. Accordingly, we affirm the issuance of a writ of mandamus but reverse and vacate the declaratory judgment.

We note that our holding does not preclude the City from challenging the validity of the proposal should the voters choose to enact it. If the measure is enacted, the City may file a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 (Reissue 1995) to challenge the City's ability to implement the measure. Because neither the district court nor this court addressed the issue, principles of res judicata would not apply.

CONCLUSION

We determine that § 77-27,142.03 controls the number of signatures required to place the proposal on the ballot. We further determine that mandamus was the proper remedy. But we determine that the court erred in entering a declaratory judgment. Accordingly, we affirm the order of the district court issuing an alternative writ of mandamus and reverse and vacate the order entering a declaratory judgment. Because the district court did not pass on the subject, we do not address whether the proposal would be valid if enacted by the voters.

AFFIRMED IN PART, AND IN PART
REVERSED AND VACATED.

WRIGHT, J., dissenting.

The majority affirms the district court's writ of mandamus directing that the initiative petition be placed on the ballot for a vote by the electors of the City of Grand Island (City). The majority concludes that the district court did not decide whether the initiative petition was a valid measure, and therefore, it does not address that issue. I respectfully dissent.

The initiative was a half-cent sales tax to be used to create an endowment. The interest generated from U.S. Treasury bills purchased with sales tax funds would be allowed to accumulate in the City's general fund until spent as directed by the voters at a future election. The City refused to place the matter on the ballot

and did not seek declaratory relief pursuant to Neb. Rev. Stat. § 18-2538 (Reissue 1997), which permits a municipality to seek a declaratory judgment regarding any question arising under chapter 18, article 25. Section 18-2538 also provides that if the municipality does not timely file such action, it shall be required to proceed with the initiative. In my opinion, the City's failure to ask the district court to determine the validity of the initiative does not change the issue before us.

When Sydow, the relator, sought a mandamus, he had the burden to establish a clear legal right to the relief. Mandamus is an extraordinary remedy imposed by law when the relator has a clear legal right to the relief sought. See *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000).

Use of the initiative process to enact measures is governed by Neb. Rev. Stat. §§ 18-2501 to 18-2538 (Reissue 1997 & Cum. Supp. 2000). In order for a measure to be placed on the ballot, it must be an ordinance, charter, provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass. See § 18-2506 (defining "measure"). Thus, before the district court could issue the mandamus, it had to determine that the initiative was within the authority of the City to pass. The burden is always upon the relator to show clearly and conclusively that it is entitled to a particular thing that the relator asks. See *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997).

Although the district court stated that it made no determination of the validity of an endowment fund because that issue was not before it, the court found: "Relator is entitled to a declaratory judgment declaring that the measure proposed by the Relator's initiative petition for the one-half cent sales tax is a subject which may be enacted by the initiative petition process and is otherwise validly and lawfully proposed under the applicable provisions of law." Having so found, the court ordered the City to submit the "question" at the next election.

The majority has decided that since the validity of the proposal was not raised by the parties, the district court could not decide the validity of the proposal. It concludes that because the City did not seek a declaratory judgment to determine the validity of the initiative, § 18-2538 required that the City place the

proposal on the ballot. I respectfully disagree. This is an action for mandamus, and I do not believe § 18-2538 is controlling.

The issue, as framed by the pleadings, is whether Sydow has a clear legal right to have the initiative on the ballot. The number of signatures does not establish this right. Sydow does not have a clear legal right unless the proposal is within the legislative authority of the City to pass. See § 18-2506. Before the court can issue the mandamus, it must first determine whether the City has the authority to pass the proposal. There is no clear legal right if the City cannot legally enact the proposal.

The district court found that Sydow was entitled to a declaratory judgment, stating that "the measure proposed by the Relator's initiative petition for the one-half cent sales tax is a subject which may be enacted by the initiative petition process and is otherwise validly and lawfully proposed under the applicable provisions of law." Therefore, in my opinion, the district court did decide that issue, and it should be addressed by this court.

Perhaps the following example will better illustrate: An initiative proposes the construction of a gambling casino or some other illegal activity. The relator obtains the required number of signatures and files the petition with the city. The city refuses to place the measure on the ballot. The relator seeks a mandamus, and the only issue presented to the trial court is whether the relator has obtained the required number of signatures. In my opinion, the trial court could not issue a mandamus without addressing the validity of the initiative under § 18-2506. There is no clear legal right to have an illegal initiative on the ballot even if the city failed to seek declaratory relief under § 18-2538.

In the case at bar, the district court could not issue the mandamus unless it first determined that the initiative complied with § 18-2506. A governing body should not be required to place an initiative on the ballot that it cannot enact even if approved by the electors.

GERRARD, J., joins in this dissent.

JEFFREY J. POLINSKI, APPELLANT, V. SKY HARBOR AIR SERVICE, INC., A NEBRASKA CORPORATION, APPELLEE.

640 N.W.2d 391

Filed March 15, 2002. No. S-99-1358.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
4. **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.
5. **Blood, Breath, and Urine Tests: Controlled Substances: Invasion of Privacy.** The taking of a specimen for drug testing purposes in accordance with Neb. Rev. Stat. § 48-1901 et seq. (Reissue 1993 & Cum. Supp. 1994) is not contrary to the provisions of Neb. Rev. Stat. § 20-203 (Reissue 1997).
6. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at 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 Douglas County, MICHAEL MCGILL, Judge. Judgment of Court of Appeals affirmed.

Thomas J. Young for appellant.

Patrick J. Barrett, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Jeffrey J. Polinski filed a petition in the district court for Douglas County seeking various damages against Sky Harbor Air Service, Inc. (Sky Harbor). His petition generally alleged a violation of his statutory right to privacy, wrongful termination of employment, and improper disclosure of an employment-related drug test. Following an evidentiary hearing, the district court sustained Sky Harbor's motion for summary judgment on each of Polinski's three enumerated causes of action and ordered the petition dismissed. Polinski appealed to the Nebraska Court of Appeals, which affirmed in part, and in part reversed, and remanded for further proceedings. *Polinski v. Sky Harbor Air Serv.*, No. A-99-1358, 2001 WL 118595 (Neb. App. Feb. 13, 2001) (not designated for permanent publication). Polinski petitioned for further review, which we granted. For reasons different from those articulated by the Court of Appeals, we affirm.

STATEMENT OF FACTS

Polinski began working for Sky Harbor in 1988 as a lineman refueling aircraft at Eppley Airfield in Omaha. With respect to this employment, there is neither an indication in the record suggesting the existence of contractual restrictions upon Sky Harbor's right as an employer to discharge Polinski nor any allegation of a constitutional or statutory prohibition on employment termination. We, therefore, treat Polinski as an at-will employee of Sky Harbor. See *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001).

Polinski worked as a lineman for Sky Harbor from 1988 until his employment was terminated in 1996. During the course of his employment with Sky Harbor, Polinski was also employed by United Air Lines, Inc. (United), as a ramp serviceman in United's area at Eppley Airfield. Both of these positions required that Polinski have an Omaha Airport Authority (OAA) "Eppley Airfield Identification and Access Control" badge authorizing Polinski to enter certain nonpublic areas at Eppley Airfield.

During his employment with Sky Harbor, Polinski was aware that the company had a drug-free workplace policy. On August 2, 1994, Polinski signed a copy of Sky Harbor's "Drug-Free

Workplace Policy," which stated that "[it] is unlawful to illegally manufacture, distribute, dispense, possess or use a controlled substance in the workplace." On November 1, 1995, he signed a copy of Sky Harbor's "Drug/Alcohol Free Workplace Policy Letter," indicating that he had read the letter and understood its contents. The letter stated that Sky Harbor employees could be terminated for being under the influence of drugs and that Sky Harbor reserved the right to randomly test employees for drugs when reasonable cause was present or as part of a postaccident investigation. The letter further stated that employees who refused to participate in the drug test could be disciplined up to and including being discharged.

In late February 1996, Sky Harbor was informed by its attorneys that OAA security was apparently preparing to bring members of the federal Drug Enforcement Agency to Sky Harbor to test Sky Harbor employees suspected of illegal drug use. As a result of this information and in an effort to avoid the disruption of work that would occur if the agency did conduct such an investigation, Sky Harbor decided to test essentially all of its employees for drugs. Sky Harbor informed OAA's chief of security of this decision. The primary employees not tested were pilots and mechanics who had been tested earlier.

On February 29, 1996, while at work, Polinski was advised by personnel at Sky Harbor that he and other Sky Harbor employees would be tested for the use of drugs. Polinski was tested for the use of drugs on February 29 at St. Joseph Hospital in Omaha. Prior to the test, Polinski executed a form labeled "Employee Consent and Waiver for Laboratory Testing" given to him by Sky Harbor (the Sky Harbor consent). In the Sky Harbor consent, Polinski "authorize[d] and [gave] full permission" to St. Joseph Hospital to conduct the drug test and to send the test results to Sky Harbor. While he was at St. Joseph Hospital, Polinski executed a "Drug Testing & Control Form" given to him by St. Joseph Hospital (the St. Joseph consent), which stated, in part, the following:

> I hereby consent to have a specimen of my urine and/or blood taken, and I understand that it will be used for drug analysis by Saint Joseph Hospital Toxicology laboratory. The results of the tests on my specimen will then be made

> available to the above named company/employer [Sky Harbor] for employment evaluation only.

The results of the drug test indicated that Polinski had tested positive for marijuana. After receipt of these results, Sky Harbor terminated his employment on or about March 7, 1996. In a March 7 letter, Sky Harbor advised Polinski that his employment with the company had been terminated due to his violation of Sky Harbor's drug-free workplace policy and "extenuating circumstances."

As a result of its termination of Polinski's employment, Sky Harbor returned Polinski's identification badge to OAA. Because Polinski no longer possessed his OAA identification badge, he was not authorized to access those areas of Eppley Airfield where he had worked as a United employee, and United suspended Polinski from employment with pay. Ultimately, United terminated Polinski's employment when he was unable to regain his OAA identification badge.

On August 28, 1996, Polinski filed a petition against Sky Harbor alleging three numbered causes of action and seeking various damages. Polinski alleged (1) that the employment-related drug test resulting in his termination from his employment with Sky Harbor contravened his statutory right to privacy, Neb. Rev. Stat. § 20-203 (Reissue 1997); (2) that he had been wrongfully terminated from his employment with Sky Harbor in contravention of Nebraska drug and alcohol testing statutes, Neb. Rev. Stat. § 48-1901 et seq. (Reissue 1993 & Cum. Supp. 1994); and (3) that Sky Harbor impermissibly disclosed the February 1996 employment-related drug test results to the "public," specifically to OAA, in contravention of § 48-1906.

On February 5, 1999, Sky Harbor filed a motion for summary judgment. The motion came on for hearing on July 28. During the hearing, the district court received 12 exhibits into evidence. The evidence included depositions from various Sky Harbor and OAA employees, Polinski's deposition, and an affidavit from a St. Joseph Hospital medical technologist concerning Polinski's drug test. The evidence included copies of documents which Polinski had signed, including the August 2, 1994, drug-free workplace policy, the November 1, 1995, drug/alcohol free workplace policy letter, the Sky Harbor consent, and the St. Joseph consent.

On November 2, 1999, the district court entered an order granting Sky Harbor's motion for summary judgment as to all of Polinski's enumerated causes of action. The district court found that the Sky Harbor consent Polinski signed prior to his drug test barred his right to privacy claim under § 20-203 as alleged in his first cause of action. The district court did not specifically discuss Polinski's second or third causes of action. Nevertheless, the court found there were no genuine issues of material fact "as to any of the causes of action," concluded that Sky Harbor was entitled to judgment as a matter of law, and ordered the petition dismissed.

Polinski appealed the district court's order to the Court of Appeals. In an unpublished opinion dated February 13, 2001, the Court of Appeals reversed the grant of summary judgment on the second cause of action pertaining to wrongful termination under the drug and alcohol testing statutes. The Court of Appeals, however, affirmed the district court's grant of summary judgment in favor of Sky Harbor with respect to the privacy-related first and disclosure-related third causes of action based mainly on its determination that Sky Harbor had offered uncontroverted evidence (1) that Polinski had consented to the drug testing, a defense to the first cause of action, and (2) that Polinski had consented to the release of the test results to OAA, a defense to the third cause of action.

Polinski sought further review of those portions of the Court of Appeals' decision which affirmed the district court's grant of summary judgment in favor of Sky Harbor as to his first and third causes of action. Sky Harbor did not petition for further review of the Court of Appeals' decision reversing the district court's grant of summary judgment in favor of Sky Harbor as to Polinski's second cause of action. Therefore, the Court of Appeals' decision reversing the entry of summary judgment in favor of Sky Harbor on Polinski's second cause of action is not before us and remains in effect. We granted Polinski's petition for further review.

ASSIGNMENTS OF ERROR

In his petition for further review, Polinski claims, restated, that the Court of Appeals erred in its determinations (1) that Polinski had consented to the drug testing, a defense to the privacy-related first cause of action, and (2) that Polinski had consented to the

release of the test results to OAA, a defense to the disclosure-related third cause of action.

STANDARD OF REVIEW

[1-4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000). 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. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

ANALYSIS

First Cause of Action: Right to Privacy.

In his first cause of action, Polinski claimed that the employment-related drug test was a violation of his right to privacy. The Court of Appeals affirmed the district court's order granting summary judgment in favor of Sky Harbor on the first cause of action. On further review, Polinski assigns as error the Court of Appeals' determination that Polinski consented to the drug testing, that such consent is a statutory defense under Neb. Rev. Stat. § 20-205 (Reissue 1997), and that Polinski was precluded from claiming that his statutory right to privacy under § 20-203 had been violated. For reasons other than those articulated by the Court of Appeals, we affirm that portion of the Court

of Appeals' decision which affirmed the order of the district court's granting summary judgment in favor of Sky Harbor on the first cause of action.

For his first cause of action, Polinski alleged that his statutory right to privacy under § 20-203 had been violated by the acts of Sky Harbor. According to Polinski's deposition testimony, it was the accusation of the illegal conduct of drug use which was the specific "humiliation" suffered by Polinski for which damages were sought from Sky Harbor.

[5] Section 20-203 provides as follows: "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy." In *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991), we considered the nature of an intrusion under § 20-203. In *Kaiser*, we described the invasion of privacy as one " 'consist[ing] solely of an intentional interference with [the plaintiff's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.' " 239 Neb. at 631, 477 N.W.2d at 562 (quoting Restatement (Second) of Torts § 652 B, comment *a*. (1977)). We listed the following examples from the Restatement as illustrations of the types of intrusions for consideration as an invasion of privacy under § 20-203: "a reporter's entering a hospital room and taking the photograph of a person suffering from a rare disease; 'window peeking' or wiretapping by a private detective; obtaining access to a person's bank records pursuant to a forged court order; or the continuance of frequent telephone solicitations." *Kaiser*, 239 Neb. at 631, 477 N.W.2d at 562. The taking of a specimen for drug testing purposes in accordance with § 48-1901 et seq. is not contrary to the provisions of § 20-203. The accusation of drug use at the workplace, without more, is not the form of interference into a person's solitude or seclusion that would rise to the level of being highly offensive to a reasonable person, such as might be actionable under § 20-203. See *Kaiser, supra*.

At the summary judgment hearing, Sky Harbor offered evidence in support of its motion for summary judgment. The evidence demonstrated that the employment-related drug test at issue

complied with § 48-1901 et seq. Polinski did not offer evidence which contravened Sky Harbor's evidence of compliance with § 48-1901 et seq.

[6] As the party moving for summary judgment, Sky Harbor had the burden to show that no genuine issue of material fact existed, and it must have produced sufficient evidence to demonstrate that it was entitled to judgment as a matter of law. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000). After the movant makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

In the instant case, Sky Harbor produced evidence demonstrating that it was entitled to a judgment in its favor if the evidence remained uncontroverted by Polinski. The burden to produce evidence showing the existence of a material issue of fact that prevented judgment as a matter of law shifted to Polinski, the party opposing the motion. *Id.* Polinski failed to produce evidence controverting Sky Harbor's evidence. Accordingly, there is no merit to Polinski's first assignment of error on further review, and we affirm the decision of the Court of Appeals which affirmed the district court's grant of summary judgment in favor of Sky Harbor on Polinski's first cause of action.

Third Cause of Action: Disclosure of Drug Test Results.

For his second assignment of error on further review, Polinski argues that the Court of Appeals incorrectly determined that there was no material dispute in the record that Polinski had consented to the release of his drug test results to OAA prior to such release and that, therefore, his third cause of action must fail. For reasons other than those articulated by the Court of Appeals, we affirm that portion of the decision of the Court of Appeals which affirmed the entry of summary judgment in favor of Sky Harbor on Polinski's third cause of action.

In his third cause of action, Polinski alleged that Sky Harbor impermissibly released the results of his drug test to the "public," namely OAA, in contravention of § 48-1906. As stated above, OAA had provided Polinski with an identification badge required for Polinski's employment with Sky Harbor. Section 48-1906 provides in relevant part as follows: "The employer or its, his, or her agents shall not release or disclose the test results to the public, except that such results shall be released . . . to the employee upon request."

On May 30, 1996, Polinski signed a document captioned "Release," in which Polinski, who had already been informed of his test results, authorized Sky Harbor to release any and all information concerning his employment and separation from employment with Sky Harbor to OAA. The Court of Appeals reasoned that because Polinski requested the release of the information by Sky Harbor to OAA, the provisions of § 48-1906 against release were not violated, and that the district court had correctly granted summary judgment in favor of Sky Harbor on the third cause of action. Polinski contends that the release he signed on May 30 cannot justify the antecedent release of information by Sky Harbor in March to OAA, which in turn resulted in his loss of employment with United. Because we conclude that the release of the drug test results to OAA by Sky Harbor was not a release to the "public" under § 48-1906, we need not consider whether the May 30 release justifies the earlier disclosures.

Section 48-1906 proscribes an employer from releasing drug test results to the "public." Resolution of Polinski's second assignment of error, therefore, depends upon whether OAA is the "public" for purposes of § 48-1906. Interpretation of a statute presents a question of law in connection with which an appellate court has an obligation to reach a conclusion irrespective of the decision made by the court below. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). We conclude that Sky Harbor was not prohibited under the terms of § 48-1906 from releasing Polinski's drug test results to OAA.

It is undisputed in the record that Polinski was required to have the OAA identification badge in order to work as a lineman for Sky Harbor and that when Polinski was terminated by Sky Harbor, Sky Harbor returned Polinski's identification badge to

OAA. OAA was involved in Polinski's channel of employment and was not a member of the unrelated "public." As a result, Sky Harbor's release of Polinski's drug test results to OAA was not a release of drug test results to the "public" for purposes of § 48-1906, and thus, Sky Harbor did not violate the provisions of § 48-1906 by releasing Polinski's drug test results to OAA. The Court of Appeals' decision affirming the district court's grant of summary judgment in favor of Sky Harbor on Polinski's third cause of action is affirmed.

CONCLUSION

Upon further review, although for different reasons, we determine that the Court of Appeals did not err in affirming the district court's grant of summary judgment in favor of Sky Harbor on Polinski's first and third causes of action. Sky Harbor did not seek further review of the Court of Appeals' decision reversing the district court's order granting summary judgment in favor of Sky Harbor on Polinski's second cause of action concerning wrongful termination, and, therefore, we do not consider the Court of Appeals' decision regarding the second cause of action, and that portion of the decision of the Court of Appeals is unaffected on further review.

AFFIRMED.

PREMIUM FARMS, A GENERAL PARTNERSHIP, APPELLEE AND CROSS-APPELLANT, V. THE COUNTY OF HOLT, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

640 N.W.2d 633

Filed March 15, 2002. No. S-00-744.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Zoning: Ordinances: Presumptions: Proof.** The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
3. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
4. **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.

5. **Statutes: Legislature: Intent.** In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.
6. ____: ____: ____. Repeal by implication is strongly disfavored, unless made necessary by the evident intent of the Legislature.
7. **Statutes: Presumptions: Legislature: Intent.** Regarding statutory construction, a court is guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute.
8. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
9. **Statutes: Legislature: Intent.** When a statute is ambiguous and must be construed, the principal objective is to determine and give effect to the legislative intent of the enactment.
10. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.
11. **Statutes.** A court must place on the statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.
12. **Statutes: Legislature: Intent.** In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature.
13. **Zoning: Municipal Corporations: Agriculture.** The farm building exemption contained in Neb. Rev. Stat. § 23-114.03 (Reissue 1997) prohibits counties from requiring building permits on buildings utilized for agricultural purposes on a farmstead of 20 acres or more which produces $1,000 or more of farm products per year.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

James G. Kube, of Stratton, Ptak & Kube, P.C., for appellant.

Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

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

HENDRY, C.J.

INTRODUCTION

Premium Farms, a general partnership, brought a declaratory judgment action, asking the Holt County District Court to

determine the validity of zoning regulations enacted by the Holt County Board of Supervisors. The court determined that various portions of the zoning regulations exceeded the county's zoning authority pursuant to Neb. Rev. Stat. § 23-114.03 (Reissue 1997). The county appeals.

FACTUAL BACKGROUND

On June 30, 1998, the board of supervisors adopted resolution No. 98-11, zoning regulations for Holt County, pursuant to its previously enacted comprehensive plan. The zoning regulations provided that any confined livestock operation (CLO) housing over 1,000 "animal units" must obtain a conditional use permit from the county.

In the fall of 1998, Premium Farms wrote to the Holt County Attorney inquiring whether the zoning regulations would apply to a confined hog production facility which Premium Farms intended to build in Holt County. The county attorney informed Premium Farms that its project was not exempt from the county's zoning regulations. Premium Farms began construction of its facility in November 1998 without obtaining a conditional use permit from Holt County.

In July 1999, while construction on the facility was continuing, the county attorney sent Premium Farms another letter, advising it to obtain a conditional use permit pursuant to county zoning regulations. On July 15, Premium Farms filed an amended petition for declaratory judgment and a temporary injunction, seeking relief from the enforcement of the Holt County zoning regulations. In its petition, Premium Farms asserted that the zoning regulations were unconstitutional and in excess of the county's statutory authority. Premium Farms also alleged that it would be futile to apply for a conditional use permit because the zoning regulations were invalid.

After a hearing on July 15, 1999, the district court granted a temporary injunction and enjoined the county from enforcing its zoning regulations against Premium Farms. In March 2000, Premium Farms filed a motion for summary judgment, asserting that there were no disputed issues of material fact and that certain portions of the Holt County zoning regulations were invalid as a matter of law. The county also filed a motion for summary

judgment, asserting conversely that the regulations were valid as a matter of law. At the hearing on the motions for summary judgment, Premium Farms argued that the Holt County zoning regulations were "outside of the powers that are granted to the County." Relying on § 23-114.03, Premium Farms asserted that counties in Nebraska "do not have power to zone . . . buildings used for agricultural purposes."

Section 23-114.03 states in relevant part:

> Within the area of jurisdiction and powers established by section 23-114, the county board may . . . regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of nonfarm buildings or structures and the use, conditions of use, or occupancy of land. . . . Nonfarm buildings are all buildings except those buildings utilized for agricultural purposes on a farmstead of twenty acres or more which produces one thousand dollars or more of farm products each year.

The county argued that § 23-114.03 was ambiguous in that the plain language of § 23-114.03 simultaneously granted counties the authority to regulate all land use, while prohibiting counties from regulating the use of farm buildings. The county further asserted that the legislative history of § 23-114.03 reconciled this ambiguity by showing that the Legislature intended § 23-114.03 to exempt farm buildings only from county building permit requirements.

On June 26, 2000, the court issued its order, stating that although § 23-114.03 "may not be absolutely clear," it was not ambiguous, and that consideration of the legislative history of § 23-114.03 was unnecessary to determine its meaning. The court found, inter alia, that "the word 'nonfarm' [in § 23-114.03] modifies only the word 'buildings' and does not modify the word 'structures.' " Accordingly, the court determined that § 23-114.03 was intended to prohibit the county from regulating "farm buildings," but not "farm structures." The court went on to find that the county's zoning regulations attempted to regulate "farm buildings" based on the definition of a CLO contained in article 1 of the regulations.

The district court further determined that under its interpretation of § 23-114.03, the county could still regulate all "use,

conditions of use, or occupancy of land." The court reasoned that regulating land use and regulating building use were separable activities, as follows:

> The use of a farm building, i.e., the interior within the confines of the roof, walls, and flooring, does not constitute the use of land within the meaning of § 23-114.03. However, when the use or consequences of use of the building exit therefrom onto, across, or under the land, whether underneath the building or adjoining thereto, or onto or into some other structure, the use involved is no longer limited to a building and becomes the use of land or another structure. While § 23-114.03 withholds authority to regulate, restrict, or prohibit the use of a farm building, that limitation does not apply to consequences or usages flowing or arising *outside the building*.

(Emphasis supplied.) The court concluded that based on its plain meaning interpretation of § 23-114.03, a county's authority to regulate land use stops at the farm building walls.

As a result of this interpretation, the court found that any reference to "agricultural buildings" or "CLO's" contained in the Holt County zoning regulations "exceed[ed] the county's statutory authority." The district court specifically found that the definition of a CLO contained in article 1 of the zoning regulations "exceed[ed] the county's statutory authority because it clearly and specifically applie[d] to agricultural buildings." Article 1, § 2(7), states:

> <u>CONFINED LIVESTOCK OPERATIONS:</u> Shall mean totally roofed buildings, which may be open-sided (for ventilation purposes only) or completely enclosed on the sides, wherein animals or poultry are housed over solid concrete or dirt floors, or slatted (partially open) floors over pits or manure collection areas in pens, stalls or cages, with or without bedding materials and mechanical ventilation.

The court found that "[b]y defining 'Confined Livestock Operation[s]' in terms of agricultural buildings, the county created a foreseeable and needless conflict with § 23-114.03." The district court then concluded that the invalid regulations were severable from the remainder of the regulations. In conformity with this determination, the court deleted the phrase "buildings or"

from article 4, §§ 2.1(b) and 3.1, of the zoning regulations regarding setback requirements. The court further struck all of article 4, § 2.3(a), and article 3, § 3.2, which primarily discussed standards for CLO manure disposal. From article 8, the court struck §§ 3, 4, and 5, which addressed nonconforming uses of CLO's. The court additionally struck article 10, § 3.1(a) and (b), which stated the requirements for a CLO conditional use permit application, and granted the county authority to impose conditions upon the grant of such a permit. From article 13, § 2, the court struck a paragraph regarding enforcement of zoning penalties against a CLO. The court also struck a portion of article 12 which incorporated certain sections of the Nebraska Department of Environmental Quality's rules and regulations into the zoning regulations.

Accordingly, the court in part granted Premium Farms' motion for summary judgment regarding the portions of the zoning regulations the court found to be invalid. The court also in part granted the county's motion for summary judgment regarding the remainder of the zoning regulations which the court found were valid and enforceable. The court ordered the county to pay costs of $89, with interest, to Premium Farms. The county appealed and petitioned this court to bypass the Nebraska Court of Appeals. Premium Farms cross-appealed, asserting that the district court erred in failing to also strike article 4, § 3.3, and article 1, § 2.18, as violative of § 23-114.03. Pursuant to Neb. Rev. Stat. § 24-1106(2) (Reissue 1995), we granted the petition to bypass.

ASSIGNMENTS OF ERROR

The county asserts, rephrased and summarized, that the district court erred in (1) failing to find § 23-114.03 ambiguous, (2) failing to properly consider and apply the legislative history of § 23-114.03 to determine the statute's meaning, (3) finding that the term "CLO" as defined in the county zoning regulations was invalid, (4) deeming certain portions of the Holt County zoning regulations invalid, and (5) restraining the county from enforcing the zoning regulations as written and ordering the county to pay $89 in costs.

Premium Farms asserts in its cross-appeal, rephrased, that the district court erred in failing to find that article 4, § 3.3, and article 1, § 2.18, of the Holt County zoning regulations were invalid pursuant to the plain meaning of § 23-114.03.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of S.B., ante* p. 175, 639 N.W.2d 78 (2002); *In re Interest of DeWayne G. & Devon G., ante* p. 43, 638 N.W.2d 510 (2002).

[2] The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

ANALYSIS

[3-5] The county asserts the district court erred in failing to find § 23-114.03 ambiguous. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). 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*. In construing a statute, an appellate court should consider the statute's plain meaning "in pari materia and from [its] language as a whole to determine the intent of the Legislature." *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 70, 615 N.W.2d 460, 466 (2000). See, also, *In re Interest of DeWayne G. & Devon G., supra*. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of S.B., supra*.

Section 23-114.03, enacted in 1967, requires counties to adopt a county-wide "comprehensive development plan" prior to enacting zoning regulations. It also directs counties to obtain "specific recommendations" from the county planning commission concerning any proposed zoning regulations. The statute then lists 14 factors a county should consider in formulating zoning regulations. Thus, § 23-114.03 provides Nebraska counties with a statutory framework to use when adopting zoning regulations.

The disputed language in the present appeal occurs in a separate paragraph of § 23-114.03 which addresses the division of

a county into districts and the procedure for adopting official district maps. Within this paragraph, § 23-114.03 grants the counties the power to "regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of nonfarm buildings or structures and the use, conditions of use, or occupancy of land." Applying the principle of "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the others), the positive grant of authority in § 23-114.03 to regulate the "erection, construction, reconstruction, alteration, or use of nonfarm buildings or structures" prohibits the county from exercising this same regulatory power with respect to farm buildings. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 272, 616 N.W.2d 326, 335 (2000). Farm buildings are then effectively defined by § 23-114.03 as "buildings utilized for agricultural purposes on a farmstead of twenty acres or more which produces one thousand dollars or more of farm products each year." There is no dispute that Premium Farms' hog confinement facility is a farm building pursuant to § 23-114.03.

The issue before this court is the breadth of the farm building exemption contained in § 23-114.03. Premium Farms argues the district court correctly found that § 23-114.03 prohibits counties from enacting any zoning regulations regarding farm buildings. The county disagrees, contending that the district court's plain meaning interpretation of § 23-114.03 conflicts with language contained elsewhere in § 23-114.03.

We first note that § 23-114.03 on its face simultaneously grants counties the authority to regulate all "use of land," while denying the authority to regulate "use" of farm buildings. The county asserts these two propositions are inherently conflicting. The district court in its order addressed the county's contention by determining that for purposes of § 23-114.03, the "use of a farm building, i.e., the interior within the confines of the roof, walls, and flooring, does not constitute the use of land within the meaning of § 23-114.03." We do not agree.

Land use does not stop at the walls of a building. Instead, land use is inextricably interwoven with what occurs on the inside and the outside of buildings. As noted in the district court's order, "the use or consequences of use of [a] building" affect land use because the consequences of the building use may "exit therefrom

onto, across, or under the land." Furthermore, § 23-114.03 does not state that the county's authority to regulate land use stops at the farm building walls. In fact, the word "nonfarm" does not appear in the clause of § 23-114.03 granting counties the authority to regulate land use.

Additionally, when § 23-114.03 is considered in pari materia with other related statutes, further conflicts arise. Section 23-114.03 states that it operates "[w]ithin the area of jurisdiction and powers established by section 23-114 . . . ." At the same time § 23-114.03 was enacted, Neb. Rev. Stat. § 23-114 (Cum. Supp. 1998) was also amended to specifically grant counties the authority to regulate "the uses of land for agriculture." § 23-114(2)(g). The broad authority to regulate agricultural land use contained in § 23-114 conflicts with the plain meaning of § 23-114.03 because regulating agricultural land use and regulating farm building use are clearly intertwined.

[6] The plain meaning of § 23-114.03 as found by the district court also cannot be reconciled with Neb. Rev. Stat. § 23-174.10 (Reissue 1997). Section 23-174.10, enacted 4 years prior to the enactment of § 23-114.03, grants counties the authority to regulate, inter alia, the "construction . . . [of] sheds, stables, [and] barns." Section 23-114.03 would, under the district court's interpretation, clearly prohibit the county from regulating the construction of all sheds, stables, and barns "utilized for agricultural purposes on a farmstead of twenty acres or more which produces one thousand dollars or more of farm products each year." This interpretation, by implication, would effectively repeal portions of § 23-174.10. Repeal by implication is strongly disfavored, unless made necessary by the evident intent of the Legislature. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995); *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991); *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 471 N.W.2d 398 (1991).

[7] Regarding statutory construction, we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). Applying the plain meaning of § 23-114.03 as found by the district

court does not lead to a sensible result in this case. As discussed above, regulating land use is inextricably interwoven with regulating the use of buildings. Additionally, the district court's interpretation of § 23-114.03 conflicts with the regulatory authority granted to Nebraska counties under §§ 23-114(2)(g) (authorizing counties to regulate agricultural land use) and 23-174.10 (authorizing counties to regulate construction of sheds, stables, and barns).

[8] A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute, or when considered in pari materia with any related statutes. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001); *Affiliated Foods Co-op v. State*, 259 Neb. 549, 611 N.W.2d 105 (2000); *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). Accordingly, because § 23-114.03 cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with related statutes, we determine that § 23-114.03 is ambiguous.

[9-12] When a statute is ambiguous and must be construed, the principal objective is to determine and give effect to the legislative intent of the enactment. *Fontenelle, supra*. See, also, *In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982). In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). The court must place on the statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *Id.* In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002); *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001).

Section 23-144.03 was enacted as part of L.B. 463. In its original form as presented to the Committee on Government and Military Affairs, L.B. 463 stated in pertinent part:

> [T]he county board may . . . regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use

> of buildings, or structures, and the use, conditions of use, or occupancy of land. . . .
>
> . . . The county board shall provide for enforcement of the zoning regulations within its county by requiring the issuance of permits prior to the erection, construction, reconstruction, alteration, repair, or conversion of any building or structure within a zoned area . . . .

At the committee hearing on L.B. 463, several people testified. One of the persons testifying was Senator Doug Bereuter, who stated:

> I would like to emphasize again that we are not under this bill authorizing zoning by counties. The counties already have that power. They have the power to regulate agriculture land use, industrial land use, commercial land use, residential land use zoning, and they are doing it now. The only point is, are they doing it properly? One of the things that is included in here is provisions relating to the securing of building permits existing under legislation now. An amendment which, a series of amendments in fact, which have been introduced at the request of a number of bodies including another state agency and two farm organizations are here and we are in complete agreement with them. One of the things they do [is] exempt farm buildings from building permits. Ordinarily this is done by the county if they do the job properly like Seward County or Cass County but by putting it into the legislation we're [e]nsuring that farm buildings are exempted from zoning permits.
>
> . . . .
>
> . . . The feeling presented here is that farm buildings, farming itself is such a changing occupation and that many times buildings are built very rapidly and torn down just as rapidly and there are restrictions placed upon the location of these such as they must be set back so many yards from the highway. These still hold but the actual reconstruction or conversion of an existing dwelling unit or a building of a new one, in most cases, these things are exempt from building permits. So we have written it into the statutes that way at the request of general individuals.

Committee Records, 77th Leg. 17 (Mar. 9, 1967).

Commissioner John Klinker, farmer and member of the Douglas County Planning Commission, stated:

> In Douglas County, of course, we require no permits on farm buildings but we do require a permit on a farm dwelling. We do require the farm buildings to conform to our other regulations as far as set back and this sort of thing which is also to the benefit of the farmer.

Id. at 27.

The following pertinent amendments were thereafter added to L.B. 463 by the Committee on Government and Military Affairs, as indicated by italics:

> [T]he county board may . . . regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of *nonfarm* buildings, or structures, and the use, conditions of use, or occupancy of land. . . . [Enacted as part of § 23-114.03.]
>
> . . . The county board shall provide for enforcement of the zoning regulations within its county by requiring the issuance of permits prior to the erection, construction, reconstruction, alteration, repair, or conversion of any *nonfarm* building or structure within a zoned area . . . . [Enacted as part of § 23-114.04.]

Later, when L.B. 463 was first presented to the full Legislature, its introducer, Senator Rick Budd, stated:

> This bill . . . is permissive and the county board takes this action [of adopting zoning regulations] only if they so desire. If they do, why then they can set up this planning commission and what it [L.B. 463] does then is define the guidelines which they will follow. In the second section of the bill, it points out the limitations of the commission as we go into the third section, it sets out exactly what a comprehensive plan is and this is necessary for good planning and zoning. The fourth section defines the zoning regulations and of course this is all approved then by the county board. And we get into taking the farm buildings out of the bill, it requires that building permits be—if they adopt a comprehensive plan then it is necessary to have building permits. But of course, the farm buildings are excluded from this. It also makes it possible that they can have a

> building inspector and section 6 sets out the penalties for failure to comply . . . .

Floor Debate, 77th Leg. 1735 (May 3, 1967).

L.B. 463, among other things, authorized counties to issue building permits pursuant to Neb. Rev. Stat. § 23-114.04 (Reissue 1997). Section 23-114.04 states that the county board shall require "the issuance of permits prior to the erection, construction, reconstruction, alteration, repair, or conversion of any nonfarm building or structure." We note that while the word "permit" does not appear in § 23-114.03, building permits were clearly included in that portion of L.B. 463 enacted as § 23-114.04. The fact that the Legislature added the word "nonfarm" to §§ 23-114.03 and 23-114.04 supports the comments made during the committee hearing on L.B. 463, which indicate that the purpose of amending L.B. 463 to include the word "nonfarm" was to exempt farm buildings from county building permit requirements.

The legislative history further shows that the reason for exempting farm buildings from county building permit requirements is that farm buildings are frequently constructed, reconstructed, and altered due to the changeable nature of farming. The legislative history does not support the contention that § 23-114.03 exempts farm buildings from all county zoning regulations. As Senator Bereuter stated in his comments, "there are restrictions placed upon the location of these [farm buildings] such as they must be set back so many yards from the highway. These still hold . . . ." Committee Records, L.B. 463, 77th Leg. 17 (Mar. 9, 1967).

As this court has often stated, a court will construe statutes relating to the same subject matter together so as to maintain a consistent, harmonious, and sensible scheme. See, *In re Interest of DeWayne G. & Devon G., ante* p. 43, 638 N.W.2d 510 (2002); *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001). Interpreting § 23-114.03 to exempt farm buildings from county building permit requirements creates a consistent, harmonious, and sensible scheme. Under such an interpretation, counties may regulate land use pursuant to §§ 23-114(2)(g) and 23-114.03 without concerns that such regulations will run afoul of the farm building exemption contained in § 23-114.03. This interpretation

is also harmonious with § 23-174.10 because nothing contained in § 23-174.10 authorizes or requires counties to issue building permits for farm buildings. Finally, this court's conclusion that the farm building exemption contained in § 23-114.03 was intended to apply to county building permit requirements is consistent with the legislative history of § 23-114.03.

[13] Accordingly, based upon the foregoing analysis, we determine that the farm building exemption contained in § 23-114.03 prohibits counties from requiring building permits on "buildings utilized for agricultural purposes on a farmstead of twenty acres or more which produces one thousand dollars or more of farm products each year."

HOLT COUNTY ZONING REGULATIONS

The county also asserts the district court erred in finding that certain portions of the Holt County zoning regulations were invalid. We agree.

The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995). Upon reviewing the Holt County zoning regulations, we find no provisions which require Premium Farms to obtain a building permit from the county prior to commencing construction of a CLO. Instead, the regulations require Premium Farms to obtain a conditional use permit to operate a CLO. The requirements for obtaining the use permit do not set forth any standards related to construction, reconstruction, or alteration of a farm building. Instead, the regulations primarily require CLO's to adhere to certain standards concerning manure removal and setbacks. These land use regulations are within the statutory authority of the county pursuant to §§ 23-114(2)(g), 23-114.03, and 23-174.10.

We therefore determine that the zoning regulations declared invalid by the district court do not exceed the county's authority pursuant to § 23-114.03.

CROSS-APPEAL

Given our determination regarding Holt County's assignments of error, we find Premium Farms' cross-appeal to be without merit.

CONCLUSION

The decision of the district court in finding that article 3, § 3.2; article 4, §§ 2.1(b), 3.1, and 2.3(a); article 8, §§ 3, 4, and 5; article 10, § 3.1(a) and (b); article 13, § 2; and portions of article 12 were in violation of § 23-114.03, and enjoining the county from enforcing said regulations is reversed. The cause is remanded to the district court with directions to modify its grant of partial summary judgment in favor of Holt County, with a finding that the above-stated Holt County zoning regulations are not in violation of § 23-114.03.

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

STEPHAN, J., not participating.

DANIEL G. URWILLER, APPELLANT, V. BEVERLY NETH, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

640 N.W.2d 417

Filed March 15, 2002. No. S-00-815.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. ____: ____: ____. A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
6. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
7. **Administrative Law.** Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.

8. **Administrative Law: Recusal: Presumptions.** A party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.
9. ____: ____: ____. An adjudicator should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
10. **Implied Consent: Blood, Breath, and Urine Tests.** An arrested motorist refuses to submit to a chemical test when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test.
11. ____: ____. There is no such thing as a conditional or qualified refusal to submit to a chemical test; anything short of an unqualified, unequivocal assent to an officer's request that the arrested licensee take the test constitutes a refusal to do so.
12. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Proof.** In an administrative license revocation hearing, the State establishes its prima facie case for license revocation by submitting the arresting officer's report. The burden of proof thereafter rests solely with the motorist, who must show by a preponderance of the evidence that the requirements for the revocation are not satisfied.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Greg C. Harris for appellant.

Don Stenberg, Attorney General, and Jodi M. Fenner for appellee.

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

GERRARD, J.

NATURE OF CASE

Beverly Neth, director of the Nebraska Department of Motor Vehicles (Director), issued an order revoking Daniel G. Urwiller's driver's license based on a hearing officer's recommendation because (1) probable cause existed for a law enforcement officer to believe that Urwiller was operating a vehicle under the influence of alcohol and (2) Urwiller refused to submit to a chemical test. On appeal, the district court affirmed the Director's decision. Urwiller now appeals the judgment of the district court, claiming that the hearing officer's refusal to recuse herself and the Director's denial of Urwiller's discovery request

caused him unfair prejudice and that the district court erred in affirming the Director's order of revocation. For the reasons stated below, we affirm the judgment of the district court.

BACKGROUND

The record reflects that on April 15, 2000, Sgt. Tony Paulsen of the Buffalo County Sheriff's Department responded to an accident reported near Kearney, Nebraska. At the scene of the accident, Paulsen observed two mailboxes and debris in the east ditch of the roadway and a green Mercury Cougar vehicle in the west ditch. Paulsen discovered Urwiller, the lone occupant of the vehicle, sitting in the driver's seat. The vehicle's airbags had deployed. With the help of a witness at the scene, Paulsen assisted Urwiller from his vehicle and asked him if he needed medical attention, which Urwiller refused.

Once Urwiller was seated in Paulsen's patrol vehicle, Paulsen detected a "moderate odor of alcohol" around Urwiller's person and noticed that Urwiller's eyes were "bloodshot and glossy." When asked, Urwiller claimed that he had consumed approximately three drinks. Additionally, Paulsen noted a small cut on Urwiller's left nostril; when asked again if he needed medical attention, Urwiller refused.

Paulsen requested that Urwiller perform three field sobriety tests: a horizontal gaze nystagmus, an alphabet maneuver, and a counting maneuver. Urwiller indicated that he was a college graduate, but he could not recite the alphabet from A to Z beyond the letter F, nor could he count from 4 to 24 and then down from 24 to 4. Paulsen did not request that Urwiller perform any physical field sobriety tests because of inclement road and weather conditions.

When Paulsen first attempted to administer a preliminary breath test, Urwiller did not blow into the tube as Paulsen requested, but instead tried to grab the testing unit out of Paulsen's hand. Paulsen pulled the testing unit away from Urwiller, reexplained to Urwiller how to submit to the test, and advised Urwiller that if he tried to grab the equipment again, it would be considered a refusal to submit to the test. Urwiller then verbally refused to submit to the breath test.

Paulsen placed Urwiller under arrest, read him the postarrest chemical test advisement form, and requested a blood test to

determine alcohol content. Paulsen advised Urwiller that refusal to submit to a test would be a separate crime with which he would be charged, but, when asked whether he would submit to the test, Urwiller verbally refused. Paulsen filled out a "Notice/Sworn Report/Temporary License" form regarding the incident with Urwiller and submitted it to the Department of Motor Vehicles (Department).

On May 8, 2000, Urwiller submitted a discovery request to the Department, asking that he be permitted to depose Paulsen. At that time, Urwiller's hearing was scheduled for May 12. Urwiller stated in his motion that because of a head injury sustained in the accident and a preexisting health condition, he could not recall the events relevant to the license revocation proceedings and should be permitted to depose the arresting officer. The Director denied Urwiller's motion for discovery, stating that the Director can issue subpoenas to compel attendance of witnesses for the hearing only, not for depositions. The Director subsequently granted Urwiller's request for a continuance and rescheduled the hearing for May 25. Urwiller claimed at the hearing that the Director's refusal of his discovery request substantially impaired his ability to prepare for the hearing and present evidence.

At the beginning of the May 25, 2000, hearing, Urwiller requested that the hearing officer recuse herself from his case on the ground that she had been interviewed and turned down for a position with the Public Service Commission (PSC); Urwiller was one of five members of the PSC who had interviewed her. Urwiller's attorney claimed that Urwiller felt uncomfortable with this person as the hearing officer for that reason. The hearing officer overruled Urwiller's motion for recusal because it was untimely and because Urwiller failed to show that the hearing officer had any particular prejudice against him that would require her by law to recuse herself.

Urwiller testified at the hearing that he did not remember Paulsen reading him the postarrest chemical test advisement form or refusing to submit to a chemical test. Five days after the incident, Urwiller visited a physician who discovered swelling behind Urwiller's left ear. On cross-examination, Paulsen, an emergency medical technician for over 12 years, admitted that

deployment of an airbag could in some instances cause head injuries, which would in turn affect a person's ability to perform field sobriety tests by impairing balance, short-term memory, and comprehension ability.

After consideration of the evidence, the hearing officer recommended that the Director revoke Urwiller's driver's license for operating a vehicle under the influence of alcohol and for refusing to submit to a chemical test. The Director adopted the hearing officer's findings and recommendations and revoked Urwiller's driver's license for 1 year. Urwiller appealed to the district court, which affirmed the Director's order. Urwiller now appeals the judgment of the district court, and pursuant to our authority to regulate the caseloads of the appellate courts, we moved this appeal to our docket.

ASSIGNMENTS OF ERROR

Urwiller assigns, restated and renumbered, that the district court erred (1) in failing to find the hearing officer's failure to recuse herself was unfairly prejudicial to Urwiller, (2) in failing to find that Urwiller's case had been unfairly prejudiced by the Director's refusal to permit discovery, and (3) in affirming the Director's decision to revoke Urwiller's driver's license for failure to submit to a chemical test.

STANDARD OF REVIEW

[1] Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

[2,3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Young v. Neth, ante* p. 20, 637 N.W.2d 884 (2002). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court

reaches a conclusion independent of that reached by the lower court. *Marshall, supra*.

ANALYSIS

Hearing Officer's Recusal

Urwiller alleges that the hearing officer should have recused herself and argues that the district court erred in failing to reverse on that basis. Urwiller, a member of the PSC at the time of the hearing, claims that because the hearing officer applied with but was turned down for a position with the PSC, she should have recused herself because of potential bias toward Urwiller.

According to Department rules and regulations, the hearing officer "shall be unbiased and impartial as to the subject proceeding." 247 Neb. Admin. Code, ch. 1, § 003.03 (1998). Further,

> No Hearing Officer shall participate in an appeal in which they have an interest. For good cause shown or on the Director's own motion, the Hearing Officer may recuse his or herself from conducting the hearing. Motions for recusal shall be made in writing to the Director and must be received no later than three (3) days prior to the date of the hearing.

247 Neb. Admin. Code, ch. 1, § 003.04 (1998).

[5,6] In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). Administrative adjudicators serve with a presumption of honesty and integrity. *Id.* In *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993), we noted that judges and arbitrators are subject to the same ethical standards. See *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). By extension, the same standards apply to administrative hearing officers.

[7] Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship. *Dowd, supra*. Urwiller argues that the hearing officer met two of these criteria: she had an adversarial relationship with Urwiller because of her application to and

rejection by the PSC and she failed to disclose that relationship prior to the hearing.

[8,9] A party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *Pattno, supra*. An adjudicator should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). See, also, *Bjorklund, supra*; *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco, supra*.

Urwiller does not allege bias or prejudice on the part of the hearing officer, and no bias or prejudice is apparent in the record. Urwiller argues only that the hearing officer's failure to recuse herself made him uncomfortable; he does not present any ruling or occurrences that prevented him from receiving a fair hearing. The hearing officer accepted Urwiller's testimony regarding his inability to remember his interaction with Paulsen and included it in her findings of fact. Other than her PSC interview with Urwiller and four other commissioners, the hearing officer stated that she did not have any personal contact with Urwiller, although she did recognize Urwiller's name when the Department appointed her as hearing officer for Urwiller's case.

Even though Urwiller's motion to recuse was untimely, the hearing officer stated that she was willing to recuse herself on account of his alleged discomfort if Urwiller would waive the 45-day statutory requirement; Urwiller, however, refused to waive the 45-day requirement. The hearing officer openly discussed her previous contact with Urwiller and asserted her lack of bias or personal prejudice, stating that she would have recused herself had she felt any conflict.

Under these facts, the district court correctly concluded that Urwiller did not overcome the presumption of impartiality in favor of the hearing officer, nor did he effectively demonstrate that a reasonable person who knew the circumstances of the

case would question the hearing officer's impartiality under an objective standard of reasonableness. See *Pattno, supra*. Nothing in the record indicates that the district court's ruling on this issue was arbitrary, capricious, unreasonable, outside the confines of the law, or unsupported by competent evidence. See *Young v. Neth, ante* p. 20, 637 N.W.2d 884 (2002). Urwiller's first assignment of error is without merit.

Discovery Request

Urwiller's second assignment of error alleges that the district court erred in affirming the Director's order of revocation because the Director refused to allow Urwiller to depose Paulsen, resulting in prejudice to Urwiller.

In any contested case before an administrative agency, all parties shall be afforded, after reasonable notice, the opportunity to be heard and present arguments and evidence. See Neb. Rev. Stat. § 84-913 (Reissue 1999). To this end, an administrative hearing officer has the authority to issue subpoenas and discovery orders. See Neb. Rev. Stat. § 84-914(2) (Reissue 1999). The Director of the Department promulgates rules and regulations to govern the conduct of a license revocation hearing and ensure that the hearing will proceed in an orderly manner. Neb. Rev. Stat. § 60-6,205(7) (Reissue 1999). Under this authority and Neb. Rev. Stat. § 84-909(2) (Reissue 1999), the Department adopted 247 Neb. Admin. Code, ch. 1, §§ 003, 008, and 009 (1998), which delineate the Director's and hearing officers' powers regarding discovery.

The Director argues that neither § 60-6,205 nor the Department's rules and regulations provide the Director with the authority to subpoena witnesses for prehearing depositions. Sections 003.04B and 003.04C give the hearing officer authority to "issue subpoenas as authorized" and "compel discovery." Section 009.01 provides that if a party wants to present a witness, that witness' attendance at the hearing should be arranged; if a witness refuses to appear voluntarily, "a party may make a request for a subpoena." Section 008.01 provides that "all discovery motions may be granted or denied at the Director's discretion." The Director asserts that under these regulations, subpoenas may be issued to compel attendance at the hearing only

and that it was within the Director's discretion to deny Urwiller's discovery request.

We are not convinced by the Director's interpretation of the regulation. In crafting § 84-914(2), the Legislature gave administrative hearing officers the power to issue subpoenas and did not limit the power to do so by stating that a subpoena may only be used to compel attendance at hearings. Further, no specific statute relating to the Department states otherwise. However, we need not reach this issue because, assuming without deciding that the Director was empowered to issue the requested subpoena for a discovery deposition, the Director did not abuse her discretion in refusing Urwiller's discovery request under these circumstances.

At the hearing, Urwiller had the opportunity to cross-examine Paulsen, and his counsel received time off the record in which to review documents and prepare questions for Paulsen. Urwiller does not allege that he could not obtain any particular information because of the Director's denial of his discovery request, nor is any such prejudice apparent from the record. Based on Paulsen's presence at the hearing and Urwiller's ability to cross-examine Paulsen after being afforded a full opportunity to prepare for the cross-examination, we conclude that Urwiller was neither prejudiced nor denied due process, and the district court's decision to affirm the Director's order of revocation on this ground was not arbitrary, capricious, or unreasonable.

Refusal to Submit to Chemical Test

Urwiller's third assignment of error alleges that the district court erred in affirming the Director's decision to revoke his driver's license based on Urwiller's refusal to submit to a chemical test. The only issues to be addressed at the administrative license revocation hearing are (1) whether the law enforcement officer had probable cause to believe the licensee was operating or in actual physical control of a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1999) and (2) whether the licensee refused to submit or failed to complete a chemical test after being requested to do so by the peace officer. See 247 Neb. Admin. Code., ch. 1, § 018 (1998). Urwiller urges that because he sustained a head injury and does not remember refusing the chemical test, he should not be held accountable for his alleged refusal.

[10,11] An arrested motorist refuses to submit to a chemical test when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test. *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996); *State v. Clark*, 229 Neb. 103, 425 N.W.2d 347 (1988). See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). There is no such thing as a conditional or qualified refusal; anything short of an unqualified, unequivocal assent to an officer's request that the arrested licensee take the test constitutes a refusal to do so. *Ruch v. Conrad*, 247 Neb. 318, 526 N.W.2d 653 (1995); *Green, supra*; *Clontz v. Jensen*, 227 Neb. 191, 416 N.W.2d 577 (1987).

In *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979), the motorist testified that he did not recall the events surrounding a car accident which led to his refusal to submit to a chemical test. Family members and witnesses described the motorist as unresponsive to questions, disoriented, and unable to carry on a conversation; the motorist's treating physician diagnosed a cerebral concussion. *Id.* State troopers repeatedly asked the motorist to submit to a chemical test; the motorist repeatedly refused. Despite the physician's testimony that the motorist did not have the presence of mind to make a valid judgment at the time of his refusal to submit to the chemical test, this court concluded that a refusal to submit to a chemical test occurs where the conduct of an arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the chemical test. *Id.* Because the motorist in *Wohlgemuth* knew that he was being asked a question and he manifested a refusal, he was, despite his concussion and inability to remember, reasonably perceived to be refusing to submit to the test.

[12] Urwiller argues that no evidence exists to support the Director's conclusion that Urwiller understood he was being asked to take a chemical test and that he refused. The burden of disproving the Director's case, however, rested on Urwiller. In

an administrative license revocation hearing, "the State establishes its prima facie case for license revocation by submitting the arresting officer's report. The burden of proof thereafter rests solely with the motorist, who must show by a preponderance of the evidence that the requirements for [the revocation] are not satisfied." *State v. Young*, 249 Neb. 539, 543, 544 N.W.2d 808, 812 (1996). See, also, *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997); *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995).

Urwiller has not met his burden of disproving the Director's prima facie case. Paulsen testified that Urwiller refused to submit to the test, both by grabbing the testing equipment and by verbally refusing the test. Urwiller's claim that he does not remember the incident does not disprove the recitations of Paulsen's sworn report. Moreover, the minor nature of Urwiller's injuries does not support a finding that Urwiller lacked the capacity to understand Paulsen's request for him to submit to a chemical test. Under these circumstances, a reasonable person would be justified in believing that Urwiller understood Paulsen's request that Urwiller submit to a chemical test and that he refused to submit. Thus, the district court did not err in affirming the Director's order of revocation.

CONCLUSION

For the reasons stated above, each of Urwiller's assignments of error is without merit. We, therefore, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
LINH BAO, APPELLANT.

640 N.W.2d 405

Filed March 15, 2002. No. S-01-282.

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. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
3. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
4. **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.
5. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
6. **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.
7. ____: ____: ____. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
8. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
9. **Convictions: Weapons: Intent.** A person cannot be convicted of use of a weapon to commit an unintentional crime.
10. **Trial: Juries: Evidence.** Allowing a jury to rehear only portions of the evidence after the jury has commenced deliberations is not to be encouraged, but is a matter within the discretion of the trial court.
11. ____: ____: ____. When a jury makes a request to rehear certain evidence, under the common-law rule, the trial court must discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis.
12. **Trial: Juries: Evidence: Notice.** If, after careful exercise of discretion, a court decides to allow some repetition of the evidence, it can do so in open court in the presence of the parties or their counsel or under strictly controlled procedures of which the parties have been notified.
13. **Criminal Law: Juries: Waiver.** Under Neb. Rev. Stat. § 29-2022 (Reissue 1995), after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until the jury agrees upon a verdict or is discharged by the court, and this right may be waived only by specific agreement or consent of counsel for the parties.
14. **Criminal Law: Juries: Presumptions: Proof.** In the absence of express agreement or consent by the defendant, a failure to comply with Neb. Rev. Stat. § 29-2022 (Reissue 1995) by permitting the jurors to separate after submission of the case is erroneous, creates a rebuttable presumption of prejudice, and places the burden upon the prosecution to show that no injury resulted.
15. **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.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays 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.

The appellant, Linh Bao, was convicted of first degree murder and use of a weapon to commit a felony. On appeal, he claims the trial court erred in giving or refusing to give certain jury instructions, allowing the reading of a portion of a witness' testimony, and allowing a juror to be separated from the jury and then return to deliberate. He also contends that there was insufficient evidence to convict him of first degree murder. We affirm.

BACKGROUND

Bao was charged by information with count I, first degree murder, and count II, use of a weapon to commit a felony. The victim, Vu Hoang La (Vu La) was shot while sitting in the driver's seat of a red car.

The record shows that on February 5, 2000, Bao attended a party. According to Bao, he became involved in an altercation and the host and hostess of the party drove him home in their sports utility vehicle (SUV). Three men who were also at the party followed them in a red car.

According to a statement Bao gave to the police, at least two of the men in the car following him, Vu La and Quynh Le, had tried to make trouble at the party. When Bao arrived home, he was "scared to death." He went inside, retrieved an unloaded gun, and went back outside. The record shows that a struggle occurred between Bao, Vu La, and possibly Quynh Le. During this confrontation, Bao was accused of trying to scare them with

a fake gun. Bao told the police that both Vu La and Quynh Le beat him up and that he was very frightened. He told the police that he got up, ran into his home, loaded the gun, and went back outside. Bao stated that when he came out again, Vu La was in the driver's seat of the red car and Quynh Le was standing "at the car," with the car door closed. Bao told the police that Quynh Le began walking toward him, that Bao shot the gun "into the sky," and that Quynh Le ran away. At times during the interview, Bao stated that Quynh Le tried to grab him or the gun. At other times, however, he stated that Quynh Le was farther away from him and did not touch him. Regardless, he maintained that he fired the gun in the air to scare Quynh Le away.

Bao told police that he knew he fired one shot and maybe two, but did not remember firing any additional shots. He stated that he did not know if he shot Vu La or not, but that a couple of minutes after he fired the shots, he saw that Vu La was "sit[ting] still." When asked if he had pointed the gun at Vu La, Bao stated, "I think so. I don't know." Later, however, Bao insisted that he did not remember shooting at the car and that he shot the gun toward the sky.

Hanh Nguyen, who, with her husband, Dang Nguyen, had driven Bao home, testified that she saw Vu La wrestle Bao to the ground and that she saw Bao holding a black object. She testified that she told Vu La and Quynh Le to go home. She saw Vu La walk around the red car, but did not see him get inside. She testified that Quynh Le had already started walking home, that she drove her SUV over by him and told him to get in, and that she then heard two gunshots. Quynh Le also testified that he had started to walk home and that as he was walking, he heard gunshots. Quynh Le's testimony indicated that he did not get into either the Nguyens' SUV or the red car. The record indicates that Dang Nguyen was outside the SUV when Vu La wrestled Bao to the ground, but that Dang Nguyen then got back in the SUV and did not get out again.

Bao's wife testified that on February 5, 2000, Bao arrived home and was mumbling to himself, "Do you want to kill me?" She testified that Bao took something from the closet where his gun was kept and went back outside. She followed him outside, carrying their baby. Bao's wife testified that she saw two people

hit Bao and try to take a gun from him. At some point, she took the gun from Bao. She testified that Bao took a few steps backward, then took the gun away from her and ran back inside their residence. She stated that one of the men tried to follow Bao, but the other man stated that they should go home. She told the men that the gun was real and that they should go home. She then went back inside. She testified that inside the residence, Bao looked angry and was walking back and forth asking, "Where is my bullet?" She saw him "do something" to the gun and then go back outside. She then heard two or three gunshots. She testified that Bao then returned to the residence and said, "I shot him. I shot him," and, apparently referring to Vu La, yelled, "Do you want to kill me? I already shot you."

Bao's neighbor, John M. Brooks, Jr., testified that on February 5, 2000, he heard noises outside his residence and looked out his window to see what was happening. Brooks testified that he saw Bao and a man fighting over something and another man possibly trying to break up the fight. Brooks saw the fight break up and saw one of the men hand something to a woman with a baby. He then saw Bao stand, back up, and then run forward again and take the object. He testified that Bao then ran toward his residence with the object. He testified that the people outside then attempted to get Vu La back into his car while Vu La kept yelling toward Bao's residence. Brooks stated that Vu La and a person he described as "the younger Asian male" got into Vu La's car and that a woman and a man got into the SUV. The SUV drove to the north, turned around, and then proceeded south down the street.

Brooks testified that he saw the red car pull onto the street and stop. He then saw the backup lights come on, and he thought the red car was going to turn around and follow the SUV. Brooks testified that at that time, he heard a gunshot. He stated that he saw Bao running toward the car, firing the gun. According to Brooks, Bao was holding the gun straight out in front of him when he was shooting. Brooks heard a total of three or four gunshots. He testified that the first shot appeared to shatter the passenger-side window and that the other shots were going into the car. Brooks called the 911 emergency dispatch service, and the police and emergency personnel arrived and found Vu La dead in the

driver's seat. Police officers found four shell casings in the vicinity of the car. A physician who performed an autopsy on Vu La determined that he had died as a result of a gunshot wound and that the manner of death was homicide.

At the end of the State's case, Bao moved to dismiss and moved for a directed verdict. The motions were overruled, and Bao did not submit any evidence. At the instruction conference, Bao requested an instruction stating that manslaughter upon a sudden quarrel is an intentional act. He also requested an instruction defining a sudden quarrel as "a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control." Bao also objected to various instructions regarding manslaughter, including an instruction that the jury could find him guilty of use of a weapon to commit manslaughter. In addition, Bao requested an instruction that the crime of use of a weapon to commit the felony of first degree murder requires proof beyond a reasonable doubt that the actor used a deadly weapon for the purpose of causing the death, and not with merely the result of causing the death. The instruction was refused.

The jury was given an instruction, labeled "Effect of Findings," which stated in part:

> You must separately consider in the following order the crimes of first degree murder, second degree murder and manslaughter. For first degree murder, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element, then you must find Mr. Bao guilty of first degree murder and proceed to Count II. If you find the State did not so prove, then you must proceed to consider the crime of second degree murder.
>
> For second degree murder, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element, then you must find Mr. Bao guilty of second degree murder and proceed to Count II. If you find the State did not so prove, then you must proceed to consider the crime of manslaughter.

After the case was submitted to the jury, the jury requested a transcription of Brooks' testimony. After discussing our decision in *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), the

court responded that the jury could not have a transcription of the testimony but that "[i]f there are particular areas of conflict or difficulty among the jurors, you may specify any such area and I will consider a specific request." Later in the day, the jury sent the following question: "We have a conflict as to where Quynh Le was at the time shots were fired. Can we have testimony given by John Brooks as an eyewitness as to who was around the red car when shots are fired?" After consultation with counsel, the court sent the jury a question which read: "Is there a disagreement among the jurors as to what John Brooks said regarding who was around the red car at the time shots were being fired? Please answer yes or no." The jury responded, "Yes."

The court examined the transcription of Brooks' testimony and marked the portions that addressed the question and proposed reading those portions to the jury. Bao objected on the basis that Brooks' testimony did not directly answer the question posed by the jury and that any reading of the testimony would unduly emphasize Brooks' testimony over that of other witnesses. The court stated that the issue the jury asked about was critical to the case and was argued fairly extensively by counsel during closing arguments. The court also stated, however, that neither the State nor Bao referred to Brooks' testimony on the issue in closing arguments. The court then stated that it would read the testimony. The parties discussed the provision of an instruction to the jury about the testimony, and defense counsel suggested that anything told to the jury tended to emphasize that the testimony had been repeated. The court agreed and stated that no special instruction would be given. No objections were made. The court then read the following portion from Brooks' testimony to the jury:

> Q. Now, you said that you recognized Mr. Bao when he stood up. He was one of the three individuals that was on the ground?
>
> A. Yes.
>
> . . . .
>
> Q. What were the other two Asian males doing shortly after Mr. Bao ran east toward his trailer?
>
> A. Uhm, the older gentleman that was there and the man who got shot, the rest of the people that were there were

trying to get him to get back into the car, there was a car there that he had drove over.

Q. Did you see where that car was at?

A. Yes, it was toward the back of our trailer.

Q. Had you noticed that for — or during this argument?

A. Ah, yes, I'd seen him there.

Q. Did you see what Mr. Bao's wife and child did?

A. Uhm, at that time I don't see them anymore so I don't know where they went. I'm not sure.

Q. You didn't see what direction they might have left?

A. Huh-uh.

Q. Is that a no?

A. Yes. I'm sorry. No.

Q. These individuals are pushing another person back towards the car; is that correct?

A. Yes.

Q. What happens then?

A. Uhm, the man who got shot is yelling back towards, towards the east, back towards Mr. Bao's trailer, in that direction. Uhm, he keeps yelling. They're trying to get him into the car. Finally after maybe five minutes he finally gets into the car.

Q. Do you see anybody else other than those individuals that are trying to get this person back into the car?

A. No.

Q. When you say he gets back into the car, which part of the car does he get into?

A. He gets into the driver side.

Q. When he gets into the driver's side of the car, what do the other people do?

A. Ah, the younger Asian male gets in on the passenger side and crawls into the back seat. Uhm, the older lady and the older man get into a sport utility vehicle that was parked in front of the other car.

Q. So at this point to your knowledge everybody is in the cars?

A. Yes.

. . . .

> [Q]. After you see that red car pull forward, what happens then?
>
> A. Ah, the sport utility drives by, his parking or backup lights coming on like he's about ready to back up to make a U-turn and possibly go down the street.
>
> Q. The red car's back-up lights come on?
>
> A. Yes. . . . At that time, ah, the brake lights come immediately back on, the car stops and that's when I hear the first shot.

After the testimony was read to the jury, Bao moved for a mistrial and the motion was overruled.

The jury was then sequestered. During deliberations, a juror fell, fractured her humerus, and was taken to the hospital. As a result, the juror was separated from the jury for more than 24 hours. The jury was told of the situation and was instructed not to deliberate, discuss, or form any opinions about the case without the injured juror present. When she returned from the hospital, the injured juror was questioned by the court. The juror stated that she felt she was able to continue as a juror. She stated that while she was away, a deputy was with her at all times. She did not discuss the case with anyone, did not go near any of the areas described by the testimony, and did not hear or read any reports about the case. She stated that she was in pain, but not severe pain. She stated that she was taking medication for pain, but that it did not affect her. She stated that she understood that she must have a clear mind during deliberations and would inform the court if she became unable to concentrate.

The juror was allowed to rejoin the others and continue deliberations. Bao moved for a mistrial, and the motion was overruled.

The jury found Bao guilty of first degree murder and use of a weapon to commit a felony.

ASSIGNMENTS OF ERROR

Bao assigns, rephrased, that the district court erred in (1) failing to instruct the jury that manslaughter upon a sudden quarrel is an intentional act; (2) failing to instruct the jury on his proposed definition of a sudden quarrel; (3) instructing the jury that it could find him guilty of use of a weapon to commit second degree murder or manslaughter; (4) instructing the jury that Bao

could be found guilty of manslaughter by causing Vu La's death while in the commission of an unlawful act, without specifying the unlawful act; (5) failing to instruct the jury that use of a weapon to commit the felony of first degree murder requires proof that the actor used the weapon with the purpose of causing the death; (6) allowing Brooks' testimony to be read to the jury after the case was submitted; (7) overruling his motion for a mistrial based on separation of the jury; and (8) determining there was sufficient evidence to sustain the verdict.

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. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

[2] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

[3] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[4] 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. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

ANALYSIS

Assignments of Error Concerning Manslaughter and Second Degree Murder

[5-8] Bao assigns that the district court erred in the manner in which it instructed the jury on manslaughter and second degree murder. Whether jury instructions given by a trial court are correct is a question of law. *State v. Thomas, supra*. 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. Thomas, supra*. Likewise, in an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

Here, the court properly administered a step instruction in which the jury was instructed to consider only the crimes of second degree murder and manslaughter if the jury first found that the State failed to prove that Bao was guilty of first degree murder. In *State v. Derry, supra*, we examined similar circumstances and noted that we will presume that the jury followed the court's instruction and did not consider any of the purported lesser-included offenses after the defendant was found guilty of the primary charge against him.

The jury found Bao guilty of first degree murder. Under the step instruction administered by the district court, the jury never reached the question whether he committed the crimes of second degree murder and manslaughter. Assuming the court erred in the manner in which the jury was instructed, an issue we do not decide, Bao could not have been prejudiced because the jury did not reach the issues of second degree murder and manslaughter. See *State v. Derry, supra*. Accordingly, we determine that all of Bao's assignments of error relating to manslaughter and second degree murder are without merit.

Use of Weapon Instruction

Bao argues he was entitled to an instruction that use of a weapon to commit the felony of first degree murder requires proof that the actor used the weapon with the purpose of causing the death of another person and not merely with the result of causing the death of that person.

Neb. Rev. Stat. § 28-1205(1) (Reissue 1995) provides:

> Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.

[9] In *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), the appellant was convicted of felony motor vehicle homicide and using a motor vehicle as a weapon to commit a felony. After an examination of § 28-1205, we held that a person could not be convicted of use of a weapon to commit an unintentional crime. We then stated that in order to convict the appellant of use of a weapon to commit a felony, the State was required to prove beyond a reasonable doubt that he used his vehicle for the purpose of committing a felony. See, also, *State v. Pruett, ante* p. 99, 638 N.W.2d 809 (2002) (discussing *State v. Ring, supra*).

Here, Bao was convicted of use of a weapon to commit the felony of first degree murder, which is an intentional crime. The jury was instructed that to find Bao guilty of first degree murder, the State must prove beyond a reasonable doubt that Bao killed Vu La and that he did so purposely, with deliberate malice, and with premeditated malice. Thus, by finding Bao guilty of both first degree murder and use of a weapon to commit a felony, the jury necessarily found that Bao used the gun for the purpose of committing the felony. Any additional instruction regarding the purpose for which a weapon is used is unnecessary when the felony which serves as the basis for the use of a weapon charge is an intentional crime. Accordingly, we determine that this assignment of error lacks merit.

Reading Brooks' Testimony to Jury

Bao contends that he should have been granted a mistrial because Brooks' testimony was read to the jury. He argues that the testimony that was read to the jury did not precisely answer the jury's question. He argues that the probative value of testimony was outweighed by the danger of undue emphasis the reading placed on the testimony.

[10-12] We have stated on several occasions that allowing a jury to rehear only portions of the evidence after the jury has commenced deliberations is not to be encouraged, but is a matter within the discretion of the trial court. *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000). See *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). When a jury makes a request to rehear certain evidence, under the common-law rule, the trial court must discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis. *State v. Gutierrez, supra*; *State v. Dixon, supra*. If, after this careful exercise of discretion, the court decides to allow some repetition of the evidence, it can do so in open court in the presence of the parties or their counsel or under strictly controlled procedures of which the parties have been notified. See *State v. Dixon, supra*.

Here, when the jury asked for a transcription of Brooks' testimony, the court refused to provide the jury with a transcript and sought to determine the exact nature of any difficulty. When the jury made it clear that the jury disagreed over what Brooks said about who was around the red car, the court reviewed the testimony and isolated those portions that best addressed the area of the jury's concern. After considering the probative value of the testimony to the case, the court then decided to read only those limited portions of the testimony to the jury. The testimony was read in open court and in the presence of Bao and his attorneys. The reading of the testimony did not precisely answer the jury's question and may have emphasized a limited portion of Brooks' testimony. The district court, however, followed the correct procedure and limited the reading of testimony to the narrow issue inquired by the jury. Under these circumstances, the court did not abuse its discretion in choosing to read portions of testimony to the jury. Likewise, the court did not abuse its discretion in denying Bao's motion for a mistrial.

Separation of Jury

Bao contends that the court should have declared a mistrial due to the separation of members of the jury upon one juror's hospitalization. Neb. Rev. Stat. § 29-2022 (Reissue 1995) provides:

> When a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court. . . . If the jury are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

[13] We have held that under § 29-2022, after submission of a criminal case to the jury, the defendant has the right to have the jury kept together until the jury agrees upon a verdict or is discharged by the court. *State v. Robbins*, 205 Neb. 226, 287 N.W.2d 55 (1980). We have also stated that this right may be waived only by specific agreement or consent of counsel for the parties. *Id.*

[14] In the absence of express agreement or consent by the defendant, a failure to comply with § 29-2022 by permitting the jurors to separate after submission of the case is erroneous, creates a rebuttable presumption of prejudice, and places the burden upon the prosecution to show that no injury resulted. *Id.* In *Robbins*, we explained that § 29-2022 is intended to prevent improper contacts or communication with or by the jurors after submission of a criminal case. Consequently, the issue is whether there was improper contact or communication with or by the jurors during separation which resulted in prejudice to the defendant. *Id.*

Here, when the injured juror was hospitalized, the remainder of the jury was kept sequestered and was instructed not to deliberate, discuss, or form any opinions about the case. When the injured juror returned, the court, without objection from the parties, questioned the juror regarding whether she had any contacts or communications with people outside of the jury about the case. The juror answered that she did not. The juror further indicated her ability to continue deliberating despite her injury. Under these circumstances, we conclude that the presumption of prejudice has been rebutted. Accordingly, we conclude that the court did not abuse its discretion in overruling Bao's motion for a mistrial.

Sufficiency of Evidence

Bao next contends that there was insufficient evidence to convict him of first degree murder. Bao argues that the evidence was not sufficient to allow a jury to find that he formed the intent to kill Vu La and then deliberated on that idea before executing it. Rather, Bao argues that he was frightened and in a state of panic when he fired the shots that killed Vu La.

[15] 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. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

There was evidence that Bao left the scene of the struggle with Vu La, returned to his residence to get ammunition for his gun, loaded the gun, and then returned outside, where he then fired shots. When Bao was in his residence, his wife noted that he looked angry and testified that he was walking back and forth asking, "Where is my bullet?" Although there was evidence that Bao was afraid of Vu La and Quynh Le and that Quynh Le may have been approaching Bao at the time the shots were fired, there was evidence to the contrary. Other evidence showed that when Bao returned outside, Vu La was in his red car and Quynh Le was either in a vehicle or walking away. Further, there was evidence that Bao did not shoot toward the sky as he stated, but that he shot directly at Vu La's car while running toward it. Under these circumstances, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that Bao formed the intent to kill and deliberated on that idea before executing it. We conclude that Bao's assignment of error on this issue is without merit.

CONCLUSION

We conclude that Bao was not prejudiced by any error that might have occurred in the manner in which the jury was instructed relating to manslaughter or second degree murder. We further determine that the district court did not err in refusing his requested instruction regarding use of a weapon to commit the felony of first degree murder. We conclude that the court did not

abuse its discretion in reading a portion of testimony to the jury and in overruling Bao's motion for a mistrial based on separation of the jury. Finally, we determine that there was sufficient evidence to support Bao's conviction for first degree murder. We conclude that the court did not err in overruling Bao's motions to dismiss, for a mistrial, and for a new trial. Accordingly, we affirm.

AFFIRMED.

BETHESDA FOUNDATION, APPELLANT, V. BUFFALO COUNTY BOARD OF EQUALIZATION, APPELLEE.

640 N.W.2d 398

Filed March 15, 2002. No. S-01-495.

1. **Taxation: Appeal and Error.** 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 reviewed de novo on the record.
4. **Taxation: Charities.** In order for property to be exempt from taxation, a claimant must prove (1) that the subject property is owned by a charitable, educational, religious, or cemetery organization; (2) that the subject property is not being used for financial gain or profit to the owner or user; and (3) that the subject property is being used exclusively for charitable, educational, religious, or cemetery purposes.
5. ____: ____. A tax exemption for charitable use is allowed because those exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing.
6. **Taxation: Words and Phrases.** Exclusive use means the primary or dominant use of property, as opposed to incidental use.
7. **Taxation: Property: Words and Phrases.** The primary or dominant use of a property is controlling in determining whether property is exempt from taxation.
8. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Robert L. Lepp, R. Thomas Workman, and Ronald R. Volkmer, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellant.

Andrew J. McMullen, Buffalo County Attorney, and Andrew W. Hoffmeister for appellee.

Abbie J. Widger and Stefanie S. Flodman, of Johnson, Flodman, Guenzel & Widger, amici curiae for Nebraska Health Care Association and Nebraska Association of Hospitals and Health Systems.

Mark D. McGuire, of McGuire and Norby, amicus curiae for Nebraska Association of Homes and Services for the Aging.

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

WRIGHT, J.

NATURE OF CASE

The Bethesda Foundation (Bethesda) requested a property tax exemption for the 2000 tax year. Bethesda sought the exemption under Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1998) for an assisted living facility which Bethesda asserted was property owned by a charitable organization and used for a charitable purpose. The Buffalo County Board of Equalization (Board) denied the application, and Bethesda appealed to the Nebraska Tax Equalization and Review Commission (TERC), which affirmed the Board's denial. Bethesda then appealed to the Nebraska Court of Appeals. The appeal was moved to this court's docket pursuant to our authority to regulate the caseloads of this court and the Court of Appeals.

SCOPE OF REVIEW

[1] Appellate review of a decision by TERC shall be conducted for error on the record of TERC. Neb. Rev. Stat. § 77-5019(5) (Supp. 2001).

[2,3] 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. *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001). 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

At the time Bethesda filed its application, § 77-202(1)(c) provided for an exemption from property taxes if a property was

> owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. . . . For purposes of this subdivision, charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons[.]

The property for which Bethesda sought an exemption for the 2000 tax year is an assisted living facility known as Cambridge Court, located at 4107 Central Avenue in Kearney, Nebraska. The state-licensed facility includes 41 residential units, a common dining room, a multipurpose room, an activities area, business offices, a nurses' station, and lounge areas. The staff includes licensed practical nurses who are on duty full time on the day and evening shifts, nurses' aides who are on duty 24 hours daily, a full-time night "med-aide," and a licensed practical nurse who provides management services. Each room is equipped with an emergency call system. Residents receive assistance with bathing, dressing, and ambulation, and medications are monitored. Three meals are provided each day, as well as an evening snack. Bethesda also provides personal laundry service, weekly housekeeping, activities, transportation, and utilities, except for telephone service.

Bethesda was formed in 1967 to own and operate nonprofit nursing homes. It later sold its nursing home assets and converted to the ownership and operation of assisted living facilities. Of the nine assisted living facilities owned by Bethesda in Arizona, Colorado, Missouri, and Nebraska, five have received property tax exemptions. Bethesda qualifies as a § 501(c)(3) organization as described in the Internal Revenue Code.

In its application for an exemption, Bethesda asserted that Cambridge Court is operated exclusively for the mental, social, or physical benefit of the public because it provides care for elderly persons who are less than totally self-sufficient. Seven of the 41 units at Cambridge Court are set aside for residents who require rent subsidies through the state Medicaid waiver program. These residents pay $400 to $500 per month less than do those who have their own financial resources. Monthly rates are $2,190 for upstairs rooms and $2,135 for downstairs rooms. Cambridge Court's administrator testified at the hearing before the Board that the State pays $1,675 per month for the seven Medicaid residents. Bethesda claimed that Cambridge Court should be considered to be in the same category as a nursing home because most of its residents would be in a nursing home if they were not living at Cambridge Court.

After a hearing on May 9, 2000, the Board voted to deny the exemption request. Bethesda appealed the denial to TERC, which found that the Board's decision to deny the application for an exemption was not unreasonable or arbitrary. TERC concluded that Bethesda did not meet the statutory definition of a charitable organization and that the facility was not exclusively or predominantly used for charitable purposes. TERC affirmed the denial of the exemption, and Bethesda appealed.

ASSIGNMENTS OF ERROR

Bethesda assigns five errors, which can be summarized to assert that (1) TERC's decision to affirm the denial of the tax exemption is contrary to the law, is not supported by competent evidence, and is arbitrary, capricious, and unreasonable; (2) TERC erroneously applied the presumption that the Board faithfully performed its duties and acted upon sufficient competent evidence; and (3) TERC erred in affirming the Board's decision, which affirmance violated the uniformity clause of the state Constitution and denied Bethesda equal protection of the law under the state Constitution because similarly situated property owners have been treated differently and there is no rational justification for this disparate treatment.

ANALYSIS

We need address only Bethesda's first assignment of error. The question presented is whether the primary or dominant use of Cambridge Court is for charitable purposes. Whether Bethesda is a charitable organization as required in § 77-202(1)(c) is not before us. The status of Bethesda as a charitable organization was not a contested issue before the Board and was not an issue contested by the parties. The parties agreed that Bethesda is a charitable organization and that the property is owned by a charitable organization. Since the issue was not presented to the Board, it could not be presented to TERC, and TERC had no power to reach the issue sua sponte. The appeal is restricted to questions raised before the Board. TERC has no authority to consider questions not raised before a county board of equalization. *Arcadian Fertilizer v. Sarpy Cty. Bd. of Equal.*, 7 Neb. App. 499, 583 N.W.2d 353 (1998).

[4] In order for property to be exempt from taxation, a claimant must prove

> (1) that the subject property is owned by a charitable, educational, religious, or cemetery organization; (2) that the subject property is not being used for financial gain or profit to the owner or user; and (3) that the subject property is being used exclusively for charitable, educational, religious, or cemetery purposes . . . .

(Citation omitted.) *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 139-40, 430 N.W.2d 502, 505 (1988).

State law and regulations adopted by the Nebraska Department of Property Assessment and Taxation specify an additional two tests which must be satisfied in order to qualify for an exemption: the property cannot be used for the sale of alcoholic liquors for more than 20 hours per week and the property cannot be owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. See, § 77-202(1)(c); 350 Neb. Admin. Code, ch. 40, § 005.01 (1999). Those two tests are not before us. No questions have been raised concerning whether Bethesda sells alcohol on the property, whether it practices any kind of discrimination, or whether it is used for financial gain or profit of the owner. In its brief, the Board notes that its sole

dispute concerns whether the property is used exclusively for a charitable purpose.

A Department of Property Assessment and Taxation regulation provides that an exemption is available only if the property is

> used exclusively for religious, educational, charitable, or cemetery purposes. The property need not be used solely for one of the four categories of exempt use, but may be used for a combination of the exempt uses. For purposes of this exemption, the term exclusive use shall mean the predominant or primary use of the property as opposed to incidental use. The exemption will not be lost if the property is used in an incidental manner that is not one or more of the exempt uses.

See 350 Neb. Admin. Code, ch. 40, § 005.03 (1999).

[5,6] The use of the property establishes whether it is exempt. See § 005.03B(3). As used in § 77-202(1)(c), the term "exclusively" meant that "the primary or dominant use of the property, and not an incidental use, [was] controlling in determining whether a property [was] exempt from taxation." *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 401, 603 N.W.2d 447, 455 (1999). A tax exemption for charitable use is allowed because those exemptions "benefit the public generally and the organization performs services which the state is relieved pro tanto from performing." *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 3, 337 N.W.2d 103, 105 (1983). "[E]xclusive use means the primary or dominant use of property, as opposed to incidental use." *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 416, 499 N.W.2d 543, 547 (1993).

TERC found that Cambridge Court was not used exclusively for charitable purposes, in part, because Medicaid waiver program residents make up only 17 percent of the residents. It concluded that the record did not support a finding that housing Medicaid waiver program residents relieved the state or federal government of any burden because Cambridge Court was reimbursed, at a maximum, $1,750 per month to house each Medicaid resident. The facility had previously been certified for the Medicaid waiver program when it was owned by a for-profit corporation. TERC found that Bethesda's fees are not moderate and

that the facility is in direct competition with a for-profit assisted living facility.

TERC found that assisted living facilities have minimal medical education or training requirements for employees and concluded that while Cambridge Court met the definitions of an assisted living facility and a health care facility under state law, "it [did] not provide 'medical care' (as that term is defined under state law)." An assisted living facility provides " 'accommodation, board, and an array of services for assistance with or provision of personal care, activities of daily living, health maintenance activities, or other supportive services.' " See Neb. Rev. Stat. § 71-2017.01(13) (Supp. 1999), currently at Neb. Rev. Stat. § 71-406(1) (Cum. Supp. 2000). TERC concluded that the services provided by the facility did not have any "exclusively" or "predominantly" charitable character and that Cambridge Court was not used exclusively or predominantly for a charitable purpose.

This court reviews a decision by TERC for error on the record of TERC. See § 77-5019(5). Our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001). 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.*

Bethesda argues that assisted living facilities currently provide services equivalent to those provided by nursing homes in the past and that nursing homes have been granted property tax exemptions. In *Evangelical Lutheran Good Samaritan Soc. v. County of Gage*, 181 Neb. 831, 151 N.W.2d 446 (1967), we held that even though a nursing home operated by a nonprofit company charged those who were able to pay for its services, the facility was used for a charitable purpose. See, also, *Bethesda Foundation v. County of Saunders*, 200 Neb. 574, 264 N.W.2d 664 (1978).

[7] The primary or dominant use of the property is controlling in determining whether property is exempt from taxation. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999). In order to determine the primary use of the property

in question, we look to the evidence presented before TERC. At the time Bethesda filed its exemption request, Neb. Rev. Stat. § 77-1511 (Reissue 1996), currently at Neb. Rev. Stat. § 77-5016 (Supp. 2001), provided that TERC shall "determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof."

The residents of Cambridge Court are admitted without regard to race, color, or national origin and without regard to the ability of the residents to pay. The criteria for admission is the need for care. No resident has ever been discharged for failure to pay, nor has Bethesda ever filed a suit to collect delinquent accounts. Accounting, payroll, and other administrative tasks are performed at Bethesda's main office. In the event a facility needs improvements or is unable to pay for them, Bethesda uses excess receipts from other facilities to pay the deficit or cover expenses.

Cambridge Court provides management of the premises by a full-time licensed nurse and nurses' aides on duty 24 hours daily. The rooms are equipped with an emergency call system monitored by nurses or aides. Monitoring of medication is provided, as is assistance with bathing, dressing, and ambulation. Three meals are provided per day, including snacks and special diets. The facility also provides personal laundry service, weekly housekeeping, weekly activities, programs, and scheduled transportation for the residents. All utilities are paid except for telephone service.

Cambridge Court is a health care facility and has secured the required state license to function as an assisted living facility. In order to be eligible for admission to an assisted living facility, an applicant must need or request the facility's services due to age, infirmity, or physical disability. See Neb. Rev. Stat. § 71-20,116(3) (Cum. Supp. 1998), recodified at Neb. Rev. Stat. § 71-461(3) (Cum. Supp. 2000).

The facility is also certified as a Medicaid waiver assisted living provider. Eligibility for this program requires that residents qualify for Medicaid and have a need for care equal to residents in a nursing facility. Cambridge Court also accepts welfare

residents who require a level of care equal to the level provided in a nursing home. It accepts individuals in need of noncomplex medical care and does not prescreen the applicants for financial ability prior to admission. All residents are permitted to remain in the facility regardless of their ability to pay for services provided.

Bethesda charges one inclusive monthly rate for room, board, and medical services provided. The residents vary in age from 58 to 96, with the average age almost 85 years. All have a medical condition requiring some assistance. A nursing station provides a program of basic nursing care. Residents are assisted with bathing, general hygiene, dressing, eating, and ambulation. There are approximately 28 paid employees, half of whom are involved in medical care of the residents.

Cambridge Court also provides Bible study, religious worship, weekly games, exercise classes, field trips, and transportation to local stores, restaurants, and other destinations. A certified activities director is employed.

[8] We hold that TERC erred in finding that the assisted living facility was not used for charitable purposes. TERC's decision does not conform to the law, was not supported by competent evidence, and was arbitrary. A decision is arbitrary when it is made in disregard of facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999). The evidence clearly established that the predominant use of the property was for a charitable purpose.

CONCLUSION

We conclude that Cambridge Court is owned and used exclusively for charitable purposes within the meaning of § 77-202 in that the primary or dominant use of the property is for charitable purposes. Therefore, TERC's order is reversed, and the cause is remanded to TERC with directions to instruct the Board to grant the exemption.

REVERSED AND REMANDED WITH DIRECTIONS.

FRAN THOMPSON, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

640 N.W.2d 671

Filed March 22, 2002. No. S-00-337.

1. **Affidavits: Appeal and Error.** An appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded with directions.

Fran Thompson, pro se.

Don Stenberg, Attorney General, and Linda L. Willard for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Fran Thompson appeals from a district court's order denying her application to proceed in forma pauperis, arguing that her workers' compensation proceeds may not be considered in assessing in forma pauperis eligibility. Because no timely objection was made pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2000), the district court erred in denying her application. Thus, we reverse, and remand with directions.

BACKGROUND

Thompson is incarcerated at the Nebraska Correctional Center for Women in York, Nebraska. On December 7, 1999, Thompson filed a petition pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999), in the district court for York County, appealing from a decision of the Nebraska Department of Correctional Services Appeals Board. Accompanying the petition were an application to proceed in forma pauperis and a poverty affidavit in support of such application. In her affidavit, Thompson averred, inter alia, that (1) she is unable to

pay the fees and costs or give security required to proceed with the case; (2) her average income from prison employment is under $70 per month; (3) "proceeds she receives from Workers Compensation, inadequate to bring her above subsistence level, are 'exempt from attachment, garnishment, or other legal or equitable process' (Neb. Rev. Stat. §§ 48-149 (Reissue 1998) and 25-1563.03 (Reissue 1995))"; and (4) such workers' compensation income is not relevant to the consideration of her application to proceed in forma pauperis.

On February 22, 2000, the district court issued an order which stated: "Ms. Thompson has available to her a worker's comp trust fund from which she may pay costs for her numerous appeals from prison disciplinary proceedings. The costs involved are minimal. Therefore, leave to proceed in forma pauperis is denied."

Thompson timely appealed from the district court's order, and we moved the case to our docket.

ASSIGNMENT OF ERROR

Thompson assigns that the district court erred in denying her leave to appeal in forma pauperis.

STANDARD OF REVIEW

[1] An appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2).

ANALYSIS

In forma pauperis proceedings are governed by Neb. Rev. Stat. § 25-2301 et seq. (Cum. Supp. 2000). Specifically, § 25-2301.02(1) provides in part:

> 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 . . . . *The objection to the application shall be made within thirty days after the filing of the application*. Such objection may be made by the court on its own motion or on the motion of any interested person.

(Emphasis supplied.)

Thompson's application to proceed in forma pauperis was filed in the district court on December 7, 1999. The record before us contains no evidence that either the district court or an interested person objected to Thompson's application within 30 days of its filing. Even when construing the district court's February 22, 2000, order to be an objection "made by the court on its own motion," the 30-day deadline had long since expired when the objection was made.

[2] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). When no timely objection is made, the plain language of § 25-2301.02(1) requires that an application to proceed in forma pauperis shall be granted. The district court erred in ruling otherwise.

CONCLUSION

For the reasons set forth above, we reverse the decision of the district court and remand the cause with directions to vacate the order denying leave to appeal in forma pauperis.

REVERSED AND REMANDED WITH DIRECTIONS.

RANIA K. SHLIEN, APPELLANT, V. THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLEE.

640 N.W.2d 643

Filed March 22, 2002. No. S-00-451.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists.
2. **Limitations of Actions: Negligence: Torts.** In a negligence action, it has generally been stated that a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.
3. **Limitations of Actions: Negligence.** In certain categories of cases, the injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage. In such cases, it is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury. When the discovery rule is applicable, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.
4. ____: ____. In those cases in which the discovery rule applies, the beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact

discovers, or in the exercise of reasonable diligence should have discovered, the injury within the initial period of limitations running from the wrongful act or omission.

5. ____: ____. In a case where the injury is not obvious and is neither discovered nor discoverable within the limitations period running from the wrongful act or omission, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.
6. **Limitations of Actions: Tort Claims Act.** The discovery rule is applicable to the State Tort Claims Act, and in a case in which the plaintiff cannot reasonably become aware of the injury at the time of the act or omission, the discovery rule applies, and the period of limitations under the State Tort Claims Act begins to run when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the existence of the injury.
7. **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.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Vincent M. Powers and Elizabeth A. Govaerts, of Vincent M. Powers & Associates, for appellant.

John C. Wiltse for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Rania K. Shlien appeals from the order of the district court for Lancaster County which concluded that her negligence cause of action against the Board of Regents of the University of Nebraska (the University) was time barred, granted the University's motion for summary judgment, and dismissed her amended petition. Because there remain genuine issues as to material facts, we reverse the decision of the district court and remand the cause for further proceedings.

STATEMENT OF FACTS

At the outset, we note as a procedural matter that Shlien's lawsuit named two defendants: the University and David Hibler, a former assistant professor at the University. The order which

forms the basis of the instant appeal concerns only the University. The district court entered judgment in favor of the University and against Shlien pursuant to the then applicable Neb. Rev. Stat. § 25-705(6) (Supp. 1999), now found at Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000). Accordingly, the parties to the instant appeal are limited to Shlien and the University.

In the early 1990's, Shlien was a student at the University of Nebraska-Lincoln. During the spring semester of 1991, she was enrolled in an English composition course taught by Hibler. As part of a class assignment, Shlien wrote and submitted two papers to Hibler entitled "Anacoluthon" and "Being There For You." Shlien alleged that the papers contained "intimate details of her private life."

In 1995, Hibler set up a Web site on the World Wide Web using the University's computer service. Part of the material Hibler posted to the Web site was a publication entitled the "Big Red Reader." At some time in 1995, Hibler uploaded the papers written by Shlien to his Web site as part of the Big Red Reader. Hibler's posting of Shlien's papers was done without Shlien's knowledge or consent. On the record before us, no party was able to specify the date in 1995 on which Hibler posted Shlien's papers to the Web site, but there was evidence that Hibler last posted material to the Big Red Reader on October 24, 1995. During the course of discovery, Shlien was deemed to have admitted that the papers had been posted sometime in 1995.

Shlien alleged that she first became aware of the presence of her papers on the Web site on or about June 19, 1997, at which time she demanded that they be removed. Shlien filed a tort claim with the State Tort Claims Board on February 17, 1998. The claim was denied on or about May 21, 1998.

Shlien filed the present action in district court on September 23, 1998, naming the University and Hibler as defendants. In the initial petition filed September 23, Shlien alleged two causes of action against each defendant. The first cause of action was for negligence, and the second cause of action was for invasion of privacy pursuant to Neb. Rev. Stat. § 20-201 et seq. (Reissue 1997).

In its answer, the University alleged that Shlien's causes of action against it were barred by the statute of limitations. The University filed a motion for summary judgment contending,

inter alia, that both causes of action were time barred and that, in any event, the petition failed to state a cause of action for invasion of privacy.

The district court entered an order on February 17, 1999. The district court concluded that Shlien's right to privacy cause of action "d[id] not come within the Nebraska right to privacy statutes" and did not constitute an invasion of privacy under § 20-203. The district court further determined, as to the cause of action for negligence, that the claim accrued in 1995 when Shlien's papers were posted to the Web site and that Shlien's claim filed with the State Claims Board in 1998 did not come within 2 years *thereafter* as required under Neb. Rev. Stat. § 81-8,227(1) (Reissue 1996), thus the negligence cause of action against the University was time barred. However, the district court ruled that Shlien was entitled to amend her petition to allege an excuse tolling the operation and bar of the statute of limitations. The district court therefore sustained the University's motion for summary judgment as to the invasion of privacy cause of action and, evidently treating the University's motion as to the negligence cause of action as a demurrer, denied the motion and gave Shlien 21 days in which to file an amended petition.

On March 10, 1999, Shlien filed an amended petition, which is the controlling petition in this case. On March 18, the University filed an answer to the amended petition, in which it again asserted that the remaining negligence cause of action was barred by the statute of limitations. The University also filed a motion for summary judgment in which it sought entry of judgment in its favor. In its motion for summary judgment, the University asserted that there were no genuine issues of material fact concerning, inter alia, the accrual of the claim in 1995, the filing of Shlien's claim with the State Claims Board on February 17, 1998, and the filing of this action in the district court on September 23, 1998.

The district court ruled on the University's motion for summary judgment in an order entered May 17, 1999. In its ruling, the district court noted that Shlien generally argued that each time the Web site was accessed, it constituted a separate actionable " 'publication,' " that her parents accessed the Web site in June 1997, and that therefore, the papers were " 'published' " to them on that date. In contrast, the University generally argued that the claim

accrued under § 81-8,227(1); that the statute of limitations began to run upon the initial "publication," which occurred when Hibler uploaded the papers to the Web site in 1995; and that, therefore, Shlien's claim filed with the State Claims Board on February 17, 1998, was filed greater than 2 years after the claim accrued. The district court specifically noted that although Shlien alleged in her amended petition that she was not aware of the date the papers were originally made available on the Web site, she had admitted that such event occurred in 1995.

In its order in favor of the University, the district court agreed with the University that "publication" occurred on the date the material was first uploaded in 1995 and made available to be accessed by other users. The district court concluded that the 2-year filing requirement of § 81-8,227(1) began to run in 1995 when the papers were first published on the Web site. The district court stated that even if the initial publication occurred on the last day of 1995, Shlien's claim, filed on February 17, 1998, was filed outside the 2-year period. The district court ordered that the University's motion for summary judgment be sustained and that the amended petition be dismissed as to the University.

Shlien appealed the May 17, 1999, order sustaining the University's motion for summary judgment. On March 13, 2000, a mandate was issued by this court dismissing the appeal due to the lack of a final order. See *Shlien v. Board of Regents*, 258 Neb. xxii (No. S-99-882, Feb. 24, 2000). The parties subsequently requested that the district court enter an order stating that the May 17, 1999, order was a final, appealable order under § 25-705(6). In an order dated March 30, 2000, the district court stated that it expressly determined that there was no just reason for delay in entry of final judgment for the University and expressly directed the entry of final judgment in favor of the University only. Shlien filed the instant appeal.

ASSIGNMENTS OF ERROR

Shlien asserts generally that the district court erred in concluding that the statute of limitations barred her negligence cause of action against the University and asserts specifically that the district court erred in finding that (1) "the Single Publication Rule applied to the Internet" and (2) "the Discovery Rule does not apply to Internet Publications."

STANDARD OF REVIEW

[1] In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists. *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 622 N.W.2d 684 (2001).

ANALYSIS

We note that in her original petition, Shlien alleged two causes of action against the University: one for negligence and one for invasion of privacy. In the course of the proceedings recited above, Shlien filed an amended petition in which the allegations against the University were limited to negligence. Shlien abandoned her right to privacy cause of action against the University. The district court's conclusions regarding the statute of limitations from which this appeal was taken apply only to the negligence cause of action, and therefore, the only issue before this court on appeal is whether on this record the district court erred in concluding that the statute of limitations barred Shlien's negligence cause of action against the University.

The University and its Board of Regents are agencies of the state, and tort claims against the University must be brought in accordance with the provisions of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2000). See *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996). Section 81-8,227(1) of the act provides:

> Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

In the district court and on appeal, the University contends that Shlien's claim accrued in 1995 when Hibler uploaded Shlien's papers to the Web site and that, therefore, Shlien's claim filed on February 17, 1998, was filed beyond the 2 years allowed under

§ 81-8,227(1). The University has consistently argued that the statute of limitations began to run upon the initial "publication" of Shlien's papers which occurred when Hibler first uploaded the papers in 1995.

In the district court and on appeal, Shlien contends that her claim did not accrue until June 1997 when her parents downloaded the papers from the Web site and she first learned that they had been posted to the Web site. Shlien has consistently argued that "publication" occurs each time the Web site is accessed and that each "publication" gives rise to a new statute of limitations.

In its May 17, 1999, ruling, the district court agreed with the analytical framework urged by both parties and focused on the "publication" of the papers and on what date such "publication" occurred. In making its ruling, the district court relied on *Patterson v. Renstrom*, 188 Neb. 78, 195 N.W.2d 193 (1972), which concluded that in the absence of fraud or fraudulent concealment, the statute of limitations in a libel action commences to run upon publication of the defamatory matter even if the plaintiff is ignorant of such publication. In the instant case, the district court concluded that under the *Patterson* rationale, Shlien's claim accrued in 1995 upon the initial posting of Shlien's papers to the Web site. The district court specifically determined that "the two year filing requirement of Section 81-8,227(1) began to run sometime in 1995 when, as admitted by [Shlien], the articles were first placed on the Internet." The district court therefore determined that even assuming Shlien's papers had been posted on the last day in 1995, to be timely, the claim had to have been filed in 1997. Because the claim was not filed with the State Claims Board until February 17, 1998, the district court concluded that the claim was time barred and that as a result, Shlien's lawsuit was barred.

In order to evaluate the correctness of the district court's ruling, we must first look to the allegations against the University in the amended petition to determine the nature of the claim against the University and therefore determine when the statute of limitations commenced on Shlien's cause of action. Shlien alleges in her amended petition that the University was negligent in certain respects, and we, therefore, must determine when her negligence claim accrued under § 81-8,227(1) of the State Tort Claims Act.

In her amended petition, Shlien alleges as follows:

> 10. That the publication and the making available to be published upon demand by anyone accessing the internet of the private, confidential information of the plaintiff was a result of the negligence of the defendant University of Nebraska in one or more of the following particulars:
>
> a. In failing to properly supervise David Hibler;
>
> b. In failing to properly supervise the Internet access by David Hibler;
>
> c. In failing to have any safeguards in place so as to prevent unauthorized publication of student material.

Shlien also asserted in her amended petition that the University "had known for a period of time that David Hibler was not fulfilling his duties as an instructor, but failed to take any steps to discipline or oversee David Hibler."

Shlien's allegations against the University are grounded in negligence, i.e., alleged negligent supervision of Hibler and an alleged failure to implement safeguards regarding distribution of student material. To determine when Shlien's claim accrued, rather than look to a "publication" date or dates, as did the district court upon the urging of the parties, we must instead look to when the act or omission which Shlien alleges forms the basis of her negligence claim against the University occurred and, because we conclude *infra* that the discovery rule is applicable, the date when Shlien discovered or reasonably should have discovered her injury resulting from such negligence.

We have stated, " '[T]he mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.' " *Condon v. A. H. Robins Co.*, 217 Neb. 60, 63, 349 N.W.2d 622, 624 (1984). The statutes of limitations are " 'enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he [or she] has the right to proceed. The basis of the presumption is gone whenever the ability to resort to the courts is taken away.' " *Id.* " 'If an injured party is wholly unaware of the nature of his [or her] injury or the cause of it, it is difficult to see how he [or she] may be charged with lack of diligence or sleeping on his [or her] rights.' " *Id.*

[2-5] In a negligence action, it has generally been stated that a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *Bernsten v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996). We have determined, however, that the discovery rule applies in certain categories of cases. The rationale behind the discovery rule is that in certain categories of cases, the injury is not obvious *and the individual is wholly unaware that he or she has suffered an injury or damage.* In such cases, " '[i]t is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury.' " *Condon v. A. H. Robins*, 217 Neb. at 67, 349 N.W.2d at 626 (quoting with approval *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983)). Thus, we have stated that when the discovery rule is applicable, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury. E.g., *Condon v. A. H. Robins, supra.* Although we have not explicitly so stated, it is implicit in our prior rulings that in those cases in which the discovery rule applies, the beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, the injury within the initial period of limitations running from the wrongful act or omission. However, in a case where the injury is not obvious and is neither discovered nor discoverable within the limitations period running from the wrongful act or omission, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.

Teater v. State, 252 Neb. 20, 559 N.W.2d 758 (1997), involved the State Tort Claims Act. Although the facts in *Teater* did not require application of the discovery rule, we referred to the discovery rule which we had applied in the products liability case of *Condon v. A. H. Robins Co., supra*. In *Teater*, we recited the "discovery rule" as follows: "[T]he statute of limitations begins to run on the date on which the party holding the cause of action discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury." 252 Neb. at 26, 559 N.W.2d at 763.

We have specifically held that the discovery rule is applicable to the statute of limitations provision in Neb. Rev. Stat. § 13-919(1) (Reissue 1997) of the Political Subdivisions Tort Claims Act, the language of which is similar to § 81-8,227(1) of the State Tort Claims Act. See *Polinski v. Omaha Public Power Dist.*, 251 Neb. 14, 18, 554 N.W.2d 636, 639 (1996) (holding that "a cause of action accrues, thereby starting the period of limitations [under the Political Subdivisions Tort Claims Act], when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence"). See, also, *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988). We believe the rationale making the discovery rule applicable to the Political Subdivisions Tort Claims Act applies equally to the State Tort Claims Act.

[6] In concluding that the discovery rule is applicable to § 81-8,227(1) of the State Tort Claims Act at issue in this case, we note that although the discovery rule as stated in *Polinski* focuses on discovery of the defendant's alleged "negligence," the more recent articulations of the discovery rule focus on discovery of the potential plaintiff's "injury." See, e.g., *Teater v. State, supra*. We, therefore, conclude that the discovery rule is applicable to the State Tort Claims Act and that in a case such as the instant action in which the plaintiff cannot reasonably become aware of the injury at the time of the act or omission, the discovery rule applies, and the period of limitations under the State Tort Claims Act begins to run when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the existence of the injury.

The district court relied on a libel case in its order concluding that the statute of limitations commenced upon "publication" sometime in 1995, regardless of whether or not Shlien was ignorant of such publication. The University in its brief to this court similarly cites to holdings in libel and slander cases to the effect that the statute of limitations commences to run upon the initial publication of the defamatory matter even if the plaintiff is ignorant of such publication. See, *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992); *Lathrop v. McBride*, 209 Neb. 351, 307 N.W.2d 804 (1981); *Patterson v. Renstrom*, 188 Neb. 78, 195 N.W.2d 193 (1972). Relying on the holdings in the libel and

slander cases, the district court granted summary judgment in favor of the University, concluding that neither the particular date in 1995 on which Shlien's papers were posted to the Web site nor when Shlien should have discovered that her papers had been posted to Hibler's Web site was relevant to a determination of whether Shlien's action was time barred. Such reasoning was error as a matter of law.

[7] 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).

The present appeal does not involve a libel or slander action in which publication gives rise to the claim and for which the running of the period of limitations does not await discovery. Instead, this case involves a cause of action for negligence brought under the State Tort Claims Act, to which the discovery rule is applicable. The acts or omissions alleged to constitute negligence give rise to the cause of action, and as we have concluded, the discovery rule applies to Shlien's negligence action. With respect to the timeliness of this action, on the record presented, both the date of uploading Shlien's papers and the date on which Shlien in the exercise of reasonable diligence should have discovered the Web site are material facts in dispute precluding entry of summary judgment.

As to the date of posting, the negligence cause of action against the University, as pled by Shlien in her amended petition, was based on allegations that the University was negligent in failing to properly supervise Hibler, specifically, in failing to properly supervise his Internet access and in failing to have safeguards in place so as to prevent unauthorized publication of student material. As fashioned by Shlien in her amended petition, the alleged "acts or omissions" which form the University's negligent conduct logically occurred prior to and culminated in Hibler's uploading Shlien's papers to the Web site, an act which occurred on an undetermined date on or before October 24, 1995. The date on which Shlien's papers were posted to the Web site is a material fact, and on this record, a material fact in issue.

As to discovery, Shlien has pled that she did not actually discover her papers on the Web site until June 19, 1997. However, when Shlien should in the exercise of reasonable diligence have discovered the presence of her papers on the Web site is a material fact in dispute, precluding the entry of summary judgment. Such date is some time between the date the papers were uploaded in 1995, which date has not been established, and the date Shlien actually discovered the posting in June 1997. Both the date the papers were uploaded and the date Shlien should have discovered her injury are material facts needed to determine whether Shlien's action is time barred. If Shlien's actual discovery of her injury in June 1997 was within 2 years of the date the papers were uploaded, then Shlien did not timely file her State claim. If, however, June 1997 was more than 2 years after the date the papers were uploaded and the date Shlien should have discovered her injury was also more than 2 years after the date the papers were uploaded, then by virtue of application of the discovery rule, the statute of limitations did not begin to run until the date Shlien discovered or should have discovered her injury. Because of the existence of genuine issues of material fact, it was improper for the district court to grant summary judgment in the University's favor.

CONCLUSION

In this appeal, we consider if there is any real issue of material fact as to whether Shlien's negligence action against the University is time barred. We conclude the discovery rule is applicable to certain cases brought under the State Tort Claims Act and that in this case, genuine issues of material fact remain which prevent the entry of summary judgment. We conclude that the district court erred in concluding that Shlien's action against the University was time barred and erred in sustaining the University's motion for summary judgment. We therefore reverse the decision of the district court sustaining the University's motion for summary judgment and dismissing Shlien's petition as to the University and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

IN RE LOYAL W. SHEEN FAMILY TRUST. VEONA G. SHEEN BARNES, TRUSTEE, AND ELENA F. SHEEN SCHMIDT, BENEFICIARY AND TRUSTEE, APPELLANTS, V. JANENE M. FEIKERT AND ALLEN W. SHEEN, BENEFICIARIES, APPELLEES.

640 N.W.2d 653

Filed March 22, 2002. No. S-00-792.

1. **Trusts: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Supp. 2001), including trust administration proceedings and proceedings to remove trustees brought pursuant to § 30-2806, are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **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.
4. **Estoppel.** The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
5. **Trusts: Standing.** A beneficiary of a trust is an "interested party" who has standing to initiate a proceeding to remove trustees under Neb. Rev. Stat. § 30-2806 (Reissue 1995).

Appeal from the County Court for Buffalo County: GRATEN D. BEAVERS, Judge. Affirmed.

Gregory C. Damman, of Blevens & Damman, and, on brief, Michael L. Johnson, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellants.

Kent A. Schroeder and Vikki S. Stamm, of Ross, Schroeder & Romatzke, for appellee Janene M. Feikert.

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

MILLER-LERMAN, J.

NATURE OF CASE

Veona G. Sheen Barnes and Elena F. Sheen Schmidt, as trustees of the Loyal W. Sheen Family Trust and individually,

appeal the decision of the county court for Buffalo County which concluded that Janene M. Feikert was among the beneficiaries of the trust and granted Janene's petition to remove Veona and Elena as trustees. We find no error on the record and affirm the decision of the county court.

STATEMENT OF FACTS

Loyal W. Sheen and Veona were married and had three children, Allen W. Sheen, Janene, and Elena. In 1979, Loyal and Veona purchased a "kit" and "educational materials" from "E. S. Publishers" and the Rev. J.H. Schroeder, which purported to instruct them on how to establish trusts that would allow them to reduce or eliminate income taxes. The Nebraska Attorney General subsequently brought an action against Schroeder under the Consumer Protection Act. It was determined that

> Schroeder employed unfair and deceptive acts and practices by misrepresentation in connection with the promotion and sale of certain purported trust forms. The claimed trusts, which were to result once the forms were completed, were to reduce or eliminate income taxes by passing one's earned income to the trust and deducting from said income his or her personal living expenses.

State ex rel. Douglas v. Schroeder, 222 Neb. 473, 475, 384 N.W.2d 626, 628 (1986).

Pursuant to advice provided in the materials purchased from Schroeder, Veona conveyed all her property to Loyal, who conveyed all of the joint property into the Loyal W. Sheen Family Trust (hereinafter the Trust). The Trust was created by an instrument dated January 17, 1979, and registered in the office of the Buffalo County register of deeds on January 24. The trust instrument was based on a form provided by Schroeder. The property transferred to the Trust was essentially all the property owned by Loyal and Veona. Loyal was named in the instrument as creator and grantor of the Trust, and Veona and Elena were named as trustees.

The first meeting of the board of trustees of the Trust was held January 16, 1979. The minutes of the meeting, which were prepared from a form provided in the kit, stated, inter alia, that the property transferred by Loyal to the Trust included, "The

Exclusive use of his lifetime services including ALL of his earned remuneration accruing therefrom, from ANY current source whatsoever in exchange for all of the beneficial interest of THIS TRUST . . . .” The minutes stated that in exchange for the property he contributed, Loyal was given “One Hundred (100) Units of Beneficial Interest being ALL of the Beneficial Interest of THIS TRUST.” The minutes further stated that the trustees elected Veona to be a trustee of the Trust “and to hold office for life.” A second meeting was held January 17, and the minutes of that meeting indicated that the Trust contracted with Loyal and Veona for their lifetime services as executive trustee and executive secretary of the Trust. The minutes indicated that in exchange for their lifetime services, Loyal and Veona would be provided with housing, transportation, health care, educational allowances, miscellaneous expenses, and remuneration for their services as mutually agreed by the trustees for consultant fees.

On February 27, 1981, a verified petition to modify and amend the terms of the Trust was filed in the county court for Buffalo County. Among the individuals attesting to the veracity of the petition were Veona and Elena. The petitioners listed in the petition were as follows: Veona and Elena, designated as trustees; Loyal, designated as grantor-creator and beneficiary; and Veona, Allen, Janene, and Elena, designated as beneficiaries. The stated purpose of the petition was “solely to clarify the intent of the Grantor-Creator in creating said Trust, to further restrict the relationship of said Grantor-Creator to said Trust, and further, to more specifically define the rights, powers and duties of the Trustees in their operation of said Trust.” The petitioners requested that the county court order that the terms of the Trust be modified and amended in accordance with an attached document. The attached document was an instrument providing the terms of the Trust. The trust instrument specified, inter alia, that Loyal was the sole initial beneficiary of the Trust and that beneficial interests were divided into 100 units, each of which represented a 1-percent interest in both the income and corpus of the Trust. The trust instrument also provided that the holder of a beneficial interest could transfer interests and, in making such transfers, could elect to split the beneficial interest between income and principal interests.

Also attached to the petition was a schedule designated as "Schedule A," which the petition alleged

> accurately lists the names of the Trustees, the name, place, and date of the registration of the Trust, the [names of the] beneficiaries of the Trust including their ages, addresses, and the extent of their interest in said Trust, and the name and address of the Grantor-Creator of said Trust.

The schedule listed Loyal as grantor-creator and Veona and Elena as trustees. Listed as "Beneficiaries of the Trust" were Veona, Allen, Janene, Elena, and Loyal. The schedule also listed the following "Units of Benf. Interest" for each person: Veona, 8 units; Allen, 30 units; Janene, 30 units; Elena, 30 units; and Loyal, 2 units. Although the listing showed 100 units distributed among the listed beneficiaries, it did not indicate whether those units represented interests in income, principal, or both, nor did it indicate how or when each person had obtained such units. On February 27, 1981, the Buffalo County Court entered an order allowing modification and amendment of the trust and ordered that "the Modification and Amendment attached to the petition do hereby supersede and take full precedent over the hereinbefore Declaration of Trust, as described in Schedule A of the petition."

Loyal died on August 18, 1982. The Trust continued with Veona and Elena serving as trustees. On April 6, 1995, Janene filed a petition for removal of trustees in the county court. Janene alleged that she was a beneficiary of the Trust and that Veona and Elena had breached their duties as trustees in that they (1) had failed to perform their duties, (2) had a conflict of interest, (3) had been guilty of misconduct while in office, (4) had contributed to hostile relations between the beneficiaries and the trustees of such a nature as to interfere with the Trust's proper execution, (5) had been negligent in caring for Trust property, and (6) had failed to deliver a statement of accounts and copies of federal and state income tax returns for the Trust pursuant to a demand made on November 9, 1994. Janene alleged that she would suffer great irreparable loss and injury if Veona and Elena were permitted to continue as trustees, and she requested that they be removed as trustees.

Veona and Elena answered the petition on May 1, 1998, by denying that Janene was a beneficiary of the Trust and denying

her allegations that they had breached their duties as trustees. On May 28, Veona and Elena as trustees of the Trust filed a petition for a trust administration proceeding pursuant to Neb. Rev. Stat. § 30-2806 (Reissue 1995), requesting that the county court ascertain the beneficiaries of the Trust. On January 6, 2000, the county court granted Veona and Elena's motion to consolidate their petition for trust administration with Janene's petition for removal of trustees.

Trial on the petitions was held May 23, 2000. On that day, Veona and Elena filed a request for findings of fact and conclusions of law pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1995) requesting findings as to (1) whether Veona was entitled to be a trustee of the Trust; (2) whether Veona should be removed as a trustee; (3) whether Elena should be removed as a trustee; (4) whether Veona was entitled under her "Employment Contract for life" with the Trust to be provided by the Trust "with housing, transportation, health care, educational allowances, miscellaneous expenses, and remuneration for services"; (5) whether Loyal was a beneficiary of the Trust; (6) whether Veona was a beneficiary of the Trust; (7) whether there were any beneficiaries of the Trust other than Loyal and Veona; and (8) if so, the identities of any beneficiaries other than Loyal and Veona.

On June 14, 2000, the county court entered its order on the petitions. The county court found that as of the date of the modification and amendment of the Trust in 1981, the beneficiaries of the Trust were Veona, Allen, Janene, Elena, and Loyal and that their percentage interests in the Trust were as indicated in Schedule A attached to the 1981 petition. There was no evidence that certificates of beneficial interest had been delivered to them; however, the county court found that Allen, Janene, and Elena had been treated as beneficiaries throughout the history of the Trust and that any requirement that certificates be delivered to them had been waived.

Based in part on the lifetime employment contracts the Trust executed with Loyal and Veona, the county court further found that the intent of the creator of the Trust was to provide for lifetime living expenses for Loyal and Veona. The county court found therefore that Veona was the lifetime beneficiary of the Trust and was entitled to all of the income from the Trust during

her lifetime. The county court further found that the trust corpus could be invaded to provide for her living expenses, health and medical expenses, and general welfare in the discretion of the trustees. The county court found that the residuary beneficiaries were entitled to distribution of the Trust's assets at its termination in accordance with the percentages listed in Schedule A attached to the 1981 petition.

Regarding the petition to remove trustees, the county court found that throughout the history of the Trust, the trustees had essentially treated the property as being the property of Loyal and, subsequently, the property of Veona. The county court found evidence of numerous transactions "reflective of personal dealing with trust assets." The county court further found that the trustees did not properly account to the beneficiaries in accordance with Neb. Rev. Stat. § 30-2814 (Reissue 1995) and that the trustees had violated the standard of care by failing to deal with trust assets in a manner that would be observed by a prudent person dealing with property of another as set forth in Neb. Rev. Stat. § 30-2813 (Reissue 1995). The county court therefore ordered that Veona and Elena be removed as trustees and ordered that the parties later appear for a hearing on appointment of a successor trustee.

Prior to such hearing, Veona and Elena filed a motion for new trial. They claimed various irregularities and errors of law, including a failure in making findings of fact and conclusions of law as requested by them. They specifically claimed that the decision was unclear regarding (1) whether the Trust terminates upon Veona's death or at some other time and (2) whether there had been distributions from the Trust to Allen and Janene which reduced the distributions to which they were entitled upon termination of the Trust.

A hearing on the motion for new trial was held, and on July 17, 2000, the county court entered an order supplementing and modifying the June 14 order in certain respects but denying the motion for new trial in all other respects. In the July 17 order, the county court modified the June 14 order to find that the Trust would not terminate until the death of Veona and that it would not terminate 25 years after its January 17, 1979, establishment date if Veona were still alive, despite a provision in the trust instrument to that

effect, but, instead, the Trust would be renewed until her death. The county court specified that it made no adjudication of whether advancements had been made to Allen, Janene, or Elena as such question was not at issue in the present proceeding. The county court stated that Allen, Janene, and Elena were entitled as residuary beneficiaries to distributions at the termination of the Trust upon Veona's death, subject to any advancements which might be determined in a future proceeding. The county court granted the parties 30 days to propose a nomination to the court as to a successor trustee or to submit an order upon agreement of the parties as to a successor trustee. Veona and Elena appeal.

ASSIGNMENTS OF ERROR

Veona and Elena assert that the county court erred in (1) concluding that Allen, Janene, Elena, and the heirs of Loyal were beneficiaries of the Trust; (2) failing to make a finding whether Veona was entitled under her lifetime employment contract with the Trust to be provided housing, transportation, health care, educational allowances, miscellaneous expenses, and consultant fees; (3) failing to find that Janene lacked standing to petition for removal of trustees because she was not a beneficiary of the Trust; (4) removing them as trustees based on findings that they did not properly account to the beneficiaries and that they had violated the standard of care required of a person dealing with the property of another; and (5) overruling their motion for new trial.

STANDARDS OF REVIEW

[1,2] Trust administration proceedings and proceedings to remove trustees are brought pursuant to Neb. Rev. Stat. § 30-2806 (Reissue 1995). Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995, Cum. Supp. 2000 & Supp. 2001), are reviewed for error on the record. *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). 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. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

[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 discretion. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

ANALYSIS

Ascertainment of Beneficiaries.

Veona and Elena first assert that the county court erred in determining that the beneficiaries of the Trust included Allen, Janene, Elena, and the heirs of Loyal. The county court based its ascertainment of beneficiaries on, inter alia, the list of beneficiaries attached to the 1981 petition to modify and amend, as well as evidence that throughout the history of the Trust, the trustees had treated those listed persons as beneficiaries.

We find no error regarding the county court's ascertainment of beneficiaries. In 1981, all the parties to this case, including Veona and Elena, signed a verified petition to amend and modify the terms of the Trust. In the 1981 petition, the petitioners alleged that the attached schedule accurately listed, inter alia, "the beneficiaries of the Trust." The schedule listed Veona, Allen, Janene, Elena, and Loyal as the beneficiaries of the Trust.

[4] Because Veona and Elena verified the petition in 1981, the doctrine of judicial estoppel applies in the present case. The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998).

In challenging the county court's finding regarding the beneficiaries, Veona and Elena did not and do not claim that Allen, Janene, and Elena were beneficiaries of the Trust who lost their status due to a particular event. Instead, Veona and Elena argue that Allen, Janene, and Elena are not and never were beneficiaries of the Trust. Such a position is inconsistent with the successful, unequivocal assertion in their 1981 petition that the three were beneficiaries of the Trust, and the doctrine of judicial estoppel prevents Veona and Elena from taking a position inconsistent with that which they asserted in the 1981 proceeding.

The evidence supports the county court's finding that throughout the years, all parties acted in a manner consistent with an understanding that Allen, Janene, and Elena were beneficiaries of the Trust. The record in this case supports the county court's ascertainment of beneficiaries. We find no error on the record in this respect, and we therefore reject Veona and Elena's first assignment of error.

Lifetime Employment Contract.

Veona and Elena next assert that the county court failed to make findings regarding Veona's rights under the lifetime employment contract. Based in part on the "lifetime employment contract," the county court ordered that Veona was intended to be the lifetime beneficiary and, as such, was entitled to everything she claims to be entitled to under the contract. The county court considered the contract as evidence of the intent of the creator of the Trust and incorporated the contract into its findings regarding the terms of the Trust. Veona and Elena assert only that the county court failed to make a finding on the contract issue. However, because the substance of the contract was incorporated into the county court's findings regarding the terms of the Trust, we find no error on the record. We therefore reject Veona and Elena's second assignment of error.

Standing to Petition for Removal of Trustees.

[5] Veona and Elena contend that Janene did not have standing to petition for removal of trustees. Such contention is based on their assertion that Janene is not a beneficiary. As discussed above, the county court found that Janene was among the beneficiaries of the Trust, and we see no error in such finding. Under § 30-2806, "[t]he court has jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts," including proceedings to remove a trustee. As a beneficiary of the Trust, Janene clearly is an "interested party" who has standing to initiate such a proceeding. See *Deutsch v. Wolff*, 994 S.W.2d 561 (Mo. 1999) (beneficiaries have standing to bring action for removal of trustee). We therefore reject Veona and Elena's third assignment of error.

Removal of Trustees.

Veona and Elena assert on appeal that the county court erred in removing them as trustees based on its findings that they did not properly account to the beneficiaries and that they violated the standard of care by failing to deal with the trust assets in a manner that would be observed by a prudent person dealing with the property of another. Following its evaluation of the evidence not repeated here, the county court found in its order removing the trustees that "throughout the history of this Trust, the trustees have essentially treated this property as being the property of Loyal W. Sheen and his wife and, later, Veona G. Sheen Barnes." The county court also found evidence of "numerous transaction[s] reflective of personal dealing with trust assets." The county court further found that the trustees did not properly account to the beneficiaries in accordance with § 30-2814 and that "the trustees violated the standard of care by failing to deal with the trust assets in a manner that would be observed by a prudent man dealing with property of another as set forth in Neb. Rev. Stat. §30-2813." Such findings formed the basis for the county court's conclusion that the trustees should be removed.

Veona and Elena argue that such findings were in error because, inter alia, the county court applied the wrong standard to their conduct. Veona and Elena note that although § 30-2813 sets forth the standard of care applied by the county court, the statute also reads, "*Except as otherwise provided by the terms of the trust*, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . . ." (Emphasis supplied.) They claim that the trust instrument in this case sets a different, arguably lower, standard of care for the trustees, which standard they met. The Trust document read as a whole does not support the reading placed on it by Veona and Elena.

The trust documents attached to the 1981 petition, which in accordance with the county court's 1981 order are the controlling documents, provide in part as follows:

> The Trustees, except as herein otherwise specifically provided, shall have as wide latitude in the selection, retention and making of investments *as an individual would have in retaining or investing his own funds*, and without the

> necessity of obtaining the written or oral consent of any beneficiary, or other interested individual or entity, or the consent or approval of any court.

(Emphasis supplied.)

Veona and Elena argue that the language quoted above provided a lesser standard of care than that set forth in the statute and gave them much greater discretion in the manner with which they dealt with the property. They argue that the statute contemplates that a different standard may be set forth by the trust document and that the language quoted above "does away with any duty to manage the property as if it was [sic] the property of another person" and gave them "the authority to deal with the property as if it was their own." Supplemental brief for appellants at 5-6. According to Veona and Elena, even if they had treated the property of the Trust as if it were the personal property of Loyal and then Veona, they argue it was not a violation of the standard of care set forth in the trust documents.

Veona and Elena also argue that the county court erred in finding that they did not properly account to the beneficiaries. In this regard, they argue that § 30-2814 provides only that " '[t]he trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration . . . .' " Supplemental brief for appellants at 6. See § 30-2814. The statute further provides that " 'unless otherwise provided in the trust instrument,' " the trustees must provide beneficiaries, upon reasonable request, with an annual statement of the accounts of the Trust. *Id.* Veona and Elena argue that notwithstanding portions of § 30-2814, under the trust documents, they were required to keep records only " 'as they deem necessary' " and that audits were "discretionary" and open to inspection only by the trustees. Supplemental brief for appellants at 7. They argue that these provisions of the trust document dispense with the reporting requirements of § 30-2814 and that their only duty was to keep the beneficiaries " 'reasonably informed.' " Supplemental brief for appellants at 7.

We reject Veona and Elena's arguments that the trust documents set a lesser standard of care for the trustees. The section of the trust document on which Veona and Elena rely addresses only how assets are invested. It does not state that in all respects,

the trustees can treat trust property as if it were their own. To the contrary, the trust documents also state, "The Trustees, holding as co-trustees, shall conserve, maintain, manage and improve the trust, investing and reinvesting the funds in such manner as in their best judgement and prudence will most benefit the beneficiaries." We conclude that the trust documents taken as a whole do not negate the fiduciary role of trustees as stewards of another person's property as set forth in § 30-2813.

Proceedings to remove trustees are brought pursuant to § 30-2806, which is part of the Nebraska Probate Code. Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). With regard to the removal of the trustees, the county court made certain specific factual findings that the trustees had treated Trust property as the personal property of Loyal and Veona and had engaged in numerous instances of personal dealing with trust assets. The evidence in the record not repeated here supports the county court's factual findings in this regard. We find no error on the record related to the county court's factual findings nor any error in its ultimate conclusion, based on such findings, that the trustees should be removed. We therefore reject Veona and Elena's fourth assignment of error.

Motion for New Trial.

Finally, Veona and Elena assert the county court erred in denying their motion for 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. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). The substance of Veona and Elena's new trial motion parallels their assignments of error discussed above. Because we find no error on the record regarding Veona and Elena's assignments of error, we conclude that the county court did not abuse its discretion by denying Veona and Elena's motion for new trial. We, therefore, reject Veona and Elena's fifth assignment of error.

CONCLUSION

The county court did not err in its ascertainment of beneficiaries nor did it fail to make a finding regarding the effect of the lifetime employment contract between Veona and the Trust. Based on

the county court's correct conclusion that Janene was a beneficiary of the Trust, Janene had standing to bring the proceeding to remove trustees. We find no error on the record in regard to the county court's conclusion that the trustees should be removed, and we conclude that the county court did not abuse its discretion in denying Veona and Elena's motion for new trial. We affirm the decision of the county court.

AFFIRMED.

OTTACO, INC., A MICHIGAN CORPORATION, APPELLANT,
v. GALEN McHUGH AND KATHY McHUGH,
HUSBAND AND WIFE, ET AL., APPELLEES.

640 N.W.2d 662

Filed March 22, 2002. No. S-00-824.

1. **Equity: Quiet Title.** A quiet title action 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: Appeal and Error.** Statutory interpretation is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
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. **Tax Sale: Deeds: Time.** Neb. Rev. Stat. § 77-1837 (Reissue 1996) sets out the period during which a purchaser of a tax sale certificate may exercise his or her right to request a treasurer's tax deed.
7. **Tax Sale: Deeds: Time: Notice: Proof.** Once a purchaser has shown proof of notice as provided for in Neb. Rev. Stat. §§ 77-1831 to 77-1835 (Reissue 1996) and requested a deed within 6 months after the expiration of 3 years from the date of sale, the purchaser has done all that is required under chapter 77, article 18, to acquire a treasurer's tax deed.
8. **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.
9. **Tax Sale: Deeds: Time: Public Officers and Employees.** Before executing and delivering a treasurer's tax deed, Neb. Rev. Stat. § 77-1837 (Reissue 1996) requires

> the county treasurer to determine that the property has not been redeemed and that the purchaser has fulfilled all of the statutory requisites under chapter 77, article 18. In addition, the purchaser must present a valid tax sale certificate and make a request for a deed within the request period. If the county treasurer determines that these requisites have been satisfied, then he or she must execute and deliver the deed, but this authority is not limited to the 6-month request period.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed.

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

Charles J. Cuypers, Grand Island City Attorney, for appellee City of Grand Island.

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

CONNOLLY, J.

This is an appeal from an action to quiet title by appellant, Ottaco, Inc. Following a private tax sale by the Hall County treasurer for delinquent taxes, the purchaser assigned the tax sale certificate to Ottaco. Although Ottaco timely requested the tax deed, the district court found that the tax deed was invalid because it was not issued by the county treasurer within the 3-year, 6-month time limitation under Neb. Rev. Stat. § 77-1837 (Reissue 1996) and dismissed Ottaco's petition.

The sole issue is whether a tax deed is invalid if the county treasurer fails to execute and deliver the deed within the 3-year, 6-month time limitation specified under § 77-1837.

We determine that once a purchaser of a tax sale certificate has shown proof of notice as provided for under chapter 77, article 18, of the Nebraska Revised Statutes and has requested a deed within 6 months after the expiration of 3 years from the date of sale, the purchaser has done all that is required under article 18 to acquire a treasurer's tax deed. We further determine that the county treasurer's authority to execute and deliver the deed is not limited to the time limitation provided for in § 77-1837. Accordingly, we reverse.

RELEVANT STATUTES

A review of the applicable statutes will clarify the positions taken by the parties. When a county treasurer sells real property for delinquent taxes under chapter 77, the purchaser receives a tax sale certificate which acts as a lien against the property for the taxes paid by the purchaser. Neb. Rev. Stat. § 77-1818 (Reissue 1996). After a period of 3 years, the purchaser can elect to acquire a deed to the property by either requesting a treasurer's tax deed under the procedures of article 18 or commencing a foreclosure action under article 19. § 77-1837 and Neb. Rev. Stat. § 77-1902 (Reissue 1990). The owner retains the right to redeem the property at any time before the tax deed is delivered by the county treasurer or before judicial confirmation of a sale after a decree of foreclosure. Neb. Rev. Stat. §§ 77-1824 and 77-1917 (Reissue 1996). This case involves the provisions for acquiring a treasurer's tax deed under article 18.

At the time of these proceedings, § 77-1837 provided:

> At any time within six months after the expiration of three years from the date of sale of any real estate for taxes or special assessments, if such real estate has not been redeemed, the county treasurer, on request, on production of the certificate of purchase, and upon compliance with the provisions of sections 77-1801 to 77-1837, shall execute and deliver to the purchaser or his or her heirs or assigns a deed of conveyance for the real estate described in such certificate.

The other statute at issue is Neb. Rev. Stat. § 77-1856 (Reissue 1996). It provides, in relevant part:

> If the owner of any tax sale certificate fails or neglects to demand a deed thereon or to commence an action for the foreclosure of the same within the time specified in section 77-1837 or 77-1902, such tax sale certificate shall cease to be valid or of any force or effect whatever and the real property covered thereby shall be forever released and discharged from the lien of all taxes for which the real property was sold.

Ottaco's position is that the district court incorrectly interpreted § 77-1837 to require the execution and delivery of a treasurer's tax deed within the time limitation in this section

instead of finding that the section required only that the purchaser of a tax sale certificate request a tax deed within the time limitation. The City of Grand Island (City) responds that the county treasurer has only the authority to issue a treasurer's tax deed within the time limitation of § 77-1837 and that because the treasurer executed the tax deed after more than 3 years 6 months from the date of sale, the deed is invalid.

We note that this is a case of last impression. The Nebraska Legislature has since amended § 77-1837 to include the following sentence: "The failure of the county treasurer to issue the deed of conveyance if requested within the timeframe provided in this section shall not impair the validity of such deed if there has otherwise been compliance with the provisions of sections 77-1801 to 77-1863." See 2001 Neb. Laws, L.B. 118.

BACKGROUND

The facts are not disputed. Galen McHugh and Kathy McHugh became the owners of record of this residential property in 1989 when the City conveyed the property to them through special warranty deed in exchange for their promise to make improvements and pay all taxes and assessments. In 1991, the McHughs mortgaged the property to the City for $15,000. On April 6, 1994, the Hall County treasurer sold the property at a private tax sale for delinquent taxes for 1992 in the amount of $984.83 to Equivest Financial (Equivest). See Neb. Rev. Stat. § 77-1801 et seq. (Reissue 1990 & Cum. Supp. 1994). Equivest later assigned its interest to Ottaco. Equivest and Ottaco are affiliated companies that purchase tax sale certificates in different states. The certificate of tax sale gave Equivest the right to obtain a deed after a 3-year redemption period, on April 6, 1997.

In March and April 1997, Equivest sent notice to the McHughs and the City that it had purchased a tax certificate for the property. The notice stated that Equivest would apply for a treasurer's tax deed unless the property was redeemed within 3 months of the date of service. See §§ 77-1831 and 77-1832. Bethany Burgess, an employee of Ottaco whose duties include servicing tax sale certificates and perfecting title, submitted an affidavit to the court. In it, she stated that she had mailed an affidavit on September 4, 1997, to the county treasurer showing that

notice was given to the parties with an interest in the property. The county treasurer sent the documents to the county attorney for review. The county attorney had concerns with technical errors in the documents. The county treasurer therefore returned the documents on September 16 to Ottaco with a letter stating that the tax deed could not be issued until specified corrections were made. On September 26, the county treasurer received the corrected documents. The property had not been redeemed, and on November 7, 1997, 42 days after receiving the corrected documents, the treasurer executed the tax deed conveying the property to Ottaco.

In March 1998, Ottaco filed a petition to quiet title against the McHughs and the City. In its answer, the City denied Ottaco was the owner of the property. The McHughs in their answer also denied Ottaco's ownership and affirmatively alleged that the county treasurer lacked the legal authority to execute the tax deed on November 7, 1997. The McHughs claimed that under § 77-1837, the county treasurer was required to execute the deed within 6 months following the expiration of 3 years from the day of the tax sale, or by October 6, 1997.

At the summary judgment hearing, the court found that § 77-1837 required issuance of the deed within 3 years 6 months and that § 77-1856 referred only to the consequences to the purchaser of a tax sale certificate if he or she failed to make a demand for the deed within 3 years 6 months. The court found that § 77-1837 was more specific to the time limitation for the issuance of the deed, and because there was not strict compliance with statute, the court denied the motion.

After a bench trial in July 2000, the court determined that the tax deed was invalid under § 77-1837 and dismissed Ottaco's petition. Ottaco timely appeals.

ASSIGNMENTS OF ERROR

Ottaco assigns that the district court erred in construing § 77-1837 to require the execution of a treasurer's tax deed within 3 years 6 months and in failing to find that under § 77-1856, the holder of a tax sale certificate is merely required to request a treasurer's tax deed before the expiration of the 3-year 6-month time period.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). 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. *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001).

ANALYSIS

[3-5] Statutory interpretation is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Marie E.*, 260 Neb. 984, 621 N.W.2d 65 (2000). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001).

The City contends that the 6-month period serves as both a limitation on the purchaser's right to make a request and the county treasurer's authority to issue a deed. We disagree. This argument ignores the fact that § 77-1837 is the only provision under chapter 77, article 18, which sets out the period during which a purchaser may exercise his or her right to request a tax deed. Further, the City's interpretation has inherent conflicts.

[6] The City's argument is contrary to a sensible construction of § 77-1837 when read in pari materia with § 77-1856. As the court noted, § 77-1856 specifies that the purchaser's tax lien against the property is discharged if the purchaser fails to timely request a treasurer's tax deed or commence a foreclosure action. But the court failed to consider that, regardless of which procedure the purchaser elects to follow, § 77-1856 acts as a time bar by referring to periods during which the purchaser may exercise his or her rights under either § 77-1837 or § 77-1902. Just as § 77-1902 sets out the commencement period for a foreclosure action, § 77-1837 sets out the request period for a treasurer's tax

deed. The reference in § 77-1856 to the request period in § 77-1837 indicates that the Legislature intended for the 6-month time limitation to apply to the purchaser, not to the county treasurer.

[7] Once a purchaser has shown proof of notice as provided for in §§ 77-1831 to 77-1835 and requested a deed within 6 months after the expiration of 3 years from the date of sale, the purchaser has done all that is required under chapter 77, article 18, to acquire a treasurer's tax deed. Although it is reasonable to hold a purchaser to strict compliance with the statutory requirements of article 18, it is not reasonable to construe § 77-1837 as requiring the county treasurer to execute and deliver the deed within the same time limitation. It would be unreasonable to conclude that an otherwise blameless purchaser should have his or her deed declared invalid because the county treasurer failed to execute and deliver the deed within the request period. Compare *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). See, also, *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983); *Crete Mills v. Stevens*, 120 Neb. 794, 797, 235 N.W. 453, 455 (1931) ("it is the law that, where a party to an action is without fault, he cannot, as between the parties, be deprived of his rights therein through official fault").

[8] 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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). The 6-month period under § 77-1837 is sensibly construed only as setting forth the time limitation during which a purchaser of a tax sale certificate must request a treasurer's tax deed.

[9] We determine that § 77-1837 requires the county treasurer to determine that the property has not been redeemed and that the purchaser has fulfilled all of the statutory requisites under chapter 77, article 18. In addition, the purchaser must present a valid tax sale certificate and make a request for a deed within the request period. If the county treasurer determines that these requisites have been satisfied, then he or she must execute and deliver the deed, but this authority is not limited to the 6-month request period.

REVERSED.

LEONARD GREEN ET AL., APPELLANTS, V. MARILYN LORE, BOX BUTTE COUNTY ASSESSOR, APPELLEE.

640 N.W.2d 673

Filed March 22, 2002. No. S-01-156.

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. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
3. ____. As a general rule, a moot case is subject to summary dismissal.
4. **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.
5. ____: ____. The public interest exception to the mootness doctrine 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.
6. ____: ____. An application of the public interest exception to the mootness doctrine is inappropriate when the issue presented on appeal does not inherently evade appellate review.
7. **Taxation: Valuation.** A taxpayer concerned about an overvaluation of his or her property may file a protest with the county board of equalization.

Appeal from the District Court for Box Butte County: ROBERT O. HIPPE, Judge. Appeal dismissed.

Laurice M. Margheim, of Curtiss, Moravek, Curtiss & Margheim, for appellants.

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

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

CONNOLLY, J.

The appellants, Leonard Green, Kent Green, and Edna Fisher, sought a writ of mandamus. The writ sought to compel Marilyn Lore, the Box Butte County assessor, to implement a resolution passed by the Box Butte County Board of County Commissioners, acting as the Box Butte County Board of Equalization (Board). Under the resolution, assessed values for

all subclassifications of agricultural land in the county would be equalized using the lowest value of any subclass of agricultural land for each market area. Lore refused to implement the resolution because she did not believe the Board had the authority to adjust a class or subclass of property and appealed the resolution to the Tax Equalization and Review Commission (TERC). While Lore's appeal was pending, the appellants filed a petition for mandamus, which the district court denied. We dismiss because the issue is moot.

BACKGROUND

For the 2000 tax year, real property in Box Butte County was assessed by using a sales comparison approach and the establishment of market areas. The use of market areas is an appraisal technique in which the appraising officer determines market value based on the location of real property within the county. Lore testified that she began using market areas in her assessments after receiving a directive from TERC and input from the state Property Tax Administrator regarding the quality of assessment of agricultural land in the county.

On July 17, 2000, the Board passed resolution No. 2000-19, finding that the market areas used for assessing property for subclasses of agricultural land involved the drawing of arbitrary lines. The Board also found that market areas are not a proper class or subclass of land for purposes of assessment. The resolution stated that the market areas resulted in assessments for agricultural land that were not uniformly and proportionately valued in conformance with Neb. Const. art. VIII, § 1, and Neb. Rev. Stat. § 77-1501 (Cum. Supp. 2000). As a result, the Board ordered that assessed values for all subclassifications of agricultural land in the county be equalized using the lowest value of any subclass of agricultural land for each market area.

After the resolution was passed, the Board filed a petition with TERC requesting a change to the valuation of subclasses of agricultural land in the county. At the hearing before TERC, the Box Butte County Attorney stated that the Board requested that the values be adjusted by a percentage for each subclass of land to put those values at approximately what they had been the previous year. At an August 3, 2000, hearing on the issue, the Board

moved to withdraw the petition. TERC allowed the petition to be withdrawn, and because the deadline for filing petitions to adjust values by class or subclass for tax year 2000 had passed on July 26, the action was dismissed with prejudice.

Lore refused to implement the Board's resolution and on August 3, 2000, filed an appeal of the resolution to TERC. While Lore's appeal was pending, on August 25, the appellants filed a petition seeking mandamus to compel Lore to implement the resolution. The record shows that Leonard Green also filed a protest with the Board concerning the valuation of a portion, but not all, of his property and that he was granted relief. The record shows that the other appellants did not file protests. The district court concluded that Lore did not have a clear duty to implement the Board's resolution and denied mandamus.

ASSIGNMENT OF ERROR

The appellants assign that the district court erred in failing to grant a peremptory writ of mandamus.

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. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

ANALYSIS

Because the tax year at issue has already passed, we first address whether the appeal is moot. At oral argument, the appellants conceded that the case is moot but argued that this court should hear the appeal under the "public interest exception."

[2,3] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). As a general rule, a moot case is subject to summary dismissal. *Id.*

[4-6] But, under the public interest exception, we may choose to review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be

affected by its determination. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). 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. *Id*. We have held that an application of the public interest exception is inappropriate when the issue presented on appeal does not inherently evade appellate review. *Id*., citing *Putnam v. Fortenberry, supra*.

[7] Whether Lore was required to implement the resolution of the county board does not inherently evade appellate review. Lore filed an appeal of the Board's resolution to TERC, and that appeal is still pending. Furthermore, a taxpayer concerned about an overvaluation of his or her property may file a protest with the Board. See, Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2000); *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987). The action of the Board upon the protest may be appealed to TERC, which in turn may be appealed to the Nebraska Court of Appeals. See Neb. Rev. Stat. §§ 77-1504 and 77-5019 (Cum. Supp. 2000). As discussed, Leonard Green did indeed file a protest and was granted relief. Because the issue presented on appeal does not inherently evade appellate review, we do not apply the public interest exception to this case. We do not reach the merits of the appeal and dismiss.

APPEAL DISMISSED.

JANET L. SHAUL, GARDEN COUNTY ASSESSOR, APPELLEE,
v. CATHERINE D. LANG, PROPERTY TAX
ADMINISTRATOR, APPELLANT.

640 N.W.2d 668

Filed March 22, 2002. No. S-01-248.

1. **Taxation: Appeal and Error.** 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. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.
4. ____. 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.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Michael J. Goodwillie, Special Assistant Attorney General Counsel, for appellant.

Phillip E. Pierce, Garden County Attorney, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Catherine D. Lang, Property Tax Administrator (the PTA), appeals from a decision of the Tax Equalization and Review Commission (TERC). TERC found the selling price of certain transactions of real property should be adjusted before being included in a qualified agricultural sales roster because the buyer owned adjoining land. We find that no such adjustment is permissible and therefore reverse the decision of TERC and remand the cause with directions.

BACKGROUND

The Department of Property Assessment and Taxation maintains the qualified agricultural sales roster (hereinafter the sales file), a database of all arm's-length sales of real property in Nebraska transacted over a 3-year period. The data gathered and compiled to form the sales file provides statistical information regarding the level and quality of assessment by county and school district for any class or subclass of real property. This information is used for a variety of purposes, such as measuring assessment uniformity in each county, analyzing intracounty and intercounty comparisons, and determining school-adjusted values for state aid to education.

In 2000, Janet L. Shaul, Garden County assessor, filed protests with the PTA over the PTA's inclusion in the sales file of 19 sales

transactions of agricultural real property. Shaul requested that several of the transactions be excluded entirely from the sales file because they were not arm's-length transactions. Shaul requested that the sales prices of several other transactions be reduced by $25 per acre because (1) the buyer owned adjoining property and therefore paid more than market value for the land or (2) the significant number of acres purchased rendered these transactions atypical of Garden County. The PTA denied all of Shaul's protests, who appealed the PTA's decisions to TERC.

TERC released its findings regarding the 19 transactions in five separate orders, only one of which is at issue in this appeal. That order, filed on February 1, 2001, addressed six sales of property identified as cases Nos. 00PT-16, 00PT-17, 00PT-18, 00PT-20, 00PT-28, and 00PT-30. In that order, TERC reversed the PTA and held that the sales prices of the six aforementioned parcels of agricultural real property should be reduced by $25 per acre before inclusion in the sales file. TERC found that

> professionally accepted mass appraisal methodologies allow for an adjustment in the sale price to account for the acquisition of adjoining land. Nebraska state law also recognizes this principle, and specifically expands the principle to allow for the acquisition of land located within one-mile of the buyer's existing property. Neb. Rev. Stat. §77-1371(2000 Cum. Supp.).

The PTA filed a petition for review, pursuant to Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2000), of TERC's decision to the Nebraska Court of Appeals, and we moved the case to our docket pursuant to our authority to regulate the caseloads of the Court of Appeals and this court.

ASSIGNMENT OF ERROR

The PTA assigns, restated, that (1) TERC misapplied several statutes when ordering an adjustment to the selling price of the six parcels and (2) TERC's findings were unsupported by the evidence.

STANDARD OF REVIEW

[1,2] Section 77-5019(5) 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. *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001).

ANALYSIS

In her first assignment of error, the PTA argues that adjusting the selling price of property before inclusion in the sales file is contrary to the statutes governing the sales file, none of which allow for such an adjustment.

Neb. Rev. Stat. § 77-1372 (Cum. Supp. 2000) provided for the compilation and contents of the sales file as follows:

> All transactions of real property for which the statement required in section 76-214 is filed shall be available for development of a sales file for analysis of level of value and quality of assessment for purposes of section 77-5027 and for use by assessing officials in establishing assessed valuations. All transactions with stated consideration of more than one hundred dollars or upon which more than one dollar and seventy-five cents in documentary stamp taxes are paid shall be considered sales. All sales shall be deemed to be arm's length transactions unless determined to be otherwise. The Department of Property Assessment and Taxation shall not overturn a determination made by a county assessor regarding the qualification of a sale unless the department reviews the sale and determines through the review that the determination made by the county assessor is incorrect.

We note that § 77-1372 was repealed by the Legislature, effective April 5, 2001, and was recodified at Neb. Rev. Stat. § 77-1327(2) (Supp. 2001). See 2001 Neb. Laws, L.B. 170.

The real property transactions eligible for inclusion in the sales file are those transactions for which the statement required by Neb. Rev. Stat. § 76-214 (Cum. Supp. 2000) is filed. This statement is filed with the register of deeds, and its contents are prescribed by the PTA. Among the information required to be in this statement is the total consideration paid for the property. § 76-214(1). It is thus apparent that for those transactions initially eligible for inclusion in the sales file, the price to be included in

the sales file is the total consideration paid as listed on the statement described in § 76-214(1).

Shaul argues that the six transactions at issue here are "atypical" of Garden County because of the large number of acres purchased. Brief for appellee at 21. While that may be true, whether a transaction is made at arm's length is not dependent upon the number of acres purchased. Both the PTA and Shaul agree that these six transactions should be included in the sales file. Thus, both parties concede that the transactions are arm's-length transactions.

Shaul argues that TERC correctly found statutory authority for ordering an adjustment to the sale prices in Neb. Rev. Stat. § 77-1371 (Cum. Supp. 2000), which provides in pertinent part:

> When using comparable sales in any method of determining actual value provided in section 77-112, the following guidelines shall be considered in determining what constitutes a comparable sale:
>
> . . . .
>
> (3) For sales of agricultural land or horticultural land as defined in section 77-1359, whether a premium was paid to acquire nearby property. Land within one mile of currently owned property shall be considered nearby property.

We determine that TERC's determination does not conform to the law because § 77-1371(3) pertains to determining actual value for purposes of taxation when a comparable sales methodology is used. Section 77-1371(3) does not pertain to a compilation of a sales file under § 77-1372.

[3,4] It is not within the province of the courts to read a meaning into a statute that is not there. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

Based on the record in this case, we determine that the decision of TERC to adjust the value of the land by lowering the same $25 per acre did not conform to the law.

CONCLUSION

For the reasons set forth above, we reverse the decision of TERC and remand the cause to TERC with directions to reinstate the decision of the PTA to include the sales price of the real estate in question in the sales file without the adjustments made by Shaul.

REVERSED AND REMANDED WITH DIRECTIONS.

GAYLE A. DAVIS, APPELLANT, V. EDWARD D. WIMES, DIRECTOR OF NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

641 N.W.2d 37

Filed March 29, 2002. No. S-00-284.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
4. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and, on brief, Kyle C. Dahl for appellee.

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

McCormack, J.

NATURE OF CASE

Gayle A. Davis appeals from an order of the district court for Sheridan County affirming the decision and order of revocation entered by the director of the Nebraska Department of Motor Vehicles following an administrative license revocation hearing. We affirm the district court.

BACKGROUND

On November 22, 1998, State Patrol Trooper Clint W. Bruhn was dispatched to the scene of a reported car accident in Sheridan County. Upon arriving at the scene of the one-car accident, Bruhn contacted Davis, who was the driver of the vehicle. Bruhn was able to detect the smell of alcohol on Davis' breath and asked Davis to perform field sobriety tests. Davis did not satisfactorily complete the tests, and she also failed a preliminary breath test performed at the scene.

Davis was arrested pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1998) and was read a postarrest chemical test advisement form. This form informed Davis that she was required to submit to a chemical test of her blood, breath, or urine and that "[r]efusal to submit to such test or tests is a separate crime for which you may be charged." Davis agreed to submit to the chemical test, and the test results indicated an alcohol concentration of 0.228 grams per 210 liters of breath.

Davis subsequently petitioned for a hearing before the director of the department to contest the revocation of her driver's license. Davis was notified that the hearing would be held on December 15, 1998, and would be conducted using teleconference hearing procedures. The hearing was later continued to January 4, 1999, on Davis' motion. Once again, Davis was notified that the January 4 hearing would be held using teleconference hearing procedures.

At the outset of the hearing, the hearing officer acknowledged on the record that Davis and Bruhn were participating in the hearing by telephone, although the record does not conclusively reflect the location of the participants. After several exhibits were received into evidence, but before any testimony was received, Davis objected to the "telephonic nature" of the

hearing. Davis argued that the hearing was required to be conducted by videoconference if technically feasible to do so and that Davis "believe[d]" several sites in the area offered such technical capabilities.

During her cross-examination of Bruhn, Davis also objected to the offer of the department's "Notice/Sworn Report/Temporary License" (sworn report), which contained the results of the chemical test. Bruhn testified that he did not know if the individual who administered the test to Davis possessed a valid permit to administer the test under the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations. Davis' objection was overruled, and the sworn report was received into evidence.

Following the hearing, Davis' driver's license was revoked by the director. Davis timely appealed the revocation to the district court. The district court affirmed the revocation, and this appeal followed.

ASSIGNMENTS OF ERROR

Davis assigns, rephrased, that the district court erred in (1) finding that her license revocation hearing was held in accordance with Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998); (2) finding that her license revocation hearing was held in accordance with Neb. Rev. Stat. § 84-913.03 (Reissue 1999); (3) finding that the department established sufficient foundation to receive the sworn report into evidence; and (4) finding that the postarrest advisement form provided sufficient notice of the consequences of failing the chemical test.

STANDARD OF REVIEW

[1,2] A judgment or final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

ANALYSIS

Location of Hearing

Davis argues that her license revocation hearing was not held in accordance with § 60-6,205(6)(a), which provides in pertinent part: "The hearing shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." The record before us does not conclusively establish the location of the hearing officer, Davis, or Bruhn at Davis' license revocation hearing.

The above-quoted portion of § 60-6,205(6)(a) was the subject of our decision in *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000). In that case, we held that § 60-6,205(6)(a) is a venue statute and that generalized objections directed to the method by which the hearing was being held were not objections to venue. See, also, *Reiter v. Wimes, ante* p. 277, 640 N.W.2d 19 (2002).

At the outset of her hearing, Davis objected to "the proceedings by way of telephone conference" and to "the telephonic nature of this hearing." These objections did not address the location or venue of the hearing, as required by *Muir*, but, rather, the method of the hearing. Davis' improper objections and subsequent participation in the hearing without objecting to the hearing location constituted a waiver of any objection she may have had. See *Muir v. Nebraska Dept. of Motor Vehicles, supra*. Accordingly, this assignment of error is without merit.

§ 84-913.03

Davis argues that if a hearing is held by teleconference pursuant to § 84-913.03, the hearing officer must first find that it is not technically feasible to hold the hearing using videoconference hearing procedures. Section 84-913.03 provides:

> The hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

[4] A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). Davis was notified well in advance that her hearing would be conducted by telephone, providing her with ample opportunity to request that the department conduct her hearing via videoconference. However, the record contains no evidence that Davis ever made such a request or ever objected to the use of the teleconference hearing procedures until after the hearing began. Thus, Davis has waived her right to assert this alleged error on appeal.

Sworn Report

In her third assignment of error, Davis argues the sworn report should not have been received into evidence because of a lack of foundation for the chemical test result reported on the sworn report. Davis claims that *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997), stands for the proposition that a minimal amount of foundation must be made so as to reasonably confirm that the chemical tests have been conducted in accordance with the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations, 177 Neb. Admin. Code, ch. 1, §§ 001 through 010 (1998).

We have held that the department makes a prima facie case once it establishes that the arresting officer provided his or her sworn report to the director containing the required recitations. *McGuire v. Department of Motor Vehicles, supra*; *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). Thereafter, the burden is on the defendant to prove that one or more of the recitations on the sworn report were false. *Id.*

In her brief, Davis characterizes the issue as one of foundation for the sworn report. In his argument at the conclusion of the license revocation hearing, Davis' counsel stated, "There's nothing [in the sworn report] that says that . . . the test was done

in compliance with Title 177," and "we believe we've met the sufficient rebuttal and did so by a preponderance of the evidence and as a result she should not have her license revoked."

In *McGuire v. Department of Motor Vehicles, supra*, we held that the defendant met his burden of disproving the truth of the sworn report when he elicited testimony that the arresting officer did not have the required permit to conduct the chemical test. No such evidence was adduced by Davis. At the license revocation hearing, Davis' arresting officer testified that he did not know if the individual who administered the chemical test to Davis possessed a valid permit to conduct such a test, in accordance with the Nebraska Department of Health and Human Services Regulation and Licensure rules and regulations. Rather than disproving the contents of the sworn report, Davis merely proved that a possibility existed that the contents of the sworn report were not true. Davis did not carry her burden of rebutting the department's prima facie case, and the district court did not err in affirming on this ground.

Postarrest Advisement Form

In her final assignment of error, Davis argues that the advisement form is deficient because it did not inform her that refusing to submit to the chemical test subjected her to license revocation procedures under Neb. Rev. Stat. § 60-6,197(4) (Reissue 1998). She argues that "the spirit of Smith [*v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995)] and its progeny and fundamental fairness" require that additional notice of the license revocation procedures be given. Brief for appellant at 19.

In *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), we affirmed a district court's order finding that the defendant was not fully advised of the consequences of submitting to a chemical test as required by § 60-6,197(10) (Reissue 1993). At the time *Smith* was decided, § 60-6,197(10) read as follows:

> Any person who is required to submit to a preliminary breath test or to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised of (a) the consequences of refusing to submit to such test or tests and (b) the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in

> violation of subsection (1) of section 60-6,196. Refusal to submit to such test or tests shall be admissible in any action for a violation of section 60-6,196 or a city or village ordinance enacted pursuant to such section.

This section was amended by the Legislature in 1996 with the enactment of L.B. 939. Since February 27, 1996, and thus at the time of Davis' arrest, § 60-6,197(10) (Reissue 1998) has stated that "[a]ny person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." This case provides us with our first opportunity to measure the sufficiency of an advisement form against the current language of § 60-6,197(10).

When *Smith v. State, supra*, was decided, § 60-6,197(10) required that an arresting officer advise a person of the "consequences" of their decision to submit to a test. Our holding in *Smith* was based on the fact that the advisement form read to the defendant did inform him of *some* of the consequences of his decision, but did not inform him of *all* the consequences of his decision. For that reason, the defendant was not properly advised, and the decision to revoke his license was reversed.

With the enactment of the current version of § 60-6,197(10), the Legislature has essentially determined that an individual must be advised of only one of the consequences of their decision to submit to a chemical test, i.e., that refusal to submit to the test is a crime for which they may be charged. That is exactly what Davis was advised of. We find no error where the arresting officer complied with the exact requirement of the statute.

CONCLUSION

Finding no errors on the record before us, we affirm the decision of the district court affirming the order of revocation of the Nebraska Department of Motor Vehicles.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY RAY BILLUPS, APPELLANT.

641 N.W.2d 71

Filed March 29, 2002. No. S-00-631.

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: 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 state or federal Constitution.
3. ____: ____: ____. An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
4. ____: ____: ____. When a motion for postconviction relief properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his defense.
6. **Postconviction: Effectiveness of Counsel: Proof.** In determining whether counsel's performance was deficient, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

This appeal arises from Billy Ray Billups' request for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). Billups alleged that his conviction violated his

right not to be placed in jeopardy twice for the same offense and that he received ineffective assistance of counsel. The district court denied postconviction relief without an evidentiary hearing, and Billups appeals.

SCOPE 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. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

FACTS

On August 22, 1994, prior to the filing of any criminal charges, the State filed a petition for disposition of seized property. The petition alleged that Billups was the owner of $3,376 in currency and $186 in food stamps. Billups' answer admitted that he owned the currency, but he claimed no ownership in the food stamps. After a hearing, the Lancaster County District Court entered an order on September 14, 1995, denying both the State's petition for forfeiture and Billups' claim to the currency. The court found that the State had failed to prove beyond a reasonable doubt that the seized property was used in violation of the law and that Billups had failed to prove by a preponderance of the evidence that he had an interest in the property.

On October 10, 1994, Billups was charged with three counts of the "Unlawful Manufacture/Distribution of Controlled Substance," a Class II felony, in violation of Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 1994). An amended information was filed on July 3, 1995, which added charges of being an habitual criminal to all three counts. After Billups pled guilty to one count and the other two counts were dismissed, he was sentenced to a term of 20 to 30 years in prison. Billups appealed, and the Nebraska Court of Appeals sustained the State's motion for summary affirmance. See *State v. Billups*, 4 Neb. App. lii (No. A-96-010, Aug. 13, 1996).

In his motion for postconviction relief, Billups asserted that his constitutional rights had been violated and that he had received ineffective assistance of counsel when he entered a guilty plea to the criminal charge on the advice of counsel because he had previously been placed in jeopardy by the forfeiture action. In

support, Billups cited *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), *cert. denied* 528 U.S. 968, 120 S. Ct. 407, 145 L. Ed. 2d 317, and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999). Billups claimed that a plea in bar to the information should have been filed rather than a plea of guilty and that, therefore, he did not knowingly, voluntarily, and intelligently waive his right against double jeopardy.

The district court found that Billups was procedurally barred from raising a double jeopardy claim and that although Billups knew his property had been subject to forfeiture, he failed to raise a double jeopardy claim at any time during the criminal prosecution or on direct appeal. The court noted that because this court did not apply the Double Jeopardy Clause to forfeiture proceedings until 1999 in *Franco*, trial counsel "had no reasonable basis upon which to make a double jeopardy challenge." It rejected Billups' contention that *Franco* and *Spotts* should be applied retroactively, because such an application would have a disruptive effect on the administration of justice. For these reasons, the court denied Billups' motion for an evidentiary hearing.

ASSIGNMENTS OF ERROR

Billups assigns as error that the district court erred in taking judicial notice of the trial record in the forfeiture proceeding and in overruling his motion for an evidentiary hearing.

ANALYSIS

We first address Billups' argument that the district court erred when it took judicial notice of the trial record in the forfeiture proceeding. At the hearing on the motion for an evidentiary hearing, the State asked the court to "take judicial notice of the files and records of the court . . . in the matter found at Docket 517, Page 175," which was the forfeiture action involving Billups. Billups objected to the court's taking judicial notice because that "was a separate case and a separate judge." This objection was overruled.

We find no merit to Billups' argument. He has not advised us how the district court erred when it took judicial notice of the trial record or how this prejudiced Billups in the present action. In *State v. Dandridge*, 255 Neb. 364, 370, 585 N.W.2d 433, 437 (1998), we stated:

> The existence of court records and certain judicial acts reflected in a court's record are in accordance with § 27-201(2)(b)—facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court may, therefore, judicially notice the existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.

Next, Billups argues that the district court erred in denying him an evidentiary hearing. 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. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002). Billups' argument is not so much that he is entitled to postconviction relief but that he is entitled to an evidentiary hearing to determine whether he is entitled to postconviction relief.

Billups asserts that in order to prove that his right against double jeopardy was violated, an evidentiary hearing must be held to establish that both the forfeiture action and the criminal prosecution arose out of the same set of facts. He also desires an opportunity to offer evidence to establish why he pled guilty, as opposed to going to trial, and to present information concerning his counsel's advice prior to entry of the plea.

[2-4] Billups was represented by the same counsel at trial and on direct appeal, and therefore, he is not procedurally barred from asserting a claim of ineffective assistance of counsel. The question presented is whether Billups should have received an evidentiary hearing in order to determine whether his counsel was ineffective. 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 state or federal Constitution. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id.* Further, when the motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records

and files affirmatively show that the defendant is entitled to no relief. *Id.*

[5,6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his defense. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). In determining whether counsel's performance was deficient, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case. See *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

Billups argues that his counsel should have raised the double jeopardy issue, even though the proceedings in the forfeiture action and the criminal case were brought in 1994 and this court's decisions in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), *cert. denied* 528 U.S. 968, 120 S. Ct. 407, 145 L. Ed. 2d 317, and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999), were not issued until 1999. Billups suggests that his trial counsel either should have anticipated the holdings in *Franco* and *Spotts* or should have raised the issue to preserve it for later review. He also asserts that based upon our decision in *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989), *overruled, State v. Spotts, supra*, his counsel should have known in 1994 that Billups had been subjected to double jeopardy. In *One 1987 Toyota Pickup*, we held that the forfeiture statute, Neb. Rev. Stat. § 28-431 (Reissue 1995), was criminal in character and that double jeopardy principles applied.

In *One 1987 Toyota Pickup*, the defendant had been found guilty of unlawful manufacture and distribution of a controlled substance and possession of marijuana weighing more than 1 pound. Subsequently, his pickup was condemned in a forfeiture action brought by the State pursuant to § 28-431. The defendant appealed from both determinations, and the appeals were consolidated. We affirmed the criminal convictions, reversed the forfeiture, and remanded the cause for a new trial.

It was not until *Franco* that we addressed whether a prosecution for possession of a controlled substance with intent to

deliver, in violation of § 28-416(1)(a), and a separate forfeiture action under § 28-431 violated the defendant's double jeopardy protection as set forth in the 5th and 14th Amendments to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. The trial court denied Franco's plea in bar because it concluded that the two proceedings involved two separate offenses under the test enumerated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Franco asserted that the trial court erred in denying his plea in bar because the Double Jeopardy Clauses prohibited the State from bringing a criminal proceeding against him after jeopardy had attached in a forfeiture action arising from the same set of facts. We reversed the trial court's denial of the plea in bar and remanded the cause with directions to dismiss. Prior to *Franco*, we had not decided whether a criminal drug charge and a forfeiture proceeding arising from the same factual occurrence could be tried as separate offenses in separate proceedings.

In *Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999), *cert. denied*, *Parker v. Luebbers*, 529 U.S. 1038, 120 S. Ct. 1534, 146 L. Ed. 2d 348 (2000), the defendant, in seeking a writ of habeas corpus, argued that his trial counsel was ineffective in failing to object to a jury instruction which the Missouri Supreme Court later determined to be incorrect. The U.S. Court of Appeals for the Eighth Circuit held that counsel did not provide ineffective assistance by failing to anticipate the change in the law.

Several criminal defendants have sought habeas corpus relief based on their trial counsel's failure to object to jury composition under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In *Batson*, the U.S. Supreme Court held that peremptory challenges cannot be used to exclude individuals from a jury on the basis of race. The Eighth Circuit has held that although the theory behind *Batson* may have been known to counsel at the time jury selection occurred, no ineffective assistance of counsel could be found when *Batson* itself had not been decided. "[C]ounsel need not 'anticipate a change in existing law' to render constitutionally effective assistance of counsel." *Carter v. Hopkins*, 92 F.3d 666, 670 (8th Cir. 1996), *cert. denied* 520 U.S. 1107, 117 S. Ct. 1113, 137 L. Ed. 2d 314 (1997). See, also, *Ruff v. Armontrout*, 77 F.3d 265 (8th Cir. 1996) (failure to

anticipate change in existing law does not amount to ineffective assistance of counsel), *cert. denied* 519 U.S. 889, 117 S. Ct. 226, 136 L. Ed. 2d 158; *Johnson v. Armontrout*, 923 F.2d 107 (8th Cir. 1991), *cert. denied* 502 U.S. 831, 112 S. Ct. 106, 116 L. Ed. 2d 75; *Horne v. Trickey*, 895 F.2d 497 (8th Cir. 1990).

In *Horne*, the court noted that defense attorneys had justifiably relied on the standard established by a case decided before *Batson*.

> As a reviewing court, we must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," indulging a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Horne, 895 F.2d at 499, quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We conclude that Billups' trial counsel was not ineffective for failing to assert a double jeopardy challenge to the criminal charges based upon the fact that jeopardy attached when the State previously brought a forfeiture action against the $3,376 which Billups claimed he owned. Billups' counsel was not ineffective because he did not anticipate this court's decisions in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), *cert. denied* 528 U.S. 968, 120 S. Ct. 407, 145 L. Ed. 2d 317, and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

Since Billups has not shown any basis upon which this court could conclude that his counsel's performance was deficient, he has not sustained the first part of the test required under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Billups has not established any basis for postconviction relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. See *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

An evidentiary hearing was not necessary to establish whether the forfeiture action was factually related to the criminal prosecution or to determine why Billups pled guilty. Therefore, the district court was not clearly wrong in denying an evidentiary hearing on Billups' motion for postconviction relief.

CONCLUSION

The district court did not err in taking judicial notice of the forfeiture action, nor did it err in denying Billups' motion for an evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

BRIAN ALTAFFER, APPELLEE, V. MAJESTIC ROOFING, LLC, AND DENNIS JONES, APPELLANTS, AND DANIEL J. TAYLOR, APPELLEE.

641 N.W.2d 34

Filed March 29, 2002. No. S-00-773.

1. **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.
2. **Summary Judgment: Records: Affidavits: Depositions: Appeal and Error.** In order to receive consideration on appeal, any affidavits or depositions used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

Tim W. Thompson and Kimberli D. Dawson, of Kelley, Scritsmier & Byrne, P.C., for appellants.

Ryan R. Wilcox for appellee Brian Altaffer.

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

WRIGHT, J.

NATURE OF CASE

The Red Willow County District Court granted summary judgment in favor of Brian Altaffer and against Majestic Roofing, LLC (Majestic), and Dennis Jones in the amount of $36,500 plus postjudgment interest and costs. Majestic and Jones timely filed this appeal.

SCOPE OF REVIEW

[1] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

FACTS

On October 29, 1999, Altaffer filed a petition against Majestic, Jones, and Daniel J. Taylor, alleging breach of contract, fraudulent misrepresentation, slander, and other claims. The petition asserted that Majestic was a limited liability company licensed to operate in Colorado and that Jones was the registered agent. Jones filed a responsive pleading on December 16 entitled "Answer to Summons." Jones stated: "We either Deny, Dispute the allegations or have a counter claim [sic]."

On May 9, 2000, Altaffer filed a motion for summary judgment and an affidavit in support of the motion. Jones appeared without counsel at the hearing on the motion for summary judgment on June 16. At the hearing, Altaffer moved for a default judgment, claiming that a proper answer had not been filed. The district court overruled this motion, finding that Jones' pleading, although not in proper form, was a sufficient answer.

The district court then heard Altaffer's motion for summary judgment. Altaffer asked the court to take judicial notice of the court file, which contained the affidavit in support of his motion for summary judgment, and the court stated it would take judicial notice of the affidavit. Jones offered no evidence. The court then entered summary judgment against Majestic and Jones in the amount of $36,500. Taylor, an alleged manager for Majestic, was not mentioned in the summary judgment order. Majestic and Jones have appealed.

ASSIGNMENT OF ERROR

Majestic and Jones assign as error that the district court erred in finding that there was no genuine issue of material fact and that Altaffer was entitled to a judgment as a matter of law.

ANALYSIS

Majestic and Jones claim the district court erred in considering Altaffer's affidavit. They assert that because the affidavit was not offered and received as an exhibit at the summary judgment hearing, the district court should not have considered it as evidence.

[2] Altaffer's affidavit was filed with the clerk of the district court, but it was never offered into evidence and was not made a part of the bill of exceptions. This court has long held that an affidavit in support of a motion for summary judgment must be offered as an exhibit and must be made part of the bill of exceptions. See *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959). In *Peterson*, we stated:

> The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court.

168 Neb. at 577, 96 N.W.2d at 631. In order to receive consideration on appeal, any affidavits or depositions used on a motion for summary judgment must have been offered and received in evidence in the trial court and preserved in and made a part of the bill of exceptions. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982).

A trial court cannot take judicial notice of disputed allegations. *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). See Neb. Rev. Stat. § 27-201(2) (Reissue 1995). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*

The problem here is that a party cannot place an affidavit in the court file and then request the court to take judicial notice of the facts contained in the affidavit. In an action for summary judgment, the proponent of the affidavit must mark and offer it as an exhibit and make it a part of the bill of exceptions. Unless

the affidavit is marked, offered, and accepted, it does not become part of the record and cannot be considered by the trial court as evidence in the case. In the case at bar, the district court erred in taking judicial notice of the affidavit in the court file. An affidavit must be marked, offered, received, and preserved in the bill of exceptions.

Altaffer argues that Majestic and Jones suffered no detriment because they were able to view the affidavit prior to the summary judgment hearing. This is not relevant to the question of whether the affidavit was included in the bill of exceptions. 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). The affidavit was not offered at the hearing, and therefore, it cannot be considered by this court. Since there was no evidence before the district court upon which to render a judgment, the court erred in sustaining Altaffer's motion for summary judgment.

CONCLUSION

The district court erred in granting summary judgment in favor of Altaffer. Therefore, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MIKE SALKIN, ASSIGNEE, APPELLEE, V.
TERRY JACOBSEN, APPELLANT.

641 N.W.2d 356

Filed March 29, 2002. No. S-00-872.

1. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.

3. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
4. ____. 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.
5. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
6. **Attorney Fees: Case Disapproved.** A motion for attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) must be made prior to the judgment of the court in which the attorney's services were rendered. To the extent that dicta in *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), and *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991), suggest otherwise, that language is expressly disapproved.
7. **Rules of the Supreme Court: Courts.** Neb. Ct. R. of Prac. 9F (rev. 2001) is a rule of the Nebraska Supreme Court which also applies to the Nebraska Court of Appeals pursuant to Neb. Ct. R. of Prac. 2A (rev. 2000). It has no application to the district court, even when that court is sitting as an intermediate appellate court.

Appeal from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH P. CANIGLIA, Judge. Judgment of District Court affirmed.

Michael J. Matukewicz and John G. Liakos, of Liakos & Associates, for appellant.

Patrick M. Ford for appellee.

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

STEPHAN, J.

Neb. Rev. Stat. § 25-824 (Reissue 1995) authorizes a court, on its own motion or that of a party, to order a party or attorney who asserts a frivolous or bad faith claim or defense in a civil action to pay the opposing party's reasonable attorney fees and court costs. The statute does not however specify the time in which a motion for such an order must be made. That issue is presented in this appeal as a matter of first impression.

BACKGROUND

Mike Salkin, as the assignee of Trustland Company, brought this action in the county court for Douglas County against Terry Jacobsen to recover a real estate commission in the amount of

$2,098.60, which Jacobsen allegedly owed to Trustland. The county court sustained Jacobsen's demurrer and dismissed the action with prejudice in its order filed on May 21, 1996. Salkin perfected a timely appeal to the district court for Douglas County.

While the appeal was pending, Jacobsen filed a motion in the county court seeking attorney fees pursuant to § 25-824, based upon allegations that the lawsuit was frivolous. The county court declined to consider the motion based upon its determination that it lacked jurisdiction because of the pending appeal. On October 11, 1996, the district court affirmed the judgment of dismissal and issued its mandate directing the county court to enter judgment in accordance with its decision.

On November 22, 1996, Jacobsen filed another motion for attorney fees in the county court. It is this motion which is the subject of this appeal. In his motion, Jacobsen again sought an award of attorney fees and costs against Salkin and his attorney pursuant to § 25-824 on grounds that the action was frivolous and interposed solely for the purpose of harassment. In an affidavit filed with the motion, Jacobsen's attorney stated that he and members of his firm had devoted 44.8 hours to the case and related proceedings from June 2, 1994, through August 12, 1996, which, at an hourly rate of $90, resulted in a fee of $4,032. The attorney also claimed to have advanced unspecified costs in the amount of $79.09.

Salkin filed a special demurrer challenging the jurisdiction of the county court to adjudicate the motion following the mandate of the district court affirming the county court's prior judgment of dismissal. The county court overruled the demurrer and, based upon its determination that Salkin "acted in a frivolous manner," entered an order granting the motion without specifying the amount of the fee awarded. Salkin appealed this order to the district court and moved the county court to set an "amount in controversy" so that he could secure a cost bond. The county court entered an order stating that "the amount in controversy regarding attorney's fees assessed against the Plaintiff by prior Order of this Court shall not exceed $4300.00."

On August 1, 1997, the district court entered an order in which it concluded, based upon *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), that the county

court had jurisdiction to entertain a motion pursuant to § 25-824 following appellate affirmance of its judgment of dismissal and that the total fee request of $4,111.09 was fair and reasonable. However, because the fees were incurred in this and other related cases, the district court remanded the case to the county court for allocation of the fee award to each of the cases. Salkin appealed this order to the Nebraska Court of Appeals. In a memorandum opinion, that court reversed the order and remanded the cause with directions to dismiss the appeal based upon its determination that the order of the county court had not specified the amount of attorney fees to be awarded and was therefore not a final, appealable order. *Salkin v. Jacobsen*, 7 Neb. App. xvi (No. A-97-921, Dec. 18, 1998).

Following remand to the county court, Jacobsen moved for an order setting the amount of the attorney fees and costs to be awarded in this action pursuant to the court's prior order. In ruling on the motion, the county court awarded Jacobsen $1,535.09. Salkin appealed this order to the district court, and the appeal was heard by a judge who had not heard the prior appeal. Following oral argument, the district court concluded that Jacobsen's motion for attorney fees was untimely and vacated the order of the county court. The district court reasoned that Jacobsen had failed to move for attorney fees prior to the judgment of dismissal in the county court and had further failed to request the district court on appeal, "in accordance with Nebraska Supreme Court Rule 9F," to make a finding which would have permitted the county court to entertain a motion pursuant to § 25-824 on remand. Jacobsen perfected this timely appeal, which we removed to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Jacobsen assigns, restated and summarized, that the district court erred in concluding (1) that his request for attorney fees under § 25-824 was untimely, (2) that the county court had no jurisdiction to award attorney fees after the district court had issued its mandate, and (3) that he was required to comply with Neb. Ct. R. of Prac. 9F (rev. 2001) to recover legal fees related to the county court proceedings.

STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000); *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000).

ANALYSIS

[2] As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Jacobsen sought attorney fees and related costs pursuant to § 25-824, which provides in pertinent part:

> (2) . . . [I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.
>
> . . . .
>
> (4) The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment.

[3,4] This statute does not specify the time in which a party may move for attorney fees pursuant thereto, and we have not previously been required to address this issue. Nevertheless, familiar standards of statutory interpretation guide our analysis. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (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 Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

[5] We deem it significant that § 25-824(2) authorizes a court to award attorney fees "as part of its judgment and in addition to any other costs" when it determines that an action or defense is frivolous or made in bad faith. This is consistent with our case law, which generally treats attorney fees, where recoverable, as an element of court costs. See, *Nebraska Nutrients, supra*; *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994). An award of costs in a judgment is considered a part of the judgment. *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999); *Muff v. Mahloch Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970).

It logically follows that a party seeking an award of attorney fees pursuant to § 25-824 for services rendered in a trial court must make such request prior to the judgment in order for the award of fees, if deemed appropriate, to be made a part thereof. We recognize, however, that dicta in two of our cases suggest otherwise. In *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), the appellee made its first request for both appellate and trial-related attorney fees before this court on appeal. We held that the appeal was frivolous and then indicated that we would award the appellee attorney fees for legal services on appeal if it filed the appropriate motion and supporting affidavit under rule 9F. We added:

> The Union asks us to "remand" this cause to the district court for a determination of an attorney fee for legal services in the district court proceedings. The record does not disclose that the district court has made any determination regarding an attorney fee. Therefore, this appeal presents nothing for us to review concerning an attorney fee allowable in the district court. *Of course, after issuance of the mandate in this proceeding, the Union may ask the district court to consider allowance of an attorney fee. In light of our decision and § 25-824 concerning allowance of an attorney fee, the district court, after issuance of the mandate*

> *in this cause and on appropriate request, may consider whether an attorney fee should be awarded to the Union's lawyer for services in the district court.*

(Emphasis supplied.) *Id.* at 336-37, 506 N.W.2d at 692. Similarly, in *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 915-16, 468 N.W.2d 124, 130 (1991), we stated:

> Not before us at this time is the question of the timing of a motion for attorney fees. We note only for future reference that in the federal system a motion for allowance of attorney fees is a collateral and independent claim and, as such, need not be filed within the 10-day period for motions to alter or amend the judgment. The U.S. Court of Appeals for the Eighth Circuit has suggested a 21-day time limit. The court also noted that the time for appeal of a judgment on the merits runs from the entry of judgment and that subsequent consideration of an attorney fee claim does not toll the time for appealing the judgment on the merits. *Obin v. Dist. No. 9 of Intern. Ass'n, Etc.*, 651 F.2d 574 (8th Cir. 1981).

[6] These dicta are inconsistent with our treatment of statutory attorney fees as an element of costs and the plain language of § 25-824(2) that such fees, when appropriate, shall be awarded "as part of [a] judgment and in addition to any other costs." We therefore hold that a motion for attorney fees pursuant to § 25-824 must be made prior to the judgment of the court in which the attorney's services were rendered. To the extent that dicta in *Nebraska Pub. Emp., supra*, and *Millard, supra*, suggest otherwise, that language is expressly disapproved. We further hold that when a motion for attorney fees under § 25-824 is made prior to the judgment, the judgment will not become final and appealable until the court has ruled upon that motion. See, *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000); *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999).

In concluding that a motion for attorney fees pursuant to § 25-824 must be made prior to the judgment of the court in which the claimed fees were incurred, we have considered and reject Jacobsen's argument that language in Neb. Rev. Stat. § 25-2729 (Reissue 1995) and our holding in *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994), compel a contrary holding. In

Ventura, we held that an administrative agency had no authority to reconsider its order after an appeal of the underlying case had been filed. We stated: "In civil appeals, after an appeal to this court has been perfected, a lower court is without jurisdiction to hear a case involving the same matter between the same parties." *Id.* at 133-34, 517 N.W.2d at 380. Jacobsen argues that the words "this court" in the quoted portion of the *Ventura* opinion suggest that a lower court is divested of its jurisdiction only when a case is appealed to the Nebraska Supreme Court. Jacobsen cites no authority from this jurisdiction or any other to support this argument, and we find it to be unpersuasive.

In a similar vein, Jacobsen argues that § 25-2729, which governs appeals from county courts to district courts, preserves the power of the county court to award attorney fees in connection with a judgment which has been appealed. Section 25-2729 provides, in pertinent part: "(2) Satisfaction of the requirements of subsection (1) of this section shall perfect the appeal and give the district court jurisdiction *of the matter appealed.*" (Emphasis supplied.) Jacobsen contrasts this language with the language of Neb. Rev. Stat. § 25-1912(3) (Reissue 1995), now found under § 25-1912(4) (Cum. Supp. 2000) and governing appeals from the district court, which provided in pertinent part that "an appeal shall be deemed perfected and the appellate court shall have jurisdiction *of the cause* when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court . . . ." (Emphasis supplied.) Jacobsen argues that there is a principled difference between the phrase "of the matter appealed" in § 25-2729(2) and the phrase "of the cause" in § 25-1912(3). He contends that because district courts, pursuant to § 25-2729(2), only obtain jurisdiction "of the matter appealed," the county court is free to consider those matters not directly on appeal, including attorney fees. By contrast, Jacobsen suggests that the phrase "of the cause," as used in appeals from a district court under § 25-1912(3), completely strips the district court of all jurisdiction. Jacobsen cites no authority in support of this argument, and we find it to be premised upon a semantic distinction without a difference.

In this case, all of the services for which attorney fees were requested were rendered prior to the county court's judgment of

dismissal filed on May 21, 1996. The motion pursuant to § 25-824 was not made until after that judgment had been affirmed on appeal. Accordingly, the district court correctly determined that the motion was untimely and the award of attorney fees and costs should be vacated.

[7] We disagree, however, with the observation of the district court that Jacobsen could have preserved his claim for attorney fees incurred in the county court pursuant to § 25-824 by invoking rule 9F to request a finding during the pendency of the appeal in the district court. Rule 9F is a rule of this court which also applies to the Nebraska Court of Appeals pursuant to Neb. Ct. R. of Prac. 2A (rev. 2000). It has no application to the district court, even when that court is sitting as an intermediate appellate court. Moreover, rule 9F is clearly limited to requests for attorney fees "for services in the appellate court."

CONCLUSION

The district court correctly concluded that Jacobsen's motion for attorney fees and costs pursuant to § 25-824 was not made prior to the final judgment of the county court dismissing Salkin's action and was thus untimely. We therefore affirm the judgment of the district court vacating the award of fees and costs entered by the county court.

AFFIRMED.

GLADYS HABER, APPELLANT AND CROSS-APPELLEE, V.
V & R JOINT VENTURE, A GENERAL PARTNERSHIP,
APPELLEE AND CROSS-APPELLANT.

641 N.W.2d 31

Filed March 29, 2002. No. S-00-930.

1. **Statutes.** Statutory interpretation presents a question of law.
2. ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
3. **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.
4. **Motions for New Trial: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2000), a notice of appeal filed before the trial court has completely disposed of a motion for new trial is of no effect.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Appeal dismissed.

Norman Denenberg for appellant.

Frank Meares for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Gladys Haber filed a declaratory judgment action in the district court for Douglas County. V & R Joint Venture (V&R) filed a cross-petition based on assumpsit. Following trial, the district court found generally in favor of V&R, concluding that Haber had validly assigned proceeds from a personal injury action to V&R in satisfaction of a debt Haber owed V&R. Haber appeals the district court's denial of her motion for new trial. V&R cross-appeals, challenging the district court's denial of its motion for new trial. Because Haber's notice of appeal was filed prior to the complete disposition of V&R's motion for new trial, the notice of appeal was premature and this court lacks appellate jurisdiction. Accordingly, we dismiss the appeal and cross-appeal.

STATEMENT OF FACTS

Haber was injured in an automobile accident on May 31, 1995. In an unrelated matter, on July 5, 1996, V&R recovered a judgment in the amount of $6,813.88 against Haber and another individual for rent due under a lease. In an effort to satisfy V&R's judgment, Haber signed a document entitled "Assignment," which by its terms assigned to V&R a portion of the proceeds from her personal injury settlement as a result of the May 31, 1995, automobile accident. The assignment provided in pertinent part as follows:

> The undersigned, Gladys Haber, assigns all her right and interest in and to a personal injury action . . . to V&R Joint Venture up to the amount of rent due on the certain lease . . . at the time of settlement. I direct my attorney . . . after deduction of his attorney fee, to pay the then balance due in accordance with the terms of the rental agreement.

V&R notified Metropolitan Property and Casualty Insurance Company and Affiliates (Metropolitan), the insurance carrier handling Haber's personal injury claim, of the assignment. Haber settled her claim with Metropolitan. In 1997, Metropolitan mailed a settlement check to Haber's attorney, made payable to Haber, her attorney, and the attorney for V&R, in the amount of $5,737.46.

On March 2, 1998, Haber filed a declaratory judgment action, seeking a declaration that the assignment in favor of V&R was "void, illegal and a nullity because a tort claim for bodily injury is not assignable." On May 27, V&R filed an "Answer and Cross Petition." V&R's cross-petition sounded in assumpsit "for money had and received in the sum of $5737.46" and other relief.

The matter was tried to the district court on June 19, 2000. In an order filed June 28, the district court concluded that Haber had validly assigned proceeds from the personal injury action to V&R and that the assignment was enforceable. Although V&R was successful in its cross-petition with respect to the money owed, the district court denied the remainder of the relief V&R sought in its cross-petition.

The parties filed cross-motions for new trial which came on for hearing on August 9, 2000. In an order filed August 18, the district court overruled Haber's motion for new trial. In its August 18 order, the district court also overruled a portion of V&R's motion for new trial and set the remainder for hearing on September 27. Thus, in its August 18 order, the district court did not completely dispose of V&R's motion for new trial.

On September 5, 2000, Haber filed her notice of appeal. Thereafter, on September 27, following a hearing, the district court filed its order, finally disposing of all of the issues raised in V&R's new trial motion. No new notice of appeal was filed by either Haber or V&R subsequent to the district court's September 27 order.

ASSIGNMENTS OF ERROR

In her appeal, Haber assigns as error the district court's conclusion that the assignment of her personal injury cause of action was valid and enforceable. In its cross-appeal, V&R assigns four errors, claiming the district court erred (1) in failing to award attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995),

(2) in failing to assess all costs against Haber, (3) in failing to award V&R prejudgment interest, and (4) in ordering that the check which was the subject of V&R's cross-petition in assumpsit be filed with the clerk of the district court.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

ANALYSIS

[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. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001).

Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2000) governs the running of the time for filing a notice of appeal when a motion for new trial has been filed. The statute was amended effective July 13, 2000, and as amended provides, in pertinent part, as follows:

> (3) The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01 . . . and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a) . . . of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion.

In this case, Haber filed a notice of appeal on September 5, 2000, which was prior to the order resolving V&R's terminating motion and was, thus, of no effect. The record shows that in its order filed on August 18, the district court overruled Haber's new trial motion in its entirety and ruled in part and reserved ruling in

part on V&R's motion for new trial. The district court set the hearing on the remainder of V&R's motion for new trial for September 27, upon which date, the district court completely disposed of V&R's motion for new trial. Thus, the district court had not finally disposed of V&R's motion for new trial at the time Haber filed her notice of appeal on September 5.

[4] Pursuant to § 25-1912(3), Haber's September 5, 2000, notice of appeal was of "no effect." Further, neither Haber nor V&R filed a new notice of appeal as required by § 25-1912(3), which provides that a "new notice of appeal shall be filed within the prescribed time *after* the entry of the order ruling on the [terminating] motion." (Emphasis supplied.)

This court has previously stated that "[i]t is axiomatic that for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders." *State ex rel. Fick v. Miller*, 252 Neb. 164, 165, 560 N.W.2d 793, 795 (1997). In this case, the August 18, 2000, order, disposing of one but not both new trial motions, did not entirely dispose of the terminating motion. See § 25-1912(3). The August 18 order was not a final, appealable order.

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). Under a plain reading of § 25-1912(3), Haber's notice of appeal filed on September 5, 2000, before complete disposition of V&R's motion for new trial, was of "no effect." Contrary to § 25-1912(3), neither party filed a new notice of appeal after the district court completely disposed of V&R's new trial motion, and this court did not acquire jurisdiction over the appeal. See *State ex rel. Fick v. Miller, supra*.

CONCLUSION

The district court's August 18, 2000, order did not completely dispose of V&R's motion for new trial and was not a final, appealable order. Pursuant to § 25-1912(3), Haber's notice of appeal filed September 5 was of "no effect." Contrary to § 25-1912(3), neither Haber nor V&R filed a new notice of appeal following the district court's September 27 order, which completely disposed of V&R's motion for new trial. Because Haber's notice of appeal

was premature and no notice of appeal was filed by either party subsequent to the complete resolution of the motions for new trial, this court lacks jurisdiction to entertain the appeal and cross-appeal.

APPEAL DISMISSED.

JILL S. MCCARSON, NOW KNOWN AS JILL S. AMORUSO, APPELLANT, V. KEVIN S. MCCARSON, APPELLEE.

641 N.W.2d 62

Filed March 29, 2002. No. S-00-1145.

1. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
2. **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.
3. **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.
4. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.
5. **Jurisdiction: Service of Process: Parties.** For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process.
6. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
7. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
8. **Res Judicata.** Under the traditional rule of res judicata, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies.
9. **Child Support: Paternity.** A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.
10. **Divorce: Paternity: Judgments.** The paternity findings in a dissolution decree constitute a final judgment.
11. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.

12. **Courts: Judgments: Fraud: Proof.** In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 1998), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.
13. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Margaret M. Zarbano for appellant.

Richard K. Lydick for appellee.

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

GERRARD, J.

NATURE OF CASE

Kevin S. McCarson filed a petition for modification of the decree dissolving his marriage to Jill S. McCarson, now known as Jill S. Amoruso, claiming that the minor child born during the McCarsons' marriage is not Kevin's child as represented in the decree. The district court granted Kevin's motion for summary judgment and terminated Kevin's child support obligation. Jill now appeals, claiming that Kevin's petition is barred by res judicata pursuant to our decision in *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), in which this court concluded that the finding of paternity in a dissolution decree precludes the parties from relitigating paternity.

BACKGROUND

Jill and Kevin were married on March 26, 1988. One child was born during the marriage on April 16, 1995. On June 1, 1995, Kevin filed a petition for dissolution of marriage, in which Kevin alleged that the child was not his and he should not have to pay child support. The district court eventually dismissed Kevin's petition on May 2, 1996, for lack of prosecution.

Jill filed a petition for dissolution of marriage on April 10, 1998. Kevin entered a voluntary appearance on the same day.

On June 11, the district court entered a decree of dissolution; at that time, Kevin was an active member of the U.S. Air Force stationed at Kadena Air Force Base in Japan. The decree stated that "one child has been born of said marital union" and granted permanent joint legal custody of the minor child to Jill and Kevin, with Jill as the primary custodial parent. The court ordered Kevin to pay $323 per month as child support. Both parties signed the consent decree; Kevin was not represented by counsel at the time.

Kevin filed a "Petition to Modify Decree" on May 6, 1999, alleging that, prior to the entry of the decree, Jill had represented to Kevin that the minor child was the product of their marital union, but later acknowledged to Kevin that he was not the father of the minor child. Thus, Kevin requested that the decree be modified to terminate his child support payments.

Jill filed a motion for leave to file pleadings out of time on July 16, 1999, and a demurrer on the basis of res judicata on July 26. After a hearing on the demurrer, the district court ordered that the clerk of the district court sequester and hold child support payments made by Kevin on the minor child's behalf. Jill appeared at the hearing with her attorney. Although attorneys for both parties agreed that Kevin was not the minor child's father, Jill argued that Kevin's child support obligation continued because the district court determined Kevin to be the minor child's father in the decree of dissolution. The district court overruled Jill's demurrer. Jill subsequently filed a responsive pleading and preserved the issue raised in her demurrer.

Kevin filed a motion for summary judgment on October 19, 1999. On November 16, Jill filed a cross-application for modification of decree, alleging a change in circumstances and asking that the district court (1) grant her sole custody of the minor child subject to reasonable visitation by Kevin, (2) increase Kevin's child support obligation, (3) change the minor child's last name, and (4) require Kevin to contribute to Jill's attorney fees and costs.

After a hearing on November 30, 1999, the district court determined that because both parties agreed that Kevin was not the minor child's father, no material issue of fact existed to preclude summary judgment. In response to a request for admission, Jill

acknowledged that she knew at the time of the entry of the decree that the child was not Kevin's child. Thus, the district court found that Jill knew Kevin was not the minor child's father prior to the filing of her petition for dissolution and the entry of the order of dissolution. The court concluded that Jill perpetrated a fraud upon the court by representing that Kevin was the minor child's father in her petition for dissolution and that she admitted this fact in her responses to Kevin's requests for admission.

Although Jill urged that the doctrine of res judicata applied to the adjudication of the child's parentage pursuant to *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), the district court, citing *Carlson v. Zellaha*, 240 Neb. 432, 435, 482 N.W.2d 281, 283 (1992), concluded that "[a] consent judgment is subject to collateral attack when the facts demonstrate that the judgment or settlement was entered into fraudulently, collusively, or in bad faith." Because the district court found that Jill had admitted that she knew at the time of the decree that the child was not Kevin's, the district court did not apply the doctrine of res judicata to the issue of the minor child's paternity. Thus, the district court sustained Kevin's motion for summary judgment, declared that Kevin was not the child's father, and terminated Kevin's child support obligation. Additionally, the district court dismissed Jill's cross-application for modification of decree.

Jill now appeals from the judgment of the district court. Pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals, we moved this appeal to our docket.

ASSIGNMENTS OF ERROR

Jill assigns that the district court erred in (1) finding that it had jurisdiction over the proceedings, as Kevin did not properly serve Jill with his petition for modification; (2) overruling Jill's demurrer; (3) sustaining Kevin's motion for summary judgment; and (4) dismissing Jill's cross-application for modification of decree.

STANDARD OF REVIEW

[1] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[2,3] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (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. *Id.*

ANALYSIS

Personal Jurisdiction

[4,5] Jill first assigns that the district court lacked personal jurisdiction over her because Kevin did not meet the statutory requirements for service of process. Jill did not raise the issue of improper service before the district court, and we will not consider it for the first time on appeal. An issue not presented to the trial court may not be raised on appeal. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). Additionally, Jill has already voluntarily appeared before the court and invoked its power on an issue other than jurisdiction. For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). Jill filed a motion to file pleadings out of time, a demurrer, and appeared personally at the hearing on the demurrer. Therefore, Jill's first assignment of error is without merit; her voluntary actions to invoke the power of the court on issues other than the court's jurisdiction waived her right to contest personal jurisdiction.

Demurrer

[6,7] Second, Jill assigns that the district court erred in overruling her demurrer to Kevin's petition for modification. In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.

Northwall v. State, ante p. 1, 637 N.W.2d 890 (2002). In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

[8] Jill alleges that res judicata bars revisiting the issue of paternity, as the decree of dissolution already determined Kevin to be the minor child's father; therefore, the district court erred by not sustaining her demurrer. This court addressed a similar set of facts in *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). In *DeVaux*, the mother of a minor child sought modification of a dissolution decree based on conclusive blood tests establishing that her ex-husband was not the child's father. The ex-husband opposed the modification. This court concluded that under the doctrine of res judicata, a finding of paternity in a dissolution decree prevents the parties to the decree from relitigating paternity. In our most recent phrasing, we stated that under the traditional rule of res judicata, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies. *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001).

[9,10] In analyzing Jill's res judicata claim, we first recognize that resolution of the divorce litigation necessarily involved the question of the minor child's paternity, as the decree required Kevin to pay child support. " 'A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.' " *Cross v. Perreten*, 257 Neb. 776, 781, 600 N.W.2d 780, 784 (1999). See, also, *DeVaux, supra*. Second, the district court was competent to render the dissolution decree. See, Neb. Rev. Stat. § 42-351 (Reissue 1998); *DeVaux, supra*. Third, the paternity findings in a dissolution decree constitute a final judgment, so the dissolution order in this case qualifies as a final judgment. *DeVaux, supra*. Finally, the district court, in entering the dissolution decree, reached the merits of the parties' cause (namely, their dissolution) rather than disposing of the matter on procedural or jurisdictional grounds.

Thus, absent a "fraud upon the court," res judicata should apply to the litigation of paternity under *DeVaux, supra*.

Unlike *DeVaux*, however, we face here an allegation that at least one of the parties knew, at the time of the decree, that the decree did not reflect the true paternity of the minor child. Kevin argues that he has a remedy pursuant to Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 1998), which allows the district court to modify the dissolution decree after term on the basis of fraud by the successful party. Section 25-2001 states that "[a] district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (4) for fraud practiced by the successful party in obtaining the judgment or order." Under Neb. Rev. Stat. § 25-2008 (Reissue 1995), proceedings to vacate or modify a judgment or order for the causes mentioned in § 25-2001(4) must be commenced within 2 years after the judgment was rendered or made; Kevin filed his petition for modification on May 6, 1999, less than 2 years after the decree for dissolution was entered on June 11, 1998.

In reviewing the district court's ruling on Jill's demurrer, we are required to accept as true all the facts which are well pled in Kevin's petition and the proper and reasonable inferences of law and fact which may be drawn therefrom. See *Northwall v. State, ante* p. 1, 637 N.W.2d 890 (2002). In determining whether a cause of action has been stated, we must construe Kevin's petition liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. See *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). Kevin pled that the dissolution decree should be modified because the minor child was not his, and, in reviewing the demurrer, we must accept this fact as true. Further, a liberal construction of Kevin's petition provides him with a potential remedy based on his allegation of Jill's fraud in obtaining the judgment. Therefore, the district court did not err in overruling Jill's demurrer.

Summary Judgment

Next, Jill assigns that the district court erred in sustaining Kevin's motion for summary judgment, as genuine issues of material fact remained regarding representations made by Kevin

and Jill about knowledge of the child's paternity. Under Neb. Rev. Stat. § 25-1332 (Reissue 1995), "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[11] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). If a genuine issue of fact exists, summary judgment may not properly be entered. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001).

Although Kevin's petition for modification states that he did not know at the time of the decree that he was not the minor child's father, Jill argues that she offered evidence at the summary judgment hearing to demonstrate that Kevin knew, prior to dissolution, that he was not the minor child's father. Thus, Jill claims that Kevin is not entitled to summary judgment because genuine issues of material fact remain regarding Kevin's knowledge of the minor child's paternity prior to entry of the decree. Kevin argues that the only issue before the district court was whether Jill represented to Kevin that he was the minor child's father prior to dissolution, but that issue disappeared when Jill admitted that she knew at the time of dissolution that Kevin did not father her minor child. Kevin bases his "fraud upon the court" allegation on Jill's concealment from the district court of the minor child's true paternity.

[12] As discussed above, § 25-2001(4) provides Kevin with a potential legal remedy: the court can vacate or modify an order or judgment after term for fraud by the successful party, in this case, Jill's alleged fraud upon the court. However, in order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in § 25-2001(4), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.

Caddy v. Caddy, 218 Neb. 582, 358 N.W.2d 184 (1984). In *Caddy*, 218 Neb. at 584, 358 N.W.2d at 186, this court concluded that because "[t]he respondent chose to proceed without adequate representation and with at least a general knowledge of the underlying facts, and made no effort to bring before the court the correct information," the district court properly denied the respondent's petition to vacate under § 25-2001(4). Therefore, in order for Kevin to obtain a modification of the 1998 decree under § 25-2001(4), it must be clear that the alleged failure to secure a just decision was attributable only to Jill's misrepresentation, and not to any fault or negligence by Kevin.

Jill offered an affidavit in which she stated that while the parties were both serving in the U.S. Air Force, Kevin initiated a punishment proceeding against Jill for adulterous conduct. Jill's affidavit asserts that Kevin told her numerous times during the pendency of their dissolution that he knew the minor child was not, and could not be, his child. Jill states in her affidavit that when she questioned Kevin's desire to pay child support even though the minor child was not Kevin's child, Kevin responded that he thought of the child as his own and that the child was probably the only child he would ever have. Further, Jill's affidavit avers that Kevin did not contest paternity during dissolution proceedings. During the summary judgment hearing, the district court received into evidence Kevin's previously dismissed petition for dissolution, filed on June 1, 1995, shortly after the child's birth on April 16, 1995, in which Kevin alleges that he is not the father of the minor child.

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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). Viewed in a light most favorable to Jill, the evidence at least presents an issue of material fact as to whether Kevin knew that he was not the minor child's father prior to the entry of the dissolution decree, which Kevin signed and in which he was not represented by counsel.

[13] In fact, the evidence offered by Jill reveals that Kevin at least suspected the minor child's true paternity prior to the

dissolution, and Kevin did not present evidence to contest this fact. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). Kevin failed to demonstrate that he did not know that he was not the minor child's father at the time the decree was entered. Kevin offered no evidence to refute Jill's allegation that Kevin knew, or should have known, that he was not the minor child's father prior to the entry of the decree. Based upon Kevin's allegations in his earlier dismissed petition for dissolution, a court could conclude that Kevin did not exercise the diligence required by § 25-2001(4) and *Caddy v. Caddy*, 218 Neb. 582, 358 N.W.2d 184 (1984), to set aside a judgment after term on the ground of fraud practiced by the successful party. Thus, the district court erred in entering summary judgment in favor of Kevin. Jill did not file a cross-motion for summary judgment; therefore, it is necessary to remand this matter to the district court for further proceedings consistent with this opinion.

Cross-Petition for Modification

Jill's fourth assignment of error alleges that the district court erred in dismissing her cross-petition for modification, which requested, inter alia, sole custody of the minor child, an increase in child support, a change of the minor child's last name, and attorney fees. The district court did err in dismissing Jill's cross-petition for modification at this stage of the proceedings based on the reasons stated above. However, because the district court did not consider any evidence concerning the merits of Jill's cross-petition, she could not present any argument regarding the merits of her modification action, and as a practical matter, we cannot consider this assignment of error at the present time. Upon remand, the district court shall consider the merits of Jill's cross-petition and render judgment accordingly.

CONCLUSION

The district court erred in sustaining Kevin's motion for summary judgment, as Kevin was not entitled to judgment as a matter of law. Therefore, we reverse the judgment of the district court

and remand the cause to the district court with directions to conduct further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DOUGLAS COUNTY BOARD OF COMMISSIONERS ET AL., APPELLEES, V. CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA, APPELLANT.

641 N.W.2d 55

Filed March 29, 2002. No. S-00-1155.

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.
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. **Administrative Law: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2000), only orders made in the exercise of judicial functions by a board or tribunal inferior to the district court are reviewable by proceedings in error.
4. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
5. **Civil Service: Administrative Law: Legislature: Statutes.** The Civil Service Commission of Douglas County is a statutorily created tribunal established by the Legislature. As a statutorily created entity, the commission has only such authority as has been conferred on it by statute.
6. **Civil Service: Administrative Law: Public Officers and Employees: Appeal and Error.** Neb. Rev. Stat. § 23-2510 (Reissue 1997) authorizes a civil service commission to hear employee appeals from decisions where the employee is discharged, suspended, or demoted in rank or compensation by his department head by a written order which shall specifically state the reasons therefor.
7. **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.
8. **Civil Service: Administrative Law: Legislature: Appeal and Error.** The Legislature has authorized a civil service commission to hear only those appeals which meet the requirements of Neb. Rev. Stat. § 23-2510 (Reissue 1997).

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Steven J. Riekes and Harold M. Zabin, of Marks, Clare & Richards, for appellant.

Soren S. Jensen and Karl von Oldenburg, of Erickson & Sederstrom, P.C., for appellees.

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

HENDRY, C.J.

INTRODUCTION

In an order dated April 6, 2000, the Civil Service Commission of Douglas County (Commission) ordered the Douglas County Board of Commissioners (Board) to increase its portion of health insurance premium payments for all "nonbargaining unit employees" employed by the county, effective January 1, 2000. The Board appealed the Commission's order to the Douglas County District Court, which vacated the order. The Commission appeals.

FACTUAL BACKGROUND

On December 14, 1999, the Board ratified an employment agreement between the Board and the Douglas County Health Department Employees Association (Association). The Association is the bargaining unit for health department union employees. The agreement provided in part that the Board would pay an increased percentage of health insurance premium payments for Association members. Some employees of the health department were Association members, while others were nonbargaining unit employees.

The agreement ratified by the Board became effective January 1, 2000. After the agreement went into effect, Association members paid a smaller percentage of their health insurance premiums than that being paid by nonbargaining unit employees.

Four registered nurses employed by the department of health as nonbargaining unit employees, acting pro se, appealed the Board's December 14, 1999, decision to the Commission. On April 6, 2000, the Commission held a hearing on the nurses' appeal. All four nurses were present at the hearing, but only one nurse testified. This nurse asked the Commission to find that the agreement ratified by the Board violated "Article 2, page 10," of the "Civil Service Personnel Policy Manual" by providing an "enhanced contribution benefit" for Association members.

At the conclusion of the nurse's testimony, the Commission unanimously passed a motion which provided, inter alia, that "the insurance premium be comparable to the bargaining unit-approved insurance premium payment for all Civil Service employees."

The Commission then issued an order dated April 6, 2000. The order states in pertinent part:

> In review of the testimony heard and evidence presented, the Commission finds that a disparate situation does exist with regards to Douglas County's enhanced payment of health insurance benefits relative to bargaining and non-bargaining unit employees. The Commission finds that it has the proper authority to provide for equitable treatment for all employees under it's [sic] jurisdiction and that such disparate treatment is contrary to the Commission's rules.
>
> . . . .
>
> IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that all non-bargaining employees under the jurisdiction of the Douglas County Civil Service Commission shall receive the enhanced health insurance payment plan currently provided to those employees covered by the extant labor agreement between the Douglas County Board of Commissioners and the Health Department Employee's Association which became effective January 1, 2000.
>
> IT IS FURTHER ORDERED, DECREED AND ADJUDGED that the Board of County Commissioners has until July 1, 2000, to implement this plan and to provide for any possible retroactive payments to the plan's participants.
>
> IT IS FINALLY ORDERED, DECREED AND ADJUDGED that the Douglas County Board of Commissioners shall timely effectuate and comply with the terms of this Order.
>
> An appeal from a final Order of the Commission shall be in a manner provided by Nebraska Revised Statutes §25-1901 to §25-1908.

On May 5, 2000, the Board filed a petition in error pursuant to Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2000) in the Douglas County District Court. The Board asked the court to set aside and reverse the April 6 decision of the Commission because it exceeded the statutory authority granted to the Commission.

A hearing was held in the district court on September 12, 2000. At that hearing, the Commission argued the district court lacked jurisdiction over the appeal because the April 6 order was not a judicial or quasi-judicial decision appealable through the petition in error statutes. The Board argued that proceeding by petition in error was proper and asked that the April 6 order be vacated.

In its order filed October 6, 2000, the district court first determined that the April 6 order was appealable pursuant to Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1995 & Cum. Supp. 2000). The court found that the Commission "exercised a judicial function by receiving evidence and hearing arguments by the R.N.s on their appeal concerning allegedly disparate treatment practiced by the Douglas County Board." Furthermore, the district court noted that the April 6 order itself "Ordered, Decreed and Adjudged" that " '[a]n appeal from a final Order of the Commission shall be in a manner provided by Nebraska Revised Statutes §25-1901 to §25-1908.' "

The district court then determined that (1) the Commission lacked the statutory authority to hear the nurses' appeal pursuant to Neb. Rev. Stat. § 23-2510 (Reissue 1997), (2) the Commission lacked the statutory authority to order the Board to increase its portion of nonbargaining unit employee insurance premium payments pursuant to Neb. Rev. Stat. § 23-2507 (Reissue 1997), and (3) the April 6 order was in excess of the Commission's authority pursuant to Neb. Rev. Stat. § 23-2508 (Reissue 1997). The court then vacated the Commission's order.

The Commission appealed and filed a petition to bypass the Nebraska Court of Appeals, which this court granted.

ASSIGNMENTS OF ERROR

The Commission asserts, rephrased, that the district court erred in (1) finding the petition in error statutes were the proper vehicle to bring the appeal, (2) failing to find that the petitioners in error lacked standing to bring the appeal, and (3) finding that the Commission did not have the statutory authority to issue the April 6, 2000, order.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In*

re Interest of Jaden H., ante p. 129, 638 N.W.2d 867 (2002); *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998).

[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 Interest of S.B., ante* p. 175, 639 N.W.2d 78 (2002); *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

ANALYSIS

JURISDICTION

[3] In its first assignment of error, the Commission argues that the district court lacked jurisdiction to hear the Board's appeal because the April 6, 2000, order was not reviewable under the petition in error statutes. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *In re Interest of Jaden H., supra*. Pursuant to § 25-1901, only "[o]rders made in the *exercise of judicial functions* by a board or tribunal inferior to the district court are reviewable by proceedings in error." *Hawkins v. City of Omaha*, 261 Neb. 943, 953, 627 N.W.2d 118, 127 (2001). A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Id.*

The Commission asserts that the April 6, 2000, order was merely an employee policy or regulation issued pursuant to the Commission's authority under § 23-2507(1)(e) and therefore not the exercise of a judicial function appealable as a final order in accordance with § 25-1901. Section 23-2507(1)(e) grants the Commission the authority to prescribe "regulations for use by all offices governed by sections 23-1501 to 23-2516 relating to such matters as employee benefits, vacation, sick leave and holidays." However, the April 6 order announced no new rule or regulation. Instead, the order found that "disparate treatment" existed regarding health insurance premium payments. The order further "Ordered, Decreed and Adjudged" that the Board must grant specific relief to nonbargaining unit employees by increasing the Board's portion of insurance premium payments. On its face, the April 6 order exercised judicial functions.

Despite the language utilized in the order, the Commission relies on *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994), to argue that the April 6, 2000, order was not an exercise of judicial functions. In *Kropp*, the school board applied the unambiguous terms of plaintiff's employment contract in determining that plaintiff's placement on the teachers' salary scale was correct. We held that this decision by the school board was not reviewable under the petition in error statutes because the "school board did not decide any dispute of adjudicative fact and was not statutorily required to act in a judicial manner." *Id.* at 144, 517 N.W.2d 117.

Unlike the school board in *Kropp*, however, the Commission is statutorily required to act in a judicial manner in hearing employee appeals. Neb. Rev. Stat. § 23-2511 (Reissue 1997) requires that "within two weeks after receipt of the notice" of an employee appeal, the Commission must "hold a public hearing thereon at which the employee shall be entitled to appear personally, be represented by counsel, cross-examine witnesses and produce evidence." Neb. Rev. Stat. § 23-2512 (Reissue 1997) also empowers the Commission to "subpoena witnesses, administer oaths, and compel the production of books and papers."

Because the Commission is statutorily required to act in a judicial manner in deciding employee appeals, and the April 6, 2000, order was clearly intended to exercise judicial functions, the April 6 order was properly appealed by the Board through the petition in error statutes. See *Hawkins, supra*.

STANDING

[4] The Commission's second assignment of error raises another alleged jurisdictional defect with the Board's petition in error. In this assignment of error, the Commission argues that the petition in error was not filed by the Board, but instead by the seven members of the Board in their individual capacity. The Commission then contends that because the members of the Board as individuals have no interest in the outcome of the appeal, the petitioners lack standing. In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

The caption to the petition in error reads:

> DOUGLAS COUNTY BOARD OF COMMISSIONERS, Mary Ann Borgeson, Chair, Board of Douglas County Commissioners, Michael Boyle, Douglas County Commissioner, Carole Woods Harris, Douglas County Commissioner, Kyle Hutchings, Douglas County Commissioner, Kathleen McCallister, Douglas County Commissioner, Carol Pirsch, Douglas County Commissioner, and Clare Duda, Douglas County Commissioner,
>
> Petitioners-In-Error,
>
> vs.
>
> CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA[,]
>
> Respondent-In-Error.

The body of the petition states in pertinent part:

> COME NOW, Petitioners-In-Error, and for their cause of action against the Civil Service Commission of Douglas County, Nebraska, who responded in error, alleges and states as follows:
>
> 1. Petitioners-In-Error, are residents of Douglas County, Nebraska and at all material times herein have been duly elected Douglas County Commissioners.

The Commission argues in its brief that paragraph 1 of the petition conclusively demonstrates that "the Appellee-Petitioners are seven individuals, and only seven individuals [and therefore] [n]either Douglas County nor the Douglas County Board are named in the Petition as being parties to these error proceedings." Brief for appellant at 22. The Commission then contends that in determining this issue, this court should not consider the caption to the petition because it "is, at best, ambiguous" and "not controlling." *Id.* at 23. For the same reason, the Commission asserts that the signature block, which is identical to the caption, should also not be considered. Finally, the Commission contends that based on *Professional Collection Service v. Coble*, 200 Neb. 683, 264 N.W.2d 686 (1978), if this court were to consider the caption, the definition of the parties contained in the body of the petition should control over the definition in the caption.

We find these arguments unpersuasive for two reasons. First, the language in paragraph 1 of the petition does not state that the

petitioners are individuals. It describes them as residents of Douglas County, who are Douglas County Commissioners. A reasonable interpretation of this sentence is that the petitioners in error are the Douglas County Commissioners in their official capacity as Commissioners, not seven individuals. Second, the caption and signature block are not ambiguous or in conflict with the meaning of the body of the petition. The pleading in the present case does not present a question of which "definition" controls, because we find no conflict between the definition of the petitioners stated in the caption and in the body of the petition. We interpret both the caption and the body as referring to the Board. Accordingly, this assignment of error is without merit.

Commission's Statutory Authority

In its third and final assignment of error, the Commission argues the district court erred in finding that the Board did not possess the statutory authority to issue the April 6, 2000, order. 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 Interest of S.B., ante* p. 175, 639 N.W.2d 78 (2002); *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

[5] The Commission is a statutorily created tribunal established by the Legislature. As a statutorily created entity, the Commission has only such authority as has been conferred on it by statute. See *In re Interest of Jaden H., ante* p. 129, 638 N.W.2d 867 (2002).

[6] Section 23-2510 authorizes the Commission to hear employee appeals from decisions where the employee is "discharged, suspended, or demoted in rank or compensation *by his department head* by a written order which shall specifically state the reasons therefor." (Emphasis supplied.) See, e.g., *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992) (appeal of order suspending employee). The nurses in the present case were attempting to appeal a decision of the Board, not an order issued by a department head.

Neb. Rev. Stat. § 23-2502(3) (Reissue 1997) defines a department head as "an officer holding an elected office, an officer

holding office by appointment of the Governor, the chief deputy of any office or the deputy if there is not more than one deputy, and such other persons holding positions as are declared to be department heads by the county board." The Commission does not argue in its brief that the Board is a department head pursuant to § 23-2502(3). Instead, the Commission contends that the Commission's authority over department heads impliedly extends to the Board because "the statutory scheme regarding County employees is not under the total domination of the County Board." Brief for appellant at 30.

[7,8] 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. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). The Legislature has authorized the Commission to hear only those appeals which meet the requirements of § 23-2510. Because the nurses' appeal was not taken from a decision rendered by a department head as specified by § 23-2510, we determine that the Commission lacked the statutory authority to hear the appeal. In light of this determination, there is no need to consider the district court's other findings regarding the validity of the April 6, 2000, order. See *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998).

CONCLUSION

The decision of the district court vacating the Commission's order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BRUCE CANADY, APPELLANT.

641 N.W.2d 43

Filed March 29, 2002. No. S-00-1250.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the

evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

2. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true.
3. **Juvenile Courts: Proof.** The State's burden of proof in a juvenile hearing to establish child abuse or child neglect is a preponderance of the evidence.
4. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.
5. **Criminal Law: Evidence: Appeal and Error.** The erroneous admission of evidence in a criminal case is prejudicial error unless the State proves that the error was harmless.
6. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
7. **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.
8. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
9. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that can reasonably be drawn from the evidence, and every controverted fact resolved in its favor.
10. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
11. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
12. **Words and Phrases.** A serious bodily injury is one which involves a substantial risk of death or which involves substantial risk of serious permanent disfigurement or protracted loss or impairment of the function of any part or organ of the body.
13. **Criminal Law: Intent.** Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct.
14. **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 Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Don Stenberg, Attorney General, Scott G. Gunem, and J. Kirk Brown for appellee.

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

WRIGHT, J.

NATURE OF CASE

Bruce Canady was charged with and convicted of felony child abuse. He was sentenced to 10 to 20 years in prison with credit for 255 days served. Canady appeals the judgment of conviction and sentence.

SCOPE OF REVIEW

[1] In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180.

FACTS

On May 12, 2000, Canady was charged by information with child abuse, in violation of Neb. Rev. Stat. § 28-707 (Cum. Supp. 2000). The information alleged that Canady had knowingly and intentionally caused his daughter, Tiffany Canady, born November 30, 1996, to be placed in a situation that endangered her life or physical or mental health and knowingly or intentionally caused her serious bodily injury.

Prior to trial, Canady sought by a motion in limine to preclude the State from introducing the testimony of Dr. David Voigt regarding his opinion as to how Tiffany had sustained burns and whether the burns were the result of forceful immersion in water.

Canady alleged Voigt was not qualified as an expert in juvenile immersion burns and was not a forensic expert, which would qualify him to testify as an expert regarding the source of the burns. In a second motion in limine, Canady sought to exclude photographs of Tiffany following treatment. He alleged that the photographs did not accurately reflect any injury and were therefore prejudicial. Canady also moved to dismiss based on comments made by the State in a separate juvenile court proceeding. The district court overruled the motion to dismiss, and the evidence was admitted.

At trial, Staci Douglass testified that Canady had moved in with her and her three young children in November 1999. In March 2000, Tiffany had been living with Canady and Douglass for about 3 weeks. During that period, Canady and Douglass were trying to toilet train Tiffany.

On the morning of March 5, 2000, Douglass and Canady argued about telephone numbers Douglass had found on her telephone's caller I.D. The argument lasted 15 to 30 minutes. Douglass then went outside to clean out her car. All four children were playing outside, and Canady remained inside. During the morning, Douglass made several trips inside, and she and Canady continued to argue about the telephone numbers. Canady later came outside to call the children in for lunch, but only Tiffany went in.

When Douglass went inside, she heard Tiffany screaming and knew something was wrong. She went to the bathroom and saw Tiffany sitting in the bathtub with the water running. As she entered the bathroom, Tiffany stood up in the bathtub and reached out to Douglass. Canady, who was behind Douglass, told Tiffany, " 'Sit your butt back down.' " Tiffany was screaming that the water was hot. Canady then yelled a profanity at Douglass and told her to get out of the bathroom. He said, " 'This is my daughter, I'm handling this.' " Douglass said that when she entered the bathroom, she had slipped on Tiffany's soiled underwear.

At some point, Douglass felt the water, which was hot, and reached to turn on the cold water, but it was already running. She tried to "swish" the water to make it cool by Tiffany's legs and then noticed that Tiffany's legs were red. Douglass, who is a licensed practical nurse, told Canady to get Tiffany out of the

bathtub and that she was going to a drugstore to get something to treat Tiffany's legs. She did not take Tiffany out of the bathtub because she was scared and confused. By the time Douglass left for the drugstore, Canady had taken Tiffany out of the bathtub.

Douglass purchased a cream for burns because she was concerned about Tiffany. When Douglass returned, Tiffany was on the bed on her hands and knees. Her skin was red, and some of it had peeled off. Douglass said she dropped the sack containing the medicine; exclaimed, " 'Oh, my god' "; and told Canady that they needed to take Tiffany to the hospital. Canady dressed Tiffany in a pajama gown, and they drove to St. Elizabeth's Hospital.

Douglass testified that the faucet in the bathtub had a constant trickle of hot water and that when the faucet was turned on full force, the cold water did not come out with as much pressure as the hot water. She had called the landlord to complain because the water temperature was erratic. She did not see Canady physically restrain Tiffany in the bathtub, nor did he physically restrain Douglass from taking Tiffany out of the bathtub.

Investigator Cindi Arthur of the Lincoln Police Department testified that on the afternoon of March 5, 2000, she tested the water temperature in the home by using a candy thermometer purchased at a grocery store. Arthur first tested the temperature of the trickle of water from the bathtub faucet when both the hot and cold water were turned off. After she held the thermometer under the trickle for 3 minutes, the thermometer read 105 degrees Fahrenheit. The defense objected, arguing that the test was not reliable, had no probative value, and was speculative. The objection was overruled, and Arthur continued to testify. Running only the hot water, she filled the bathtub with 6½ inches of water. She placed the thermometer about 2 inches into the water for 3 minutes and measured the temperature at 112 degrees. She removed the thermometer and let it cool to below 100 degrees. She then put the thermometer on the bottom of the bathtub for 3 minutes. The thermometer measured 112 degrees. She let the thermometer cool and then held it under the running water, and it measured 120 degrees. Next, she held the thermometer under the cold running water, and it stayed below the 100-degree mark, which was the lowest measurement on the thermometer. She used 3 minutes as a measurement because she "figured that was a sufficient amount of time to

level out." She did not notice a significant difference in water pressure between the hot and cold water in the faucet.

Voigt, who treated Tiffany at the hospital on March 5, 2000, testified that he had treated more than 1,500 burn inpatients and that burns make up about 70 percent of his practice. When she was admitted, Tiffany had burns on her buttocks, perineum, and feet. Her injuries were consistent with an immersion scald, marked by a straight line called a tidemark.

The defense renewed its pretrial objection and conducted a foundational voir dire of Voigt in the presence of the jury. Voigt stated that he had treated approximately 300 scald burns and that approximately 40 of those had been in Nebraska. He has treated about 12 immersion scalds of juveniles while in Nebraska. Less than 1 percent of the time during his medical training was spent trying to determine the cause of a burn because that was not an objective of his treatment. The district court ruled that Voigt's testimony as to causation would be admitted and that he was qualified to testify.

Voigt stated that the tidemark on Tiffany's body indicated the level that the water had reached. He noted that 23 percent of Tiffany's body surface was burned and that about one-third of Tiffany's burns were full thickness burns, which require skin grafts. Tiffany underwent four operations which required anesthesia.

Voigt testified that when Tiffany was released from the hospital, she was stable, was eating a regular diet, and had begun walking without assistance from the physical therapist. In his opinion, to a reasonable degree of medical certainty, Tiffany's injuries were caused when she was placed in a hot liquid and held there for a period of time long enough to sustain a full thickness injury. Canady objected when Voigt was asked whether Tiffany could have sustained the injuries without being held in the water by someone. The objection was overruled, and Voigt stated that a neurologically intact child such as Tiffany would not voluntarily stand in a bathtub of hot liquid and then sit down. He could not determine the temperature of the water based on Tiffany's injuries.

Voigt stated it is generally recommended that a water heater be set at 120 degrees. An adult would have to be in 112-degree water

for about 10 hours to sustain a full thickness burn. Although he did not calculate the figure precisely, Voigt estimated that a child would need to be in 112-degree water for 3 hours to sustain a full thickness burn. In 120-degree water, a child could sustain a full thickness burn in a little more than 3 minutes. Voigt stated that Tiffany had a very low risk of dying from her burns but that she would suffer significant impairment, including pigment change, loss of sweat gland and oil function, mobility problems, and growth retardation in height and body stature.

Det. Sgt. Gregory Sorensen of the Lincoln Police Department testified that Canady told him that he was in the kitchen cooking when Tiffany soiled her underwear, so he took her into the bathroom. Canady turned on the hot and cold water in the bathtub, took off Tiffany's clothes, and put her in the bathtub. Canady then returned to the kitchen. When he heard Tiffany crying, he returned to the bathroom, where she said the water was too hot. He said he turned on more cold water and left the bathroom. When he heard Tiffany still crying, he returned to the bathroom at about the same time Douglass entered the bathroom. Douglass told him the water was too hot, and he removed Tiffany from the bathtub.

Canady was found guilty of felony child abuse and sentenced to a term of 10 to 20 years in prison. He appeals.

ASSIGNMENTS OF ERROR

Canady assigns 15 errors, which we summarize as follows: Canady alleges that the district court erred (1) in overruling his motion to dismiss based on Neb. Rev. Stat. § 7-107 (Reissue 1997) because the Lancaster County Attorney's office stated in a separate juvenile court proceeding that his acts were unintentional; (2) in overruling his objections to the testimony of Arthur regarding tests of the water temperature because the testimony lacked foundation and was irrelevant and unreliable; (3) in overruling his objections to the testimony of Voigt as to causation because the testimony lacked proper and sufficient foundation; (4) in failing to sustain his objections to certain photographs that were irrelevant, cumulative, and unfairly prejudicial; (5) in overruling his motion to dismiss at the close of the State's evidence; (6) in overruling his motion for directed verdict at the close of

the evidence; (7) in failing to find that the evidence was insufficient and was contrary to law; and (8) in abusing its discretion in imposing an excessive sentence.

ANALYSIS

Canady alleges several errors relating to the juvenile court proceedings that took place following this incident. The State filed a petition alleging that Tiffany was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) in that she lacked proper parental care by reason of the faults or habits of Canady. In closing arguments at the formal hearing, counsel for the State said:

> And I want to be clear that it is not my position that he decided he was going to punish his daughter, put hot water in the tub and then put her in the tub. I don't — That's not the State's position as to what happened. What more likely than not happened is he became angry. He turned the water on. He didn't pay attention to how hot it was, put some bubbles in it, couldn't see steam, if there was any steam rising from it, put her in. She was crying. He was angry. He was yelling, and he just didn't pay enough attention to hear that she was saying, "It's too hot," and she needed to get out. And that was his responsibility as a parent.

The State's attorney continued:

> Now, again, I want to be clear. I do not think — and the State's position is not that Bruce Canady intentionally put his daughter in that hot water, but he was so angry that he was just not paying sufficient attention to what he did. He turned on that water.

Canady moved to dismiss the criminal charges based on § 7-107, arguing that the above statements during the juvenile court proceedings constituted a judicial admission that he did not intentionally place Tiffany in the water and did not intentionally harm her. He asserted that this judicial admission was binding on the State. He also argued that the criminal prosecution violated his due process rights and fundamental fairness in that the State was allowed to proceed on two different theories of liability. The district court overruled the motion to dismiss at the pretrial hearing and again when it was renewed at the close of the evidence.

On appeal, Canady claims that the district court erred in overruling the motion to dismiss because pursuant to § 7-107, the

prosecutor was bound by statements made in the juvenile court proceedings asserting that Canady's acts were unintentional. Section 7-107 states in relevant part:

> An attorney or counselor has power: . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court[.]

Canady argues that pursuant to § 7-107, the State was bound by the admission in the juvenile court proceedings that Canady acted unintentionally and that the criminal charges alleging that he acted intentionally should have been dismissed. He claims the parties "agreed" in the juvenile court proceedings that Canady had acted unintentionally. We disagree.

[2,3] "[A] judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true." *Anderson v. Cumpston*, 258 Neb. 891, 897-98, 606 N.W.2d 817, 823 (2000). We do not adopt Canady's argument that the State's comments during closing arguments in a juvenile court proceeding bind the State to the same theory in a criminal proceeding. The State's burden of proof in a juvenile hearing to establish child abuse or child neglect is a preponderance of the evidence. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001), citing Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998). The petition brought in juvenile court was "brought on behalf of the child, not to punish" Canady. See *In re Interest of Constance G.*, 247 Neb. 629, 635, 529 N.W.2d 534, 539 (1995). Comments made by counsel during closing arguments in the juvenile court proceeding did not bind the State as a judicial admission or bar it from pursuing criminal charges. The statements merely set forth the State's position as to the juvenile court proceedings.

Canady next argues that the district court erred in allowing Voigt to testify about the causation of Tiffany's injuries and that this testimony was not helpful to the jury. Canady filed a pretrial

motion in limine to preclude Voigt from testifying regarding causation of the burns. The court deferred ruling on the motion pending foundation. At trial, Canady objected when Voigt began to address the causation issue and the court granted Canady an opportunity to conduct a foundational voir dire in the presence of the jury. After excusing the jury, the court heard arguments and ruled that Voigt was qualified to offer an opinion as to the cause of the burns. The State then proceeded to examine Voigt, and the following colloquy took place:

> Q[:] Doctor, based on your training and experience, do you have an opinion, to a reasonable degree of medical certainty, as to what was the cause of Tiffany Canady's burns?
>
> A[:] I do.
>
> Q[:] And what do you base that opinion on?
>
> A[:] I base that opinion on the burn pattern that she has.
>
> Q[:] Do you need any photographs to describe that?
>
> A[:] I don't think so. I mean, we've kind of pointed it out all along. The tide marks; the nice, straight lines; the areas underneath the knees that are spared, and the fact that the toes were not burned.
>
> Q[:] What is your opinion?
>
> A[:] My opinion is that she was placed in a hot liquid and held there for a period of time, long enough to sustain a full thickness injury.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1995). Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

In determining whether an expert's testimony is admissible, the court must first determine whether the witness qualifies as an expert pursuant to § 27-702. 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). Voigt, a medical doctor, had treated more than 1,500 burn inpatients,

approximately 300 scald burns, and 12 immersion scalds of juveniles and was qualified to testify as an expert.

The cause of Tiffany's burns was not in dispute. Voigt stated that the burns were caused when Tiffany was placed in a hot liquid and held there for a period of time long enough to sustain a full thickness injury.

Canady concedes that Voigt was qualified as a medical expert to testify about the injuries, but he asserts that Voigt did not have a sufficient basis for offering an opinion about the causation of the injuries because he had treated only 12 cases of immersion scalds of juveniles. This claim is without merit.

Next, Canady argues that because Voigt's testimony indicated that Canady intentionally caused the injury, the testimony should not have been admitted. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Neb. Rev. Stat. § 27-704 (Reissue 1995). Voigt's testimony as to the source of Tiffany's injuries was admissible. It was obvious to Douglass that Tiffany did not want to be in the hot water when she reached out to Douglass. The burn marks indicated that Tiffany tried to keep her body out of the water. Voigt's testimony was highly relevant to the determination of whether Canady knowingly or intentionally caused or permitted Tiffany to be placed in a situation that endangered her health. See § 28-707(1)(a). We conclude that the district court did not err in the admission of this evidence.

Canady also asserts as error that the testimony of Arthur lacked foundation and was irrelevant and unreliable. Although the State argues that the objections were not preserved for appellate review because Canady did not object to the testimony, we find that a sufficient objection was made when defense counsel approached the bench and stated that the tests were not reliable, lacked probative value, and were based on speculation. The district court overruled the objection. On appeal, Canady argues that the testimony was unreliable, irrelevant, and lacked foundation. We therefore proceed to examine the objection based on the reliability of the tests.

The thermometer used to measure the water temperature was a candy thermometer purchased at a grocery store. Arthur did not testify that the precision of the thermometer was evaluated

in any manner prior to its use to test the water temperature. Thus, the district court erred in allowing Arthur to testify as to the exact temperature of the water because there was no proof that the thermometer was accurate.

[4-7] We have previously held that to sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly. *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989). The erroneous admission of evidence in a criminal case is prejudicial error unless the State proves that the error was harmless. See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (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. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

In our consideration of whether the admission of Arthur's testimony was harmless error, we must also examine Voigt's testimony and other evidence that was presented at trial. In this examination, we are to keep in mind that the issue presented to the jury was whether Canady knowingly or intentionally caused or permitted Tiffany to be placed in a situation that endangered her health. See § 28-707(1)(a). Therefore, we consider whether the jury was materially influenced by Arthur's testimony in reaching its verdict that Canady acted knowingly or intentionally.

The evidence clearly established that Tiffany was placed in a hot liquid long enough to sustain a full thickness burn. Voigt testified that Tiffany's injuries were consistent with an immersion scald, marked by a straight line of burns called a tidemark, which indicated the level that the water had reached on Tiffany's body.

Voigt was asked whether Tiffany could have sustained the injuries without being held in the water by someone. He stated

that a neurologically intact child such as Tiffany would not voluntarily stand in a bathtub of hot liquid and then sit down. He testified concerning the amount of time required to cause full thickness burns in adults and children. He stated that Tiffany's burns could have occurred by immersion for a matter of seconds if the water was hot enough, or she could have been restrained for a longer period of time.

We conclude that Arthur's testimony about the tests made with the thermometer did not materially influence the jury to determine that Tiffany had knowingly been placed in a situation dangerous to her physical health. The admission of Arthur's testimony was error, but it was harmless. The evidence supports a finding that Tiffany did not voluntarily sit in the bathtub of hot water and that she attempted to get out of the bathtub but was not permitted by Canady to do so.

[8] Canady next argues that photographs of Tiffany's burns were unfairly prejudicial. Canady's objections on the basis of cumulativeness and relevancy were overruled. The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). The district court did not receive every photograph offered by the State. It reviewed the photographs and admitted only some of them. The State charged Canady with child abuse as a Class III felony, which requires that the abuse result in serious bodily injury. See § 28-707. The photographs were necessary to demonstrate the serious nature of the injury to Tiffany, and this assignment of error is without merit.

[9-11] Canady next asserts that the State failed to prove beyond a reasonable doubt that he acted intentionally and knowingly and that, therefore, the district court erred in not granting his motion to dismiss or his motion for directed verdict. In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that can reasonably be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). In a criminal case, a court can direct a

verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[12] Accepting the State's relevant evidence as true and giving the State every reasonable inference, the motion to dismiss was properly overruled. See *State v. Clark, supra*. The evidence was sufficient to find beyond a reasonable doubt that Canady "knowingly, intentionally, or negligently cause[d] or permit[ted] a minor child to be: (a) Placed in a situation that endanger[ed] his or her life or physical or mental health." See § 28-707. The crime was charged as a Class III felony, which occurs "if the offense is committed knowingly and intentionally and results in serious bodily injury." See *id*. A serious bodily injury is one which involves a substantial risk of death or which involves substantial risk of serious permanent disfigurement or protracted loss or impairment of the function of any part or organ of the body. See Neb. Rev. Stat. § 28-109(20) (Reissue 1995).

Tiffany's injuries were consistent with an immersion scald and were caused when she was placed in hot water and held there for a period of time long enough to sustain a full thickness injury. A normal child would not have voluntarily remained in the hot water. The evidence established that Tiffany will suffer significant impairment, including pigment change, loss of sweat gland and oil function, mobility problems, and growth retardation in height and body stature.

[13] Intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999). The jury heard and observed the witnesses and the evidence. It is not this court's role to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. We are bound to sustain the verdict of the jury if, taking the view most favorable to the

State, there is sufficient evidence to support it. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *cert. denied* 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180. The evidence is sufficient, and the verdict must be upheld.

[14] Finally, Canady complains that the district court abused its discretion in imposing an excessive sentence. Canady was convicted of a Class III felony, which is punishable by a sentence from 1 to 20 years in prison. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Canady was sentenced to a term of 10 to 20 years in prison. 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*, 262 Neb. 185, 629 N.W.2d 542 (2001). Canady's sentence does not demonstrate that the court abused its discretion. This assignment of error is without merit.

CONCLUSION

Finding no merit to any of Canady's assignments of error, we affirm the judgment of conviction and sentence of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RONALD E. CANADAY, APPELLANT.

641 N.W.2d 13

Filed March 29, 2002. No. S-01-150.

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. **Entrapment: Appeal and Error.** Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and 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: 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.

4. **Criminal Law: Sentences: Final Orders: Appeal and Error.** In a criminal case, the trial court must pronounce sentence before a criminal conviction constitutes a final, appealable order.
5. **Conspiracy.** Under the unilateral approach to the agreement element of conspiracy embodied in Neb. Rev. Stat. § 28-202 (Reissue 1995), only the defendant need agree with another person; the second party can feign agreement. This approach applies equally when the party who feigns agreement is a government agent.
6. **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.
7. **Criminal Law: Entrapment.** While artifice and stratagem may be employed to catch those engaged in criminal enterprises, government agents, in their zeal to enforce the law, may not implant in an innocent person's mind the disposition to commit a criminal act and then induce commission of the crime so that the government may prosecute.
8. **Criminal Law: Entrapment: Words and Phrases.** In Nebraska, 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.** The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. This determination is made as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.
10. **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 the cross-examination of the government's witnesses.
11. **Entrapment: Evidence: Proof.** When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact. The burden is then on the State to prove beyond a reasonable doubt that the defendant was not entrapped.
12. **Entrapment: Evidence: 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 representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it.
13. **Entrapment: Words and Phrases.** 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.
14. **Entrapment: Evidence: Proof.** Where the State has induced an individual to break the law, it must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents.
15. **Criminal Law: Entrapment: Evidence.** Predisposition to commit the criminal act must be independent and not be the product of the attention of the government

directed at the defendant. This is not to say 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. However, only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition.

16. **Entrapment: Circumstantial Evidence.** Predisposition may be shown by circumstantial evidence.

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

Thomas C. Riley, Douglas County Public Defender, and Gary D. Olson for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

STEPHAN, J.

Following a bench trial in the district court for Douglas County, Ronald E. Canaday was convicted of conspiracy to commit first degree sexual assault on a child and sentenced to 5 years' probation. Canaday appeals, arguing there was insufficient evidence to convict him because the State failed to prove beyond a reasonable doubt that he was not entrapped.

I. BACKGROUND

In 1995 and again in the fall of 1997, Det. Steven J. Henthorn of the Omaha Police Department placed an advertisement in "Express Contact," an adult magazine with strong sexual content. The advertisement was part of a proactive investigation designed to identify persons with a sexual interest in children. The advertisement read: "Single mom looking for right man who likes kids and understands needs!" The advertisement listed a Council Bluffs, Iowa, post office box and the name "Lisa," which name we will use when referring to any correspondence or contact between the Omaha Police Department and Canaday. According to Henthorn, the advertisement was purposefully

worded so that it identified children in a manner that was vague and open to interpretation.

On August 10, 1998, Henthorn received a letter from Canaday addressed to Lisa at the identified post office box in Council Bluffs. In the letter, Canaday wrote that he had obtained Lisa's name and address from "a list of women seeking men," which also included the phrases " 'Plain Mates' " and " 'love starved- man hungry-women.' " The letter gave Canaday's physical description and requested similar information about Lisa. Canaday wrote, "Being cautious, since I'm not sure of your feelings, I'll just say I Like Sex!" He concluded with a request to visit Lisa.

Henthorn testified that based upon his training in proactive investigation of child sexual offenders, there was nothing significant in Canaday's initial letter. Posing as Lisa, Henthorn sent a responsive letter to Canaday on September 10, 1998. The entire text of the letter read:

> Dear Ronald
>
> Thank you for writing. I have gotten several reply's [sic]. For some reason, yours caught my eye. I hope I am not making a mistake.
>
> I am 29, divorced and have three children. We are a very close family. I am trying to find someone to help with my children's special education.
>
> Someone who does not let society's views stand in the way. I have tried to be both mother and father to my children, but there are some things I am just not equipped to do. I hesitate to say more until I am sure you share my views. I hope you understand.
>
> /s/ Lisa

Henthorn testified at trial that the term "special education" is often used by persons with a sexual interest in children, the reference to "society's views" was purposefully vague, and the reference to "not [being] equipped" was meant to signify the lack of a male sex organ by the fictitious mother, Lisa.

Canaday responded in a letter received by Henthorn on September 17, 1998. In this letter, Canaday inquired as to what portion of his first letter attracted Lisa's attention. He also questioned why she referred to making a mistake and specifically asked, "Tell me what you are looking for? A friend? A mate? A

partner? A Husband?" He inquired about the ages of Lisa's children and whether they were boys or girls. He asked, "What kind of help with their 'special education'? What 'special education'? Please explain?" Canaday further wrote that he was not too worried about "society's views," although more explicit information from Lisa would be helpful. He wrote, "Lisa, I'm not complaining but your letter is very vague. I'd really like to understand. Please write and tell me some specific things about all the thing [sic] you eluded [sic] to in your letter." Henthorn testified that the inquiry about Lisa's children was significant because the advertisement had been placed in an adult magazine with an audience of adults seeking sexual partners, not personal relationships.

Lisa responded in a September 24, 1998, letter. In this letter, she wrote, "I have read your letter several times and I am not sure if you understand what I am looking for or not." She expressed fear of losing her children and stated, "I am looking to find the best teacher I can for my sweethearts [sic] special education. I want them to have the same kind of special memories that I do. My sweethearts are 12, 10 & 7. I have two girls and one boy. We are a very close family." Lisa concluded, "If you do understand I would love to hear back from you. If not please destroy my letters." Henthorn testified that the references to the "teacher" and potential loss of the children were intended to make it clear that the "special education" was sexual education for the children so that Canaday could extricate himself if he understood and was not interested.

Canaday responded in a letter received by Lisa on October 29, 1998. In this letter, he stated that there was a communication problem and that it was difficult to know if they shared the same views because he did not know what her views were. He wrote, "Maybe this will help — I am not with law enforcement, a postal inspector, or a morally righteous fanatic. I'm just a regular guy. No entrapment or judging other people." He then asked, "Is this 'special education' you are talking about associated with sex? Please don't be offended if not. I'm just trying to figure this out." Canaday wrote that he understood about trying to find the right partner in life and that he did not understand why Lisa would be worried about losing her children. He continued, "As for sex — I think that if everyone is agreeable to happenings then it's safe,

fun, and fulfilling. I sure wish I knew if this is what you are talking about. . . . Maybe I've helped you be 'safe and comfortable' with me and we can actually discuss this." Henthorn testified that Canaday's reference to not being associated with law enforcement was significant because it indicated that he was contemplating an illegal activity as opposed to a consensual adult sexual relationship. Henthorn also deemed it significant that Canaday associated "special education" with sex and that his reference to sex being "fun for everyone" indicated no age restrictions.

Lisa responded in a November 10, 1998, letter. She expressed the "strong feeling that you do share my views." She agreed that things should be safe, fun, and fulfilling and asked if Canaday was "comfortable teaching someone the ages of my sweethearts" and what he would "be comfortable teaching." Henthorn testified that these inquiries were intended to determine if Canaday found sex with children to be offensive.

Canaday's next letter was received by Henthorn on November 24, 1998. In this letter, Canaday stated "this would be a whole lot easier if you weren't so mysterious." He then asked if Lisa was affiliated with law enforcement because he wanted to be "sure I'm not getting 'suckered' in to [sic] something." Canaday wrote, "For now — Yes I believe I would be comfortable teaching your children." He asked, "Are we talking about teaching by example (demonstration by you and I)? Are we talking about teaching by 'hands on' experience (me physically teaching and you also physically teaching your kids)?" He indicated his understanding that Lisa was being cautious because she did not want to risk losing her children. He promised he was "not that type of person" and suggested that they meet personally or talk on the telephone so that they would both be more at ease. Henthorn testified that these passages further indicated Canaday's concern about the legality of the situation. Henthorn testified that this letter was significant because Canaday expressed comfort with "teaching" children, knowing that the teaching involved sex, and made the initial suggestion of personal or telephone contact with Lisa.

In his next response, Henthorn mistakenly sent Canaday a letter intended for another person, named "Dale," with whom the police, posing as Lisa, were also corresponding. The salutation of the letter read, "Dear Dale." The writer, Lisa, stated, "You are

right that I am only looking for a male teacher" and that when "I see the look of wonder and excitement in [the children's] eyes . . . I know what I am doing is right. I want them to have very special memories. Society does not understand. I can only hope that you do."

In a responsive letter received by Henthorn on December 10, 1998, Canaday stated that he read Lisa's last letter several times and was confused until he realized that "you put Dale's letter in the envelope to me. I may be a little slow but I eventually overcome my confusion!" He again inquired,

> Are you looking for a male as a partner? As a teacher along with you to teach your children about Love and Sex? By just talking to them or by visual aid (meaning you and I having sex in front of them)? Are you looking for a male to teach them by personal experience (having sex with them or aiding them in having sex with each other)?

Canaday concluded that if Lisa could answer his questions, he would know what would be expected of him. He also requested a photograph of Lisa and her children. Henthorn testified that this letter was significant because Canaday again referred to "physically having sex with the children and raises no opposition to that and doesn't tell us that that is something that he would not do." Henthorn further testified that Canaday's request for photographs was also significant because it sought personal contact.

Lisa responded in a December 14, 1998, letter to Canaday in which she apologized for sending the wrong letter and stated, "You were much nicer then [sic] Dale about it." She stated, "My sweethearts have made it clear that anything between me and their man teacher would upset them. Their teacher would be for them." She then stated that Canaday was "very close" about why she was being so cautious because "[m]y sweethearts are my life." She stated, "Trying to find a man teacher for them is the hardest thing I have ever tried to do. If I did not know it was what they want and need I would not continue my search." Henthorn testified that this letter was intended to make it clear that Lisa was not interested in a sexual relationship with Canaday.

Canaday responded in a letter which Henthorn received on December 30, 1998. He inquired as to how many men Lisa was corresponding with and then stated:

> OK so I am a male teacher strictly for your children and will have no involvement with you. Correct? Could you maybe just give me a hint as to what I would teach them and how? I think we had established that sexual education was the goal. You still haven't told me how? I take it I would need to move to Council Bluffs. Right?

Later in the same letter, Canaday asked, "Wouldn't it be easier to get down to specifics and just be straight-forward and say exactly what would be expected of me if I am the 'man teacher' you select?" He also asked whether the children had any role in choosing their teacher. He asked Lisa to explain why the children would be upset if he and she were involved. He also asked, "Is this strictly a 'hands-on' situation with me and your children? . . . Am I to teach your children in the bedroom? Are you teaching your son?" Henthorn testified that these statements indicated that Canaday "finally understands that this is just between him and the children, and he just wants that to be affirmed." Henthorn interpreted this letter as a "clearer desire [on the part of Canaday] to teach the children in a sexual manner."

Lisa responded in a January 4, 1999, letter. She informed Canaday that she had been writing to two other men. She thanked him for understanding that there would be nothing between them and told him that the children were involved in picking the teacher. She informed him that he seemed to understand what he would be doing and stated he could use the bedroom or wherever he would be comfortable. She also stated that after her experience with the children's father, she did not want another man in her life. She concluded by asking if he was comfortable teaching one or all of her children and asked what he had in mind for the first lesson.

Canaday responded in a letter received on January 15, 1999. He stated that he really enjoyed Lisa's last letter and that he finally felt like they were getting somewhere and he was understanding things better. He asked whether the other two men were also going to be teaching her children. He stated that the logical place to start teaching was in the bedroom and that they should start with him getting to know the children and they him so that everyone felt comfortable. He wrote, "You ask — Would I be comfortable teaching your children? It would be new for me but

I think I could be comfortable with it if they are with me." He suggested that the first lesson would involve helping the children with their curiosities and making it informal and pleasurable so that they could learn to enjoy all aspects of sex. He gave his telephone number and indicated when he could be reached.

On January 20, 1999, Officer Teresa Thorson, posing as Lisa, placed a telephone call to Canaday. Henthorn was in the room with Thorson and listened to both sides of the telephone conversation, which was recorded on audiotape. In this conversation, Lisa informed Canaday that she wanted only one teacher for her children and repeatedly asked what lessons he had in mind. Canaday stated that he was "new at this too, as far as children" but that he wanted them to learn what they were curious about. At one point, Lisa said to Canaday, "If you're not comfortable, you just tell me." He replied that he could not state whether he was comfortable with something unless he tried it and further stated, "I've never tried it, so I can't tell ya for sure if I'm comfortable about it or not." Lisa told Canaday that he seemed to understand her and sounded like a good person. Although the conversation was initially somewhat vague, Canaday finally stated, "We're talking about sex here so let's just be honest." When Lisa asked him what kind of sex he would engage in with the children, Canaday suggested that the education would be "hands on" and asked whether the children would be comfortable with that. Lisa said that she had talked to the children about it and that they were "ready" and "excited." She asked if she could "watch" and requested that Canaday send her a written "lesson plan."

Canaday complied with this request in a letter received by Henthorn on January 26, 1999. He wrote that the most important thing was that "we are all comfortable with and can trust each other." He indicated that they would start by kissing and touching and eventually remove clothes. He indicated that this would be followed by oral sex and then intercourse.

Thorson, again posing as Lisa, placed a second tape-recorded telephone call to Canaday on January 27, 1999. In this conversation, Lisa asked whether Canaday "still want[ed] to teach my sweethearts" and whether he understood that this was reality and not a fantasy. He responded affirmatively. Lisa also confirmed that there would be no relationship between her and Canaday.

Canaday responded that he had received that impression from Lisa's letter, stating, "I don't quite understand it, but hey, whatever you want." When Canaday mentioned that he understood his role as providing "guidance" to the children, Lisa responded, "Ron, I am looking for a teacher, though." When asked how he wished to proceed, Canaday stated that he wanted all three children involved so that no one felt left out. Lisa told him that he seemed like an understanding person and that the children "all seem to be excited." Lisa stated that she was somewhat nervous and that she wanted to "make sure I am comfortable with choosing the right person." Canaday responded, "If you're not, you can say so, you know." Lisa replied that if Canaday was comfortable with the plan, she would be comfortable too. Canaday admitted that he was somewhat uncomfortable because "this is something new for me" and "if the wrong people found out, this is gonna be really bad." Lisa responded, "You're making me nervous. Maybe we shouldn't even do this." Canaday asked whether the children knew not to tell anyone, and Lisa responded, "They know that this is something that's just in the family" and that based upon her discussions with them, "they know what would happen if they told." She repeated that the children were "excited" and said "they think it's gonna be a—a wonderful experience." Lisa then said, "It's awful hard for me to believe that you haven't taught before because you just seem to understand so much." Canaday said that his first wife mentioned that he taught her a lot, but he thought they learned together. When Lisa asked if Canaday planned to "bring anything to help my sweethearts learn," Canaday asked what she was referring to and said that all he had were "some tapes" of "amateurs." Lisa asked if the tapes showed "children learning." Canaday said, "No . . . it's all adults." He said that he did not know what else he could bring, but that if Lisa had any ideas in this regard, she should let him know. Lisa then proposed a date for their meeting in a hotel room and told Canaday that her oldest daughter wanted to bake him a favorite food. Canaday suggested cheeseburgers. Lisa said she would call later in the week to confirm arrangements. Canaday stated that he was "not exactly rich" and asked who would pay for the hotel room. Lisa said that she would. She reiterated that the children were "excited" and "really looking forward to it."

Thorson, posing as Lisa, initiated another tape-recorded telephone conversation with Canaday on February 3, 1999. In this conversation, Lisa again stated that she was "nervous" and asked if Canaday still wanted to teach her "sweethearts." When Canaday said yes, she said that the children were excited and that she was excited for them. Lisa inquired whether he knew it was not just a fantasy, and he again responded affirmatively. When Lisa asked him if he wanted to start the lesson with her oldest daughter, Canaday said yes but expressed concern that if he was with her and Lisa was with her son, there was still one child left out. Lisa told him that she did not want to participate because this was to be a "special time" with him. Canaday stated he did not want anyone to have bad feelings but he was not comfortable having sexual relations with the boy, stating "I've never done that." Lisa again inquired whether Canaday knew that it was not a fantasy and that she was not interested in him sexually; he indicated that he understood. Canaday stated that he had never taught sex to children before and, when questioned by Lisa, further stated that he had never even thought about it before. He stated that once the idea was put to him, he was interested because helping someone else better understand their sexuality would make him feel good. When asked by Lisa to describe what acts he would engage in with the children so that she could discuss it with them, Canaday indicated that he would begin with kissing and touching, then oral sex and intercourse. During the conversation, Lisa frequently commented how "excited" the children were about the plan. Lisa told Canaday that the children had purchased new special underwear and that he should act surprised when he saw it. He replied that he would be surprised because "I'm still at a loss for any idea at all what you're exactly talking about." Lisa informed him that she had reserved a room at an Omaha hotel and made arrangements to meet him there.

Canaday met Thorson, posing as Lisa, at the hotel room on February 5, 1999. Their meeting was videotaped. Seated next to each other on a loveseat, Canaday and Lisa talked for approximately 45 minutes. Lisa informed Canaday that she was nervous but would feel better if he could tell her exactly what was going to go on with the children. Canaday responded that he intended to do the things he described in the letter. Canaday confessed that he

was concerned about the "wrong people" finding out and that he was nervous he was getting set up and would have to go to jail. Canaday asked Lisa if the children would be disappointed when they saw him, and she responded no because she had taught them that a person is what is inside the heart. He stated he asked because he was used to people being disappointed with his looks, and Lisa told him he was a beautiful person. After several questions by Lisa, Canaday stated that he planned to start with the oldest daughter and that the younger boy and girl could watch and then try things they saw on each other if they wanted to. He stated that the activities would involve kissing, touching, and removing clothes, and then progress to oral sex and intercourse. Lisa showed Canaday pictures of the children, which she said were taken during a summer vacation at a nudist camp. She told him she had some difficulty getting the pictures developed and asked if he knew where she could get more prints. Canaday replied that he had no idea. Lisa showed him a magazine which apparently depicted nude pictures of children, and Canaday stated he had never seen such a magazine before. Canaday told Lisa about his girl friend who was incarcerated in Oklahoma and whom he eventually planned to marry. The girl friend had two young daughters, and when Lisa asked if he might teach them, he stated they had never talked about that, but the mother was pretty open about such things. Lisa asked Canaday if he was aware that this was reality, and he said he knew it was. She gave him a key to a room where the children allegedly were. After the conversation ended, Canaday entered the room and was met and arrested by Henthorn.

Canaday consented to a search of his vehicle, which resulted in the discovery of a bottle of baby oil, an unopened box of condoms, and a Polaroid camera. After he was advised of his *Miranda* rights, Canaday stated that he learned about Lisa in a "swinging magazine" and that he was at the hotel to teach her children about sex.

Henthorn testified that he conducted a background check on Canaday after the third letter and found no criminal history. He stated that Canaday's home was searched after his arrest and that no evidence of child pornography was found. Henthorn denied that the letters from Lisa suggested the "lesson plan" must involve physical sex.

Testifying on his own behalf, Canaday stated that he responded to the magazine advertisement in order to meet Lisa, not with the intention of having sex with children. Canaday, who was 44 years old at the time of trial, testified that aside from his first sexual experience at the age of 20, which involved a female hitchhiker who told him she was 16 but was actually 13, he had no sexual encounters with minor children. He said that he responded in his letters as though he was willing to have sex with the children in order to meet Lisa.

On cross-examination, Canaday testified that after "guessing at it," he understood that Lisa's references to "special education" dealt with sex. He admitted that he was the first to suggest telephone and personal contact with Lisa. He testified that he was making her believe he would have sex with the children but that he did not think she was serious. He testified that he went into the hotel room where Lisa told him her children were in order to "see what game she was playing." Canaday further testified that the condoms and baby oil had been in his vehicle since the fall of 1998 and that the camera was in his overnight bag so that it would not get dirty. He testified that he thought Lisa was just using a different approach to screening people that she wanted to meet.

On November 3, 1999, following a bench trial, the district court found Canaday guilty of conspiracy to commit first degree sexual assault on a child, noting that the paraphernalia found in Canaday's car strongly influenced its decision. On December 29, Canaday was sentenced to 5 years' probation. Canaday filed this appeal. Although the notice of appeal was filed within 30 days of the December 29 sentencing order which is included in the record, the notice refers to a December 12 sentencing order imposing a term of 12 to 36 months' imprisonment for the crime of first degree sexual assault.

II. ASSIGNMENT OF ERROR

Canaday assigns that the State failed to prove beyond a reasonable doubt that he was not entrapped, and thus, there was insufficient evidence to find him guilty of the crime.

III. 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. *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001).

[2] Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and 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. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

[3] 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. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Heitman, supra*.

IV. ANALYSIS

1. Appellate Jurisdiction

The State argues that we lack jurisdiction to hear this appeal because the notice of appeal refers to a sentencing order different from the sentencing order contained in the record. The record includes an order file stamped December 29, 2000, sentencing Canaday to 5 years' probation. The notice of appeal, file stamped January 26, 2001, is captioned, "The State of Nebraska, Plaintiff, vs. Ronald Canady [sic], Defendant" and includes the same docket number appearing on the sentencing order. However, it is clear that an error was made in preparing the notice of appeal because it recites a sentencing date, offense, and sentence which do not correspond to the order sentencing Canaday.

The statute governing the perfection of appeals, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000), provides in pertinent part:

> (1) The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree,

> or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record . . . .

[4] In a criminal case, the trial court must pronounce sentence before a criminal conviction constitutes a final, appealable order. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). Here, the notice of appeal was filed within 30 days of the final sentencing order in the record and, thus, meets the time restrictions of § 25-1912. The notice is signed by Canaday's attorney and in all other respects comports with the requirements of the statute. The notice reflects the same docket number as the sentencing order.

Although the erroneous information in the notice of appeal demonstrates the potential perils of careless word processing, we conclude that it does not defeat Canaday's right to appeal his conviction and sentence. It is clear from the record that the notice of appeal was timely filed on January 26, 2001, within 30 days from the valid final order of sentencing entered by the district court on December 29, 2000. It is equally clear that the notice was intended to effect an appeal from Canaday's conviction and sentence in this proceeding. Because the notice was timely filed and the erroneous reference to what was apparently a sentencing order in some other case is neither confusing nor prejudicial to the State, we conclude that we have jurisdiction to consider and resolve the appeal.

2. Entrapment

(a) General Principles

Canaday was charged with conspiracy to commit sexual assault on a child. Criminal conspiracy is defined in Neb. Rev. Stat. § 28-202 (Reissue 1995), which provides in pertinent part:

> (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.

[5] Under the unilateral approach to the agreement element of conspiracy embodied in § 28-202, only the defendant need agree with another person; the second party can feign agreement. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). This approach applies equally when the party who feigns agreement is a government agent. *State v. Heitman, supra*. See, also, *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

Section 28-202 further provides: "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."

[6,7] The only substantive issue presented in this appeal is whether the district court erred in rejecting Canaday's entrapment defense. 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. Heitman, supra*. While " '[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises,' " government agents, in their zeal to enforce the law, may not "implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), quoting *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). See, also, *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993).

[8-11] In Nebraska, 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. *State v. Heitman, supra*. The burden of going forward with evidence of government inducement is on the defendant. *Id*. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000). This determination is made as a matter of law, and

the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden. *State v. Heitman, supra*; *State v. Graham, supra*. 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 the cross-examination of the government's witnesses. *State v. Heitman, supra*. When the defendant produces sufficient evidence to raise the defense, the question of entrapment becomes one of fact. *Id*. The burden is then on the State to prove beyond a reasonable doubt that the defendant was not entrapped. *Id*.; *State v. Connely, supra*.

In finding Canaday guilty, the district court stated:

> The charge here is criminal conspiracy. And after reviewing all of the evidence, Mr. Canaday, I am left firmly convinced that you are guilty of criminal conspiracy. I need to explain my process — my thought process here for you. I don't have any enthusiasm for the efforts to find out whether folks might be disposed to commit crimes. And I must say that throughout the process here, both you and the investigators for the State were walking a very thin line. In the end, what resolved the matter for me was the meeting that you had with the investigator that — where you brought along the paraphernalia that were going to be, by my view, used in the encounter with the subjects.
>
> It isn't an easy process and it's not — I didn't — I didn't have any enthusiasm in working on this, because I do think that both you and the investigators were coming as close as you could without stepping over the line either with entrapment or an offer. But the — the meeting that you had with the investigator and the material that you brought with you over from Iowa did leave me firmly convinced that the State had met its burden of proof.

Our review of the entrapment issue is complicated by the fact that the district court did not make specific findings on the issues of inducement and predisposition. However, rejection of the defense could have resulted from only two alternative factual findings: either the district court determined that the State did not induce Canaday to commit the offense charged or the court found that there was inducement but that Canaday was predisposed to

commit the offense. Accordingly, we review the record to determine its sufficiency to support either of these findings.

(b) Inducement

[12,13] Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it. *Id*. For example, we have held that a government agent's simple offer to purchase a controlled substance or inquiry about its availability for sale does not constitute an inducement of the person to whom the offer or inquiry was made. *State v. Graham*, 259 Neb. 966, 614 N.W.2d 266 (2000); *State v. Van Egmond*, 233 Neb. 834, 448 N.W.2d 569 (1989). 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. *State v. Heitman, supra*.

The pertinent inquiry with respect to the issue of inducement in this case is whether the State went beyond simply providing Canaday with an opportunity to commit the offense. Our recent decision in *State v. Heitman, supra*, is illustrative. In that case, Heitman, a 53-year-old man, initiated the events by giving a 14-year-old girl working at a fast-food restaurant 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 eventually agreeing to meet the girl for a sexual encounter, Heitman was charged with conspiracy to commit first degree sexual assault on a child. In considering whether he was induced to commit the crime, we noted that the police officer sent "numerous e-mail messages aimed at affecting his emotions and desires," including messages indicating that the man was one of the few people who understood the girl and that the girl was looking for a sexual teacher. *Id*. at 200, 629 N.W.2d at 555. We also noted that it was the officer, posing as the girl, who first requested descriptions of

the sexual activity the man wished to engage in and that it was the officer who first suggested meeting for the purpose of a sexual encounter. We held that these facts established inducement to commit the crime, notwithstanding the fact that the trial court had not made a specific finding in this regard.

In *Heitman*, we cited and relied upon *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000), in resolving the issue of inducement. That case involved facts strikingly similar to those before us here. Poehlman, a divorced male, visited " 'alternative lifestyle' " discussion groups on the Internet in an effort to find a companion. *Id.* at 695. He responded to an ad from an undercover agent posing as a woman named "Sharon," who indicated that she was a mother looking for someone who understood her family's " 'unique needs.' " *Id.* Throughout the ensuing e-mail correspondence, Sharon indicated that she was looking for someone to help with the " 'special education' " of her children who would be understanding and would " 'not let society's views stand in the way.' " *Id.* She made it clear that there could not be " 'anything between me and my sweethearts [sic] special teacher.' " *Id.* at 697. Eventually, Poehlman perceived that Sharon was looking for a male sexual mentor for her three daughters, ages 7, 10, and 12. At Sharon's prompting, Poehlman detailed the sexual acts he would teach to the children. Sharon later made telephone contact and arranged for Poehlman to meet her in a hotel room in another state. When she escorted him to an adjoining room to meet and teach her "children," Poehlman was arrested by law enforcement officials and subsequently charged with crossing state lines for the purpose of engaging in sex acts with a minor.

In concluding that Poehlman was induced to commit the offense, the court noted that while Poehlman was originally interested in a relationship with Sharon, she made it increasingly clear that his agreement to serve as a sexual mentor for her children was a condition of her own continued interest in him. Noting Sharon's repeated requests that Poehlman provide her with lesson plans, the court found a clear implication that unless he did so, Sharon would discontinue contact and seek another mentor. The court reasoned that the "government thus played on Poehlman's obvious need for an adult relationship, for acceptance of his sexual

proclivities and for a family, to draw him ever deeper into a sexual fantasy world" involving imaginary children. *Id.* at 702. The court 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 the instant case, there is ample evidence that the State went beyond simply providing Canaday with an opportunity to violate the law. State agents made the initial references to children and brought up the issues of "special education," "society's views," and "special memories." Throughout the correspondence, and particularly in the telephone and videotaped conversations, Lisa repeatedly made it clear that she had made a firm decision about taking an active role in her children's sexual education and repeatedly informed Canaday about how "excited" the children were that he was going to be their teacher. Lisa told Canaday that she felt like he really "understood" her and understood what the rest of society did not. The overall implication of Lisa's correspondence with Canaday was that she was seeking someone who would realize, as she supposedly did, the value and benefits of teaching children about sex in a manner that society in general and law enforcement in particular would find objectionable. In that regard, she played on his emotions and desires. There is also evidence in the record that Canaday continued to seek an adult relationship with Lisa. By this evidence, especially Lisa's repeated statements to Canaday about her decision that a sexual education would be beneficial to her "sweethearts" and that he understood her while others did not, the State materially affected the normal balance between risks and rewards from the commission of the crime and induced Canaday to commit the offense. See *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000). Because the State did more than simply present the opportunity to commit the crime, we conclude that Canaday was induced to commit the offense of conspiracy, and any contrary finding would be clearly erroneous.

(c) Predisposition

[14-16] Where the State has induced an individual to break the law, it must prove beyond a reasonable doubt that the defendant

was disposed to commit the criminal act prior to first being approached by government agents. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001), citing *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). See, also, *U.S. v. Poehlman, supra*. Predisposition to commit the criminal act must be independent and not be the product of the attention of the government directed at the defendant. *State v. Heitman, supra*; *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). As we stated in *Heitman*, this is not to say 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*; *State v. Heitman, supra*. However, only those statements that indicate a state of mind untainted by the inducement are relevant to show predisposition. *Id*. Predisposition may be shown by circumstantial evidence. *State v. Heitman, supra*. See, also, *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982).

The distinction between predisposition which defeats an entrapment defense and criminal intent formulated only after governmental inducement is demonstrated by contrasting the facts in *Heitman* with those presented in both *Jacobson v. United States, supra*, and *U.S. v. Poehlman, supra*. In *Heitman*, we stated that predisposition could not be established by statements made by Heitman in correspondence with undercover police officers subsequent to inducement when the statements were indicative of his state of mind and intent at only that time. However, there was also evidence that Heitman initiated contact with the 14-year-old girl by giving her a sexually suggestive letter, money, condoms, and his e-mail address prior to any governmental involvement. Because the trial court considered and relied upon this evidence, we determined that its finding of predisposition was not clearly erroneous and affirmed the conviction.

In *Jacobson v. United States, supra*, law enforcement officials discovered Jacobson's name on the mailing list of an adult bookstore from which he had legally ordered certain publications. Subsequent to the order, the purchase of such publications became illegal under a newly enacted federal law. After 2½ years

of receiving various mailings from governmental agents, Jacobson ordered a magazine depicting children engaged in sexual activities. Following his arrest, a search of his home revealed no pornographic materials other than those sent by the government and those he had purchased legally prior to the government's solicitations. Reversing Jacobson's conviction of receiving child pornography through the mail, the U.S. Supreme Court held that the government had failed, as a matter of law, to prove a predisposition which was independent from and not the product of the mailings it directed to the defendant. Similarly, in *U.S. v. Poehlman*, 217 F.3d 692, 704 (9th Cir. 2000), the court held that no inference of predisposition could be drawn from the defendant's vivid e-mail descriptions of what he would teach "Sharon's" children because such statements did not "differentiate his state of mind prior to the government's intervention from that afterwards."

The acts described by Canaday in response to Lisa's repeated questions and requests for detailed "lesson plans" reveal nothing with respect to his predisposition prior to the State's inducement. Contrary to the district court's view, the items discovered in Canaday's vehicle following his arrest likewise do not bear on predisposition. Statements which Canaday made during the extended period of correspondence and conversations with Lisa actually negate a predisposition toward sexual interest in children. After several months of correspondence, Canaday replied to Lisa's inquiry about whether he would be "comfortable" teaching her children that "[i]t would be new for me but I think I could be comfortable with it if they are with me." A few days later, in the first telephone conversation between Canaday and Lisa, Canaday remarked that he was "new at this too, as far as children," and that "I've never tried it, so I can't tell ya for sure if I'm comfortable about it or not." In the second telephone conversation, Canaday again admitted that he was somewhat uncomfortable because "this is something new for me" and because he knew what they were discussing was illegal. In response to Lisa's question about whether he intended to "bring anything to help my sweethearts learn," Canaday mentioned that he had "some tapes." When Lisa asked if the tapes showed "children learning," he replied that the tapes depicted only adults.

During the third telephone conversation, Canaday stated that he had never taught sex to children, and until becoming acquainted with Lisa, he had never even thought about it. During the videotaped personal meeting, when Lisa showed Canaday nude photographs of her "children," he remarked that he had never seen such photographs before. When she asked him if he knew where she could have more reprints made, he said he had no idea. He spent much of the time telling Lisa about his own failed adult relationships.

As noted, the search of Canaday's home subsequent to his arrest revealed no child pornography or other indication of a sexual interest in children. He had no prior criminal record. The only evidence of any sexual contact with a minor was Canaday's admission that his first sexual experience at the age of 20 involved a female hitchhiker whom he believed to be 16 but later learned was younger. This isolated incident, occurring more than 20 years before the offense with which Canaday was charged, is simply too remote in time and circumstance to support an inference of predisposition.

The State argues that predisposition was shown by the mere fact that Canaday responded to the advertisement placed by Henthorn, which stated, "Single mom looking for right man who likes kids and understands needs!" This argument is tenuous at best in light of Henthorn's testimony that the advertisement was intentionally left "very vague and open to different interpretations." Although Canaday testified that he "probably" had purchased a copy of the magazine in which the advertisement appeared in the summer of 1998, he was not asked to identify the copy which was received in evidence. The advertisement, which Henthorn testified was placed no later than the fall of 1997, is not referred to by Canaday in his first letter to Lisa received on August 10, 1998, or in any subsequent communication. In the first paragraph of Canaday's initial letter, he stated that he received Lisa's name from a "list of women seeking men" and that the list contained the phrases " 'Plain Mates' " and " 'love starved- man hungry-women.' " This language does not appear in the advertisement placed by Henthorn. Canaday's initial letter contains no reference to children, and Henthorn conceded that based upon his training, he found nothing about the letter to be

significant. Under these circumstances, no reasonable inference can be drawn that Canaday's initial contact with Lisa evidenced any predisposition to commit an unlawful act. Based upon our review of the entire record, we conclude that there is no evidence upon which a rational finder of fact could conclude that Canaday had a predisposition to commit the offense with which he was charged prior to and independent of the State's inducement.

V. CONCLUSION

The defense of entrapment serves to prevent law enforcement agencies from overstepping the "line between setting a trap for the 'unwary innocent' and the 'unwary criminal.'" *Jacobson v. United States*, 503 U.S. 540, 542, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), quoting *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958). See, also, *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). Based upon our review of the record in this case, we conclude that the State crossed the line by inducing Canaday to commit an offense which he was not otherwise predisposed to commit. Because it was clearly erroneous to conclude from this record that the State disproved entrapment beyond a reasonable doubt, Canaday's judgment of conviction and sentence is reversed and the cause is remanded with direction to dismiss.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

ROLAND F. WAITE AND FRANK KREJCI, APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

641 N.W.2d 351

Filed March 29, 2002. No. S-01-193.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** 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. **Constitutional Law: Supreme Court: Jurisdiction: Appeal and Error.** Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.
5. **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.
6. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 1995) 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.
7. **Injunction: Final Orders: Appeal and Error.** An order denying or dissolving a temporary injunction or restraining order is not a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995).
8. **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.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge. Judgment of Court of Appeals affirmed.

James D. Sherrets and Michael S. Kennedy, of Sherrets & Boecker, L.L.C., for appellants.

Robert J. Hamer, Deputy City Attorney, for appellees.

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

GERRARD, J.

INTRODUCTION

The issue presented in this case is whether an order denying a temporary injunction and dissolving a temporary restraining order is a final, appealable order. Because it is not, we are without jurisdiction to consider the merits of this appeal.

BACKGROUND

On January 12, 2001, the plaintiffs, Roland F. Waite and Frank Krejci, filed a petition in the district court seeking a temporary restraining order, a temporary injunction, and a permanent

injunction against the City of Omaha and other city officials to prevent certain ordinances, passed on January 9, from going into effect. The ordinances at issue would close and vacate a street which the plaintiffs claim will impair access to and have the effect of devaluing their commercial property and will deter existing tenants and prospective tenants from renewing and accepting leases at the property. On January 12, the district court entered a temporary restraining order, finding that the plaintiffs had demonstrated that they may suffer irreparable damage by operation of the ordinances and enjoining the City of Omaha from acting upon the ordinances until further order of the court.

On February 1, 2001, the district court entered an order which denied the plaintiffs' request for a temporary injunction and dissolved the temporary restraining order. The district court determined that the plaintiffs had not shown by competent evidence that they were entitled to injunctive relief because the "evidence of Plaintiffs' prospective damage is not such that it can be said that their right is clear, their damage irreparable, and in particular that their remedy at law is inadequate to prevent a failure of justice." The district court further reasoned that the closing of the street could result in only a loss of income or value, which is compensable at law in Nebraska. Therefore, the district court concluded that the plaintiffs had not established every fact necessary to entitle them to injunctive relief and thus were not entitled to a temporary injunction. The district court did not, however, dispose of the plaintiffs' request for a permanent injunction.

The plaintiffs appealed from the district court's February 1, 2001, order. The Nebraska Court of Appeals summarily dismissed the plaintiffs' appeal for lack of jurisdiction on March 13, 2001. We granted the plaintiffs' petition for further review.

ASSIGNMENT OF ERROR

Summarized, the plaintiffs' petition for further review contends that the Court of Appeals erred in dismissing the appeal for lack of jurisdiction.

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. *In re Interest of Jaden H., ante* p. 129, 638 N.W.2d 867 (2002).

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. *Saunders County v. City of Lincoln, ante* p. 170, 638 N.W.2d 824 (2002). 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[4-6] Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). The two statutes primarily relevant to the issue of appellate jurisdiction are Neb. Rev. Stat. §§ 25-1315(1) (Cum. Supp. 2000) and 25-1902 (Reissue 1995). See, generally, *Keef, supra*. Section 25-1315(1), however, 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. *Keef, supra*. Because those conditions are not present in this case, our jurisdictional inquiry is limited to § 25-1902, which 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 *Keef, supra*.

[7] The plaintiffs in this case contend that although the district court has yet to rule on their request for a permanent injunction, the order denying a temporary injunction and dismissing the temporary restraining order is nonetheless a final, appealable order. This contention, however, is contrary to over 130 years of law establishing that an order denying or dissolving a temporary injunction or restraining order is not a final order as defined in § 25-1902. See, e.g., *Abramson v. Bemis*, 201 Neb. 97, 266 N.W.2d 226 (1978); *Young v. City of Albion*, 77 Neb. 678, 110

N.W. 706 (1906); *Meng v. Coffee*, 52 Neb. 44, 71 N.W. 975 (1897); *Manning v. Connell*, 47 Neb. 83, 66 N.W. 17 (1896); *Bartram v. Sherman*, 46 Neb. 713, 65 N.W. 789 (1896); *School Dist. No. 15 v. Brown*, 10 Neb. 440, 6 N.W. 770 (1880); *Scofield v. The State National Bank of Lincoln*, 8 Neb. 16 (1878); *Smith v. Sahler*, 1 Neb. 310 (1871); *O'Connor v. Kaufman*, 6 Neb. App. 382, 574 N.W.2d 513 (1998), *aff'd* 255 Neb. 120, 582 N.W.2d 350. See, also, *Guaranty Fund Commission v. Teichmeier*, 119 Neb. 387, 229 N.W. 121 (1930); *Barkley v. Pool*, 102 Neb. 799, 169 N.W. 730 (1918); *Einspahr v. Smith*, 46 Neb. 138, 64 N.W. 698 (1895); *Buda v. Humble*, 2 Neb. App. 872, 517 N.W.2d 622 (1994) (entry or continuance of temporary injunction is not final order).

The plaintiffs rely on *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 866, 612 N.W.2d 913, 918 (2000), in which we concluded that "the denial of a temporary injunction in the condemnation proceeding is an order that affects a substantial right and determines the action with regard to the request for equitable relief." In *Airport Auth. of Village of Greeley*, however, the appellant landowners sought both temporary and permanent injunctions to enjoin an airport authority from taking their property pursuant to condemnation proceedings, and the airport authority filed a petition for writ of assistance seeking that the landowners be ordered to give up possession of the condemned property. The district court's order generally denied the landowners' requests for temporary and permanent injunctions and granted the airport authority's petition for writ of assistance. It was from that order that the landowners in *Airport Auth. of Village of Greeley* appealed.

While it is well established that orders relating to temporary injunctions and restraining orders are not final orders, it is equally well established that orders entering or denying permanent injunctions, which leave no issues remaining to be determined by the trial court, are final orders within the meaning of § 25-1902. See, e.g., *Galstan v. School. Dist. of Omaha*, 177 Neb. 319, 128 N.W.2d 790 (1964), *overruled on other grounds, School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993); *Rickards v. Coon*, 13 Neb. 419, 14 N.W. 162 (1882); *O'Connor, supra*; *Buda, supra*. Similarly, an order

granting a writ of assistance, where no other issues remain to be decided, is a final, appealable order. See *Escritt v. Michaelson*, 73 Neb. 640, 106 N.W. 1016 (1906).

Had the order in *Airport Auth. of Village of Greeley, supra*, merely denied a temporary injunction, without ruling on the other issues presented in the case, then that order would not have been final. However, since the order denied both temporary and permanent injunctions and granted the airport authority's petition for writ of assistance, it was a final order within the meaning of § 25-1902. To the extent that the language of *Airport Auth. of Village of Greeley, supra*, implies that the denial of a temporary injunction, standing alone, is a final order pursuant to § 25-1902, that implication was inadvertent, as that issue was not presented by the circumstances of that case.

[8] Dissolution of a temporary restraining order is not a final order within the meaning of § 25-1902. *Abramson v. Bemis*, 201 Neb. 97, 266 N.W.2d 226 (1978). The district court's February 1, 2001, order did not finally dispose of this case. 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

We also note that the plaintiffs' appellate brief assigns error to the district court's refusal to grant a stay or supersedeas pending disposition of the plaintiffs' appeal. The district court reasoned that the plaintiffs were not entitled to a supersedeas where a temporary restraining order had been granted ex parte, but upon hearing a temporary injunction had been denied and the temporary restraining order dissolved. See *State ex rel. Beck v. Associates Discount Corp.*, 161 Neb. 410, 73 N.W.2d 673 (1955) (distinguishing between temporary restraining order and temporary injunction and stating that dissolution of temporary restraining order cannot be superseded).

The proceedings in the district court relating to supersedeas, while reflected in our record on appeal, occurred entirely after the filing of the plaintiffs' notice of appeal, calling into question whether that issue is properly before this court on appeal. See Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2000). The effect of a supersedeas bond is to either maintain an order in force or prevent the execution of an order until a case is finally heard and

determined, but not to make the underlying order, if otherwise nonfinal, into a final and appealable order. See, *Horst v. Board of Supervisors of Dodge County*, 5 Neb. (Unoff.) 410, 98 N.W. 822 (1904); *Green v. Morse*, 57 Neb. 798, 78 N.W. 395 (1899). We have determined that the dissolution of the temporary restraining order is not a final order; we are also without jurisdiction to decide any issues regarding the denial of the supersedeas bond.

CONCLUSION

The Court of Appeals correctly concluded that it was without appellate jurisdiction to consider the merits of the plaintiffs' purported appeal. The judgment of the Court of Appeals, dismissing the plaintiffs' purported appeal, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KAMIL H. AL-ZUBAIDY, APPELLANT.

641 N.W.2d 362

Filed April 5, 2002. No. S-00-535.

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.** 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 state or federal Constitution. An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. Further, when the motion properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
5. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel.

6. **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.
7. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
8. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
9. **Postconviction: Effectiveness of Counsel: Proof.** The "prejudice" component of the test stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
10. **Effectiveness of Counsel: Proof.** In order to establish prejudice resulting from an alleged deficiency in the performance of counsel, it must be shown that but for counsel's deficient performance, the result of the proceeding would have been different.
11. **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.
12. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were known or apparent from the record.
13. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A determination of whether a defendant was prejudiced by appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal necessarily requires a court in a postconviction proceeding to consider whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
14. **Effectiveness of Counsel: Proof.** The two prongs of the test for ineffective assistance of counsel claims enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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.
15. **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.
16. ____: ____: ____. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime 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.

17. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
18. ____: ____. Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant.

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

Michael J. Hansen for appellant and, on brief, Kamil H. Al-Zubaidy, pro se.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

On December 10, 1994, Kamil H. Al-Zubaidy entered the home of Ann Brown (Brown) and inflicted knife wounds upon Brown and her daughter, Seana Brown (Seana). Following a jury trial, two appeals, and a plea agreement, Al-Zubaidy stands convicted of first degree assault in connection with the injuries to Brown and second degree assault and use of a weapon to commit a felony in connection with the injuries to Seana. Al-Zubaidy filed this motion for postconviction relief alleging he had received ineffective assistance from both trial and appellate counsel. The district court for Lancaster County denied the motion without an evidentiary hearing, and Al-Zubaidy appeals.

I. BACKGROUND

[1] 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. Parmar, ante* p. 213, 639 N.W.2d 105 (2002); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000). The

following facts are established by the record in the instant case and those from Al-Zubaidy's prior appeals:

Al-Zubaidy was originally charged with attempted first degree murder and use of a weapon to commit a felony in connection with the injuries to Brown and second degree assault and use of a weapon to commit a felony in connection with the injuries to Seana. At trial, the State contended that Al-Zubaidy, angered that Brown was providing shelter to his recently estranged wife, entered Brown's home and attacked her with a knife and then stabbed Seana when she came to her mother's rescue. Brown, Seana, Brown's son, and Al-Zubaidy's wife all testified on behalf of the State. Al-Zubaidy testified on his own behalf and claimed that upon entering Brown's home to deliver some items to his wife, he was attacked by several persons and used a knife to defend himself and escape.

At trial, Seana testified that she had recently moved to Michigan. At the conclusion of her testimony, Al-Zubaidy's attorney did not request that Seana remain subject to recall or otherwise indicate that she should remain in Nebraska, and she was excused by the trial court. During Al-Zubaidy's case, his counsel attempted to call John Ways for the purpose of impeaching Seana's testimony. At the time of trial, Ways was in custody on charges unrelated to this case, and he had met Al-Zubaidy while in custody. According to an offer of proof, Ways would have testified that Seana, with whom he was acquainted, told him prior to trial that Al-Zubaidy had been "jumped" by persons in Brown's home and that he had used the knife in self-defense, injuring Seana and Brown in the process. The State objected to Ways' testimony on the ground that Seana had not been given an opportunity to explain or deny the alleged prior inconsistent statement and could not be recalled for that purpose because she had left the jurisdiction. The trial court sustained the objection and did not permit Ways to testify.

Al-Zubaidy was convicted on all four counts in the original information. Thereafter, Al-Zubaidy perfected a direct appeal and moved for appointment of new counsel because he intended to challenge the effectiveness of his trial counsel on appeal. The district court granted the motion. In his appeal, Al-Zubaidy assigned and argued (1) that the trial court erred in failing to

instruct the jury on attempted second degree murder and attempted manslaughter as lesser-included offenses of attempted first degree murder and (2) that the trial court erred in refusing to allow Ways' testimony for the purpose of impeaching Seana. The Nebraska Court of Appeals found no merit in either assignment and affirmed. *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997) (*Al-Zubaidy I*).

In its analysis of the first assignment of error, the Court of Appeals determined that the evidence did not warrant the giving of a lesser-included offense instruction. In resolving the second assignment of error, the court began by focusing on Neb. Evid. R. 613(2), Neb. Rev. Stat. § 27-613(2) (Reissue 1995), which provides in part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." The court then cited *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979), and *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996), for the proposition that the foundational requirements of § 27-613 can be met by affording the impeached party an opportunity to explain or deny either before or after the introduction of impeaching evidence. Nevertheless, the Court of Appeals concluded that because Al-Zubaidy knew that Seana was not a resident of Nebraska at the time of her trial testimony, he was obligated to take some action to secure her continued presence for the purpose of explaining or denying the alleged statement to Ways, and because he had not done so, the extrinsic evidence of the statement was properly excluded. In addition, the Court of Appeals specifically determined that Al-Zubaidy had "not demonstrated that the interests of justice require dispensing with the foundational requirement of rule 613(2) in the present case." *Al-Zubaidy I*, 5 Neb. App. at 340, 559 N.W.2d at 782.

Al-Zubaidy petitioned for further review solely on the issue of whether a lesser-included offense instruction should have been given. We granted the petition, determined that the evidence warranted an instruction on attempted second degree murder as a lesser-included offense, reversed, and remanded for

a new trial. *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997) (*Al-Zubaidy II*).

On remand, Al-Zubaidy took the position that our decision in *Al-Zubaidy II* reversed all four of his original convictions and required a new trial on all counts. The trial court determined that our decision required retrial on only counts I and II of the original information, the attempted murder and related weapons charge pertaining to Brown, and that Al-Zubaidy stood convicted of counts III and IV, the assault and weapons charge pertaining to Seana. A plea agreement was subsequently reached in which count I was amended to first degree assault and count II was dismissed in exchange for Al-Zubaidy's plea of no contest to count I, as amended. Al-Zubaidy was convicted on that count and sentenced to 10 years' imprisonment to be served consecutively to the other sentences he was serving. The plea agreement contained no waiver of rights with respect to counts III and IV. Al-Zubaidy moved for an absolute discharge on the ground that he had not been retried on those charges within the timeframe specified in Neb. Rev. Stat. § 29-1208 (Reissue 1995). The motion was denied, and Al-Zubaidy appealed. In *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999) (*Al-Zubaidy III*), we held that the decision in *Al-Zubaidy II* did not affect Al-Zubaidy's convictions on counts III and IV, which pertained to the injuries inflicted upon Seana.

Subsequently, Al-Zubaidy filed a verified pro se motion for postconviction relief based upon ineffective assistance of counsel. In this motion, Al-Zubaidy alleged that his trial counsel was ineffective for failing to take the necessary steps to "ensure that extrinsic evidence which could impeach the credibility of Seana Brown would be admitted according to Nebraska Rules of Evidence" and for failing to request a lesser-included offense instruction with respect to the second degree assault charge. Al-Zubaidy also alleged that his appellate counsel was ineffective for not asserting ineffective assistance of trial counsel as an issue on direct appeal and for not seeking further review of the Court of Appeals' determination that there was no error in excluding Ways' testimony regarding the statement allegedly made by Seana.

The district court denied Al-Zubaidy's motion for postconviction relief without conducting an evidentiary hearing. The court

reasoned that all of Al-Zubaidy's claims based upon ineffective assistance of trial counsel could have been asserted on direct appeal and were therefore procedurally barred. The court further determined that appellate counsel's decision to approach the issue of foundation for the prior inconsistent statement as he did, rather than casting it as ineffective assistance of trial counsel, was a reasonable tactical decision which was not shown to be prejudicial.

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

II. ASSIGNMENTS OF ERROR

Al-Zubaidy assigns, restated, that the district court (1) erred in denying his postconviction motion without conducting an evidentiary hearing, (2) erred in not appointing counsel to represent him in this matter, and (3) abused its discretion in not permitting him to amend his motion for postconviction relief.

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. Parmar, ante* p. 213, 639 N.W.2d 105 (2002); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (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. Parmar, supra*; *State v. Caddy, supra*.

IV. ANALYSIS

1. Scope of Postconviction Motion

Given the complex procedural history of the criminal proceeding to which this postconviction action relates, we begin by identifying the specific convictions to which the postconviction motion is addressed. Al-Zubaidy's convictions for second degree assault and use of a weapon to commit a felony in connection with the stabbing of Seana were affirmed on direct appeal and are specifically addressed by this motion for postconviction relief. However, we do not read the motion as seeking any relief with

respect to Al-Zubaidy's conviction resulting from the plea agreement following *Al-Zubaidy II.* He makes no claim of ineffective assistance on the part of the attorney who represented him at the time of his plea, and the record affirmatively shows that he was satisfied with that representation. Compare *State v. Bishop, ante* p. 266, 639 N.W.2d 409 (2002). Accordingly, we consider the postconviction motion with respect to only Al-Zubaidy's 1995 convictions for second degree assault and use of a weapon to commit a felony in connection with the stabbing of Seana.

2. Ineffective Assistance of Counsel Claims

(a) General Principles

[4] 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 state or federal Constitution. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id*. Further, when the motion properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. *Id*.

[5,6] Al-Zubaidy's postconviction motion is based upon an assertion that he was denied the effective assistance of counsel at his trial and on direct appeal. The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *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). In *Strickland v. Washingto*n, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the U.S. Supreme Court articulated the two-part standard to be utilized by courts when evaluating the performance of counsel in a criminal case. We have frequently cited and applied this standard. 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. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001); *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999).

[7-10] The *Strickland* standard has familiar corollaries. In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). Moreover, trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Buckman, supra*; *State v. Williams, supra*. The "prejudice" component of the test stated in *Strickland v. Washington, supra*, focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). In order to establish prejudice resulting from an alleged deficiency in the performance of counsel, it must be shown that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Ryan, supra.*

(b) Trial Counsel

[11,12] The district court determined that Al-Zubaidy's claims for postconviction relief based upon the alleged ineffectiveness of trial counsel could have been raised on direct appeal and were therefore procedurally barred. 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); *State v. Williams, supra*. In applying this principle, we have held that a motion for postconviction

relief asserting ineffective assistance of trial counsel is procedurally barred where a different attorney represented a defendant on direct appeal and the alleged deficiencies in the performance of trial counsel were known or apparent from the record. *State v. Suggs, supra*; *State v. Williams, supra*; *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999). Because Al-Zubaidy was represented by different counsel on direct appeal, the district court correctly concluded as a matter of law that his postconviction claims based upon allegations of ineffective assistance of his trial counsel were procedurally barred.

(c) Appellate Counsel

[13,14] Al-Zubaidy argues that his appellate counsel was ineffective (1) in not arguing on direct appeal that trial counsel was ineffective in failing to secure Seana's presence so that she could be given an opportunity to explain or deny the prior inconsistent statement she allegedly made to Ways and (2) in not seeking further review of the Court of Appeals' determination in *Al-Zubaidy I* that Ways' testimony was properly excluded. We have recognized that a determination of whether a defendant was prejudiced by appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal necessarily requires a court in a postconviction proceeding to consider whether trial counsel was ineffective under the *Strickland* test. *State v. Bishop, ante* p. 266, 639 N.W.2d 409 (2002); *State v. Williams, supra.* We have also noted that the two prongs of the *Strickland* test for ineffective assistance of counsel claims, 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. Thomas, supra*; *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

The district court held that Al-Zubaidy was not prejudiced by appellate counsel's failure to argue that trial counsel was ineffective for failing to secure Seana's presence so Ways' testimony could be heard. Based upon our review of the trial record, we reach the same conclusion. We follow the approach to the prejudice inquiry outlined by the Court in *Strickland v. Washington*, 466 U.S. 668, 695-96, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

It is undisputed that the stabbings occurred in the kitchen of Brown's home where Al-Zubaidy's estranged wife and their child were staying and that Al-Zubaidy wielded the knife which inflicted the wounds. The jury heard two accounts of why Al-Zubaidy was present in the Brown home and what he did when he arrived. According to witnesses called by the State, Al-Zubaidy had been looking for his wife earlier in the evening and became angry when he learned that she was staying with Brown. One witness who had talked with Al-Zubaidy earlier that evening testified that Al-Zubaidy actually "insisted that he was going to kill Ann Brown." Al-Zubaidy's wife testified that she had a telephone call from Al-Zubaidy earlier in the night but hung up because his voice sounded "very angry." Witnesses testified that when Al-Zubaidy arrived at the Brown home, Brown attempted to call the 911 emergency dispatch service but was confronted by Al-Zubaidy entering the kitchen through the back door with a knife in his hand. Three of the State's witnesses testified that Al-Zubaidy repeatedly stabbed Brown in the chest, arm, and wrist, and then stabbed Seana in the shoulder when she came to Brown's aid. Photographs of the stab wounds sustained by the two women were received into evidence. The State's witnesses further testified that Brown's son and some of his friends,

who had been in the basement of the home, subdued Al-Zubaidy and chased him outside, where he departed in a vehicle.

Conversely, Al-Zubaidy testified that he went to the Brown home to deliver some of their child's belongings to his wife. He stated that after knocking on the door he was admitted to the home and, at the instigation of Brown, was immediately attacked by various persons. He testified that he picked the knife up from a table in the kitchen and used it only to defend himself and facilitate his escape, causing wounds to Brown and Seana in the process.

The jury clearly chose to believe the testimony and physical evidence offered by the State over Al-Zubaidy's version of how the stabbings occurred, and the record amply supports this finding. It is conceivable, but unlikely, that a jury would have given credence to Ways' account of a prior inconsistent statement made by Seana regarding the question of who instigated the attack. Nevertheless, Seana's testimony was generally consistent with that of four other witnesses who observed some or all of the altercation. The physical evidence is also consistent with the testimony of the State's witnesses. Viewing the record as a whole, we cannot conclude with reasonable probability that had Ways' testimony been received, there would have been a different result. Accordingly, we conclude that the district court did not err in determining that Al-Zubaidy was not prejudiced by the performance of his trial counsel, which he now challenges as deficient, and he therefore could not have been prejudiced by the fact that his appellate counsel did not raise this issue on appeal. Likewise, we conclude that Al-Zubaidy was not prejudiced by the fact that appellate counsel did not petition for further review of the Court of Appeals' disposition of the exclusion of Ways' testimony.

[15] Al-Zubaidy also argues that his appellate counsel should have argued that trial counsel was ineffective for failing to request an instruction on third degree assault as a lesser-included offense of second degree assault. 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. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001); *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

Neb. Rev. Stat. § 28-309 (Reissue 1995) defines the offense of second degree assault and reads in pertinent part: "(1) A person commits the offense of assault in the second degree if he or she: (a) Intentionally or knowingly causes bodily injury to another person *with a dangerous instrument*." (Emphasis supplied.) Neb. Rev. Stat. § 28-310 (Reissue 1995) defines the offense of third degree assault and reads in pertinent part: "(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[.]"

[16] As noted above, witnesses called by the State testified that Al-Zubaidy used a knife to inflict injury upon Seana. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime 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. *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Al-Zubaidy, however, admitted in his case in chief that he used a knife to stab Brown and Seana. Therefore, Al-Zubaidy was not entitled to a lesser-offense instruction on third degree assault because all of the evidence at trial indicated that he used a dangerous instrument, in this case a knife, to injure Seana. The fact that appellate counsel did not raise this lesser-included-offense issue on appeal did not constitute deficient performance because the argument had no merit.

3. Other Assignments of Error

(a) Refusal to Appoint Counsel

[17,18] Al-Zubaidy also contends the district court erred in not appointing counsel to represent him in this postconviction action. Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Silvers*, 255 Neb. 702, 587

N.W.2d 325 (1998). Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant. *Id.* Because the district court correctly determined that the files and records of this case demonstrate that Al-Zubaidy is not entitled to postconviction relief, the court did not abuse its discretion in declining his request for appointment of counsel.

(b) Amendment

Finally, Al-Zubaidy contends the district court erred in not granting him at least one opportunity to amend his petition. Al-Zubaidy's motion for postconviction relief was filed on November 16, 1999. The State filed a motion captioned "Response and Motion to Deny Evidentiary Hearing and Motion for Postconviction Relief" on December 17, 1999. A hearing on the State's motion was held in part on January 24, 2000, and then continued and finished on February 22. At the February 22 hearing, Al-Zubaidy was asked by the district court if he had any evidence or argument to add to the motion he had filed on November 16, 1999. Al-Zubaidy indicated he did not. Given that the February 22, 2000, hearing was held over 2 months after the State filed its motion, Al-Zubaidy had ample time to seek leave to amend his petition or be prepared to make further argument if he so desired. Neb. Rev. Stat. §§ 25-849, 25-850, and 25-852 (Reissue 1995). See, also, *State v. Silvers, supra*. Instead, he chose to stand on his original motion and cannot now complain that he was denied an opportunity to amend. See *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). This assignment is without merit.

V. CONCLUSION

For the reasons stated, we conclude that the district court did not err in denying Al-Zubaidy's motion for postconviction relief without conducting an evidentiary hearing. The judgment of the district court denying postconviction relief is affirmed.

AFFIRMED.

CEDRIC PONCE, APPELLEE, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

641 N.W.2d 375

Filed April 5, 2002. No. S-00-855.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
4. **Administrative Law: Proof.** The standard of proof to sustain a charge of violating a Department of Correctional Services rule is substantial evidence.
5. **Evidence: Words and Phrases.** Substantial evidence is evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.

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

Don Stenberg, Attorney General, and Amber Fae Herrick for appellant.

Cedric Ponce, pro se.

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

WRIGHT, J.

NATURE OF CASE

A prison disciplinary committee determined that Cedric Ponce, an inmate at the Nebraska State Penitentiary, had failed to comply with his personalized program plan (plan), in violation of Nebraska Department of Correctional Services (DCS) rule 5-I-M. As a result, he lost 3 months' good time. Ponce appealed to the DCS Appeals Board (Board), which affirmed the imposition of loss of good time. The Lancaster County District Court reversed, and the DCS appeals.

SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Young v. Neth, ante* p. 20, 637 N.W.2d 884 (2002).

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

On November 4, 1999, a DCS employee reviewed Ponce's plan. She determined that Ponce had failed to comply with the plan for the period of November 2, 1998, to November 2, 1999, because he had missed more than 13 days of work due to work restriction, disciplinary segregation, administrative confinement, or intensive management. Specifically, between September 9 and 30, 1999, Ponce had spent 21 days in disciplinary segregation, and as a result, he had missed 16 days of work. Disciplinary segregation was imposed on Ponce for the "use of threatening language or gestures/fighting." The DCS employee prepared a misconduct report concerning the missed work, noting that inmates in disciplinary segregation are not allowed to work.

At a hearing before the disciplinary committee, Ponce argued that he had not intentionally missed work and that the misconduct report violated double jeopardy. He stated that he would have attended "programming" if he had been allowed to do so. Upon consideration of Ponce's testimony, other evidence submitted, and the misconduct report, the disciplinary committee determined that Ponce was guilty of violating DCS rule 5-I-M because he had missed more than 13 days of work. As a sanction, the disciplinary committee imposed loss of 3 months' good time.

Ponce appealed to the Board. It found that the evidence supported the disciplinary committee's findings and that the penalty was proportionate to Ponce's offense and was necessary to deter him and other inmates from committing similar offenses in the future. Ponce timely filed a petition in error to the Lancaster County District Court.

After a telephonic hearing, the district court reversed the decision of the Board. The court found that Ponce did not intentionally violate his plan. It noted that the case presented an identical fact pattern to that found in Elrod v. Nebraska Dept. of Corr. Servs., Douglas County District Court, No. CI99-864. For the reasons expressed in Elrod, the court found that Ponce did not intentionally violate his plan in that he did not work because the DCS would not allow him to work, not because he refused to work.

ASSIGNMENT OF ERROR

The DCS assigns as error that the district court erred in reversing the decision of the Board.

ANALYSIS

[3] Ponce sought review in the district court of a final decision by the DCS, which is an administrative agency. Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001). A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Young v. Neth, ante* p. 20, 637 N.W.2d 884 (2002). The inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *id.*

Neb. Rev. Stat. § 83-1,107(1)(b) (Reissue 1999) provides in part:

> Intentional failure to comply with the department-approved personalized program plan by any committed offender as scheduled for any year, or pro rata part thereof, shall cause disciplinary action to be taken by the department resulting in the forfeiture of up to a maximum of three months' good time for the scheduled year.

The DCS argues that Ponce was informed in his plan that he could not miss more than 13 days of work without violating the plan. It asserts that Ponce intentionally breached a DCS rule, knowing that such violation could result in disciplinary segregation and a

violation of his plan. The DCS claims that Ponce was placed in disciplinary segregation as a result of his own actions and that, therefore, he intentionally failed to comply with the DCS-approved plan.

[4,5] The standard of proof to sustain a charge of violating a DCS rule is substantial evidence. Neb. Rev. Stat. § 83-4,122(9) (Reissue 1999). Substantial evidence is " ' "[e]vidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." ' " *Dailey v. Nebraska Dept. of Corr. Servs.*, 6 Neb. App. 919, 925, 578 N.W.2d 869, 874 (1998), quoting *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 304 N.W.2d 39 (1981).

The issue presented is whether Ponce intentionally violated his plan. The district court decided in Elrod that a prisoner who was placed in segregation for misconduct could not intentionally violate his or her plan because DCS does not allow prisoners placed in segregation to work. That same rationale was adopted in the case at bar. The court concluded that Ponce could not work because the DCS would not let him and that his misconduct was not intentional.

A violation of DCS rule 5-I-M is defined as "[i]ntentional failure to comply with the department-approved personalized program plan." See 68 Neb. Admin. Code, ch. 5, § 005 (1998). The standard for determining a violation of a DCS rule is as follows:

> An inmate commits an offense only when he or she engages in conduct which fulfills all the necessary elements of the offense. The conduct must be voluntary and be intentional or reckless or grossly negligent. The accused must have had notice that the conduct was proscribed by the Code of Offenses or applicable statu[t]es.

68 Neb. Admin. Code, ch. 5, § 004 (1998).

When inmates are placed in disciplinary segregation, their participation in institutional activities may be suspended. See 68 Neb. Admin. Code, ch. 6, § 006.09 (1998). The plan signed by Ponce on February 3, 1999, set forth the following work assignment: "Do not miss more than 13 work days in a scheduled year due to any combination of work restriction, [d]isciplinary [s]egregation, [a]dministrative [c]onfinement or [i]ntense

[m]anagement." The plan also contained the statement: "I further understand that failure to comply with the [p]ersonalized [plan] may result in disciplinary action, charge 5-I-M."

Ponce was placed in disciplinary segregation from September 9 to 30, 1999, for "use of threatening language or gestures/fighting." The intentional conduct for which Ponce was sanctioned resulted in his being placed in disciplinary segregation, and inmates placed in disciplinary segregation are not permitted to work.

We conclude that the district court erred in finding that Ponce did not intentionally violate his plan. Ponce's failure to work was a direct result of his intentional "use of threatening language or gestures/fighting." Clearly a prisoner cannot voluntarily engage in conduct which places the inmate in disciplinary segregation and then claim that he or she cannot comply with the provisions of his or her plan because the prisoner has been placed in disciplinary segregation.

Ponce's plan specifically advised him that he could not miss more than 13 days in a scheduled year due to any combination of work restriction, disciplinary segregation, administrative confinement, or intense management. Since Ponce was given proper notice that his conduct could result in disciplinary segregation and that disciplinary segregation could prevent him from being able to participate in his plan, Ponce intentionally violated the plan.

For the reasons set forth herein, the judgment of the district court does not conform to the law. Therefore, we reverse the judgment of the district court and remand the cause with directions to reinstate the imposition of the loss of 3 months' good time credit.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE CHANGE OF NAME OF DAVENPORT. EDWARD M. DAVENPORT, MORE COMMONLY KNOWN AS EDWARD M. STANEK, BY AND THROUGH HIS GUARDIANS AND NEXT FRIENDS, FRANCIS E. STANEK AND SALLY A. STANEK, APPELLEE, V. RICKY R. DAVENPORT, APPELLANT.

641 N.W.2d 379

Filed April 5, 2002. No. S-00-969.

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. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 1995), the intervenor must have 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.
4. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
5. **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.
6. **Interventions: Statutes.** The intervention statutes are to be liberally construed.
7. **Interventions: Pleadings.** 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.
8. **Parental Rights: Parent and Child: Names.** A noncustodial parent whose parental rights have not been terminated and who has been involved in his or her minor child's life has a direct and legal interest in such minor child's name-change proceeding.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded with directions.

Ricky R. Davenport, pro se.

Mark A. Klinker for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Edward M. Davenport, a minor, by and through his guardians and next friends, Francis E. Stanek and Sally A. Stanek, petitioned the district court for Douglas County to legally change his

surname from Davenport to Stanek. Appellant, Ricky R. Davenport, Edward's biological father and noncustodial parent, sought leave to intervene in the name-change proceeding. Leave was denied by the district court. Following a hearing on the merits, the district court entered an order changing Edward's surname from Davenport to Stanek. Ricky appeals. Because we conclude that the district court erred in denying Ricky leave to intervene, we reverse the decision of the district court and remand the cause with directions consistent with this opinion.

STATEMENT OF FACTS

Edward was born out of wedlock on July 29, 1985, to Cynthia Ann Stanek. There is no dispute in the record that Ricky is Edward's father and that Ricky is responsible for paying court-ordered child support for Edward. At the time of his birth, Edward was given Cynthia's surname, Stanek. Ricky's paternity was not noted on Edward's birth certificate.

On November 13, 1989, for reasons not explained in the record, the Douglas County Court appointed Francis and Sally as Edward's guardians, and Edward has lived with Francis and Sally since they became his court-appointed guardians. The record reflects that Edward's mother, Cynthia, is alive, but that she has infrequent interaction with Edward. The record also reflects that Ricky is incarcerated at the Nebraska State Penitentiary. According to the record, he would initially be eligible for parole in approximately 2007.

In March 1994, pursuant to Neb. Rev. Stat. § 71-630(4) (Reissue 1990), Ricky and Cynthia amended Edward's birth certificate to change his surname from Stanek to Davenport so that Edward could "start going by his real last name." In 1994, § 71-630(4) provided in part that "[u]pon request and receipt of a sworn acknowledgment of paternity of a child born out of wedlock signed by both parents, the Bureau of Vital Statistics, Department of Health, shall amend the certificate of birth to show such paternity if paternity is not shown on the birth certificate." For the sake of completeness, we note that § 71-630(4) was amended subsequent to March 1994, but such amendments have no bearing on the instant appeal.

The record in this appeal contains a certified copy of Edward's birth certificate, issued March 31, 1994, setting forth his name as

Edward Michael Davenport and identifying his father as Ricky. The birth certificate revised pursuant to § 71-630(4) does not reflect the fact that it has been amended.

On June 28, 2000, Edward, through his guardians, filed a petition seeking to change his surname from Davenport to Stanek, which surname he had continued to use despite the 1994 amendment to his birth certificate. On August 15, Ricky filed a petition to intervene in the name-change proceeding pursuant to the intervention statute, Neb. Rev. Stat. § 25-328 (Reissue 1995), which provides as follows:

> 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.

In his petition to intervene, Ricky alleged, inter alia, that he was the biological father of the minor child Edward, that his parental rights had not been terminated, that he had an interest in the litigation, and that he opposed the name change sought by Edward.

On August 28, 2000, Ricky's petition to intervene came on for telephonic hearing before the district court for Douglas County. In an order filed August 29, the district court denied Ricky leave to intervene. The court found that Ricky was Edward's noncustodial parent, that he was incarcerated at the Nebraska State Penitentiary, and that his "primary interest in attempting to intervene in this case [was] to keep Edward from changing his surname." The court concluded that Ricky "ha[d] no right to intervene in this case" and denied Ricky's petition in intervention.

On August 31, 2000, the district court held an evidentiary hearing on the substance of Edward's petition to change his surname. Edward, Francis, and Cynthia testified at the hearing. Ricky was not present and did not participate in the hearing. In

an order filed September 5, the district court granted Edward the relief sought in his petition and changed his surname from Davenport to Stanek. Ricky appealed.

ASSIGNMENTS OF ERROR

Ricky assigns three errors. We need not address each of Ricky's assignments of error because our decision on Ricky's claim that the district court erred in denying him leave to intervene in Edward's name-change proceeding resolves the appeal.

STANDARDS OF REVIEW

[1,2] Whether a party has the right to intervene in a proceeding is a question of law. See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001). See, also, *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. *Ruzicka, supra*; *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

ANALYSIS

[3-7] In considering Ricky's first assignment of error, we are guided by the rules governing intervention. See, *In re Interest of Destiny S., ante* p. 255, 639 N.W.2d 400 (2002); *Ruzicka, supra*. Ricky seeks to intervene pursuant to § 25-328. As a prerequisite to intervention under § 25-328, the intervenor must have 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 Destiny S., supra*; *Ruzicka, supra*. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right. *Colman v. Colman Foundation, Inc.*, 199 Neb. 263, 258 N.W.2d 128 (1977). A person seeking to intervene in an action under § 25-328 must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *In re Interest of Destiny S., supra*; *Ruzicka, supra*; *In re Interest of Kayle C. & Kylee C., supra*. The intervention statutes are to be liberally construed. *Ruzicka, supra*; *Wightman v. City of Wayne*, 146 Neb. 944, 22 N.W.2d 294 (1946). 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. *Ruzicka, supra*; *In re Interest of Kayle C. & Kylee C., supra*.

In the instant case, Ricky seeks leave to intervene in Edward's name-change proceeding, claiming that he has an interest in the proceeding because he is the biological father of the minor child Edward and that his parental rights have not been terminated. The district court concluded that Ricky's status as Edward's father gave him "no right to intervene in this case." We disagree and conclude as a matter of law that the district court erred in denying Ricky's petition for leave to intervene.

This court has previously recognized the substantial interest a parent has in his or her child's surname. *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982). The reason often given for a child's retention of the parental surname is the need to preserve the parent-child bond. *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990). While we have recognized that in dissolution proceedings, "patrimonial control of surnames has virtually disappeared," *Cohee*, 210 Neb. at 857, 317 N.W.2d at 382, we have also been reluctant to approve name changes which result in the abolition of the biological parent's surname. See *Spatz v. Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977) (rejecting mother's request to change her children's surname from their father's surname to her subsequent husband's surname).

[8] It is undisputed in the instant case that Ricky is the biological father of the minor child Edward. Although he is a noncustodial parent, his parental rights have not been terminated. The record reflects Ricky's involvement in Edward's life despite his incarceration. There is an indication in the record that he writes to Edward, talks with him on the telephone, and sends him presents. Ricky's interest in Edward's name change is not indirect, remote, or conjectural. See *Colman, supra.* Rather, as Edward's biological father, Ricky has a demonstrable direct and legal interest of such character that he will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. See *In re Interest of Destiny S., ante* p. 255, 639 N.W.2d 400 (2002). Accordingly, Ricky should be afforded the opportunity to participate in his minor child Edward's name-change proceeding and present evidence as to

why the requested name change may or may not be in Edward's best interests. See *In re Change of Name of Andrews, supra* (whether child's surname may be changed depends on and is determined by best interests of child).

To be granted intervention under § 25-328, an intervenor must have a direct and legal interest in the matter in the litigation. Ricky has such an interest in the instant case. "The language of the intervention statute is clear, and the right to intervene under it is " 'absolute.' " *Ruzicka v. Ruzicka*, 262 Neb. 824, 836, 635 N.W.2d 528, 537 (2001) (quoting *Wightman v. City of Wayne*, 146 Neb. 944, 22 N.W.2d 294 (1946)). The district court erred in denying Ricky's petition to intervene.

CONCLUSION

Edward's biological father, Ricky, has a direct and legal interest entitling him to intervene pursuant to § 25-328 in his minor child Edward's name-change proceeding. The district court's denial of Ricky's petition to intervene was error. We reverse the district court's orders denying intervention and granting a name change and remand the cause with directions to grant Ricky leave to intervene in the name-change proceeding to be conducted with Ricky as a party.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM COATES AND APRIL RUGGLES, APPELLANTS, V.
FIRST MID-AMERICAN FINANCE COMPANY, L.L.C., APPELLEE.

641 N.W.2d 398

Filed April 5, 2002. No. S-00-999.

1. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
2. **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.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Order vacated, and cause remanded with directions.

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellants.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

William Coates and April Ruggles sought a declaratory judgment as to the status of a lien given by them to First Mid-American Finance Company, L.L.C. (First Mid-American). The district court determined that the lien was valid, and Coates and Ruggles timely appealed.

FACTS

Apparently, the district court made a ruling based upon stipulated facts. However, the stipulation was not marked, offered, or received in evidence, and it was not filed by the clerk of the district court until December 15, 2000, which was after the filing of the notice of appeal on September 20. The record contains seven exhibits, but there is no transcription of a hearing, and there is no bill of exceptions which would show whether the exhibits were offered or received. No court reporter was present to record the proceedings, which were held in chambers.

Coates and Ruggles claim that the lien given to First Mid-American was discharged in bankruptcy. In their petition, Coates and Ruggles allege they entered into a retail installment contract with First Mid-American through Horizon Motors for the purchase of a 1986 Pontiac Grand Am. The vehicle was subsequently involved in a collision and was considered a total loss. First Mid-American commenced suit for the amount owed on the vehicle, $4,660.62. Coates and Ruggles granted a lien to First Mid-American for $4,660.62 plus interest of $2.17 per diem on any personal injury proceeds received as a result of the accident. Coates and Ruggles then filed chapter 7 bankruptcies, which were approved, and the debt owing to First Mid-American was discharged.

Coates' personal injury action was settled for $10,500, and the check issued by Liberty Mutual listed First Mid-American as a payee pursuant to the lien on the proceeds. Coates and Ruggles assert that the lien on the personal injury proceeds is invalid because the debt was discharged in bankruptcy.

The district court found that the bankruptcy had enjoined collection against Coates and Ruggles personally but that a creditor may still enforce a valid lien against the property. The district court stated that "[u]nder 11 U.S.C. §524(a) the lien entered into by [Coates and Ruggles] voluntarily is passed through the bankruptcy." The parties were ordered to pay their own costs and fees. Coates and Ruggles timely filed this appeal.

ANALYSIS

We first address the record in this case. There are seven exhibits in the record, but because no court reporter was present to record the proceedings, there is no record of whether these exhibits were offered or received. A stipulation of facts was filed with the district court and is included in the transcript, but it is not contained in the bill of exceptions.

[1] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997). Here, there is no evidence for this court to examine to determine whether the district court erred in reaching its decision. Without a bill of exceptions to verify whether the exhibits were received in evidence or whether the stipulation was properly presented to the district court, there is no record for this court to consider.

We recently addressed the absence of a court reporter at a hearing on a motion for summary judgment in *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001). We vacated the order and remanded the cause for a new evidentiary hearing. The same reasoning applies to the case at bar.

[2] Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), "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."

Here, although the court reporter prepared a "Bill of Exceptions Certificate" and attached it to an envelope purporting to be a bill of exceptions, this does not comply with our rules because the court reporter was not present when the proceedings were held. A bill of exceptions could not be prepared without the district court certifying what was offered and received in evidence. Rule 5B(3)c provides:

> If 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 these 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.

CONCLUSION

In accordance with our decision in *Presle*, the order of the district court is vacated, and the cause is remanded for a new evidentiary hearing.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
TIMMY ALLEN TIMMENS, APPELLANT.

641 N.W.2d 383

Filed April 5, 2002. No. S-01-448.

1. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial.
2. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal.
3. **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.

4. **Trial: Evidence.** When a court overrules a motion in limine to exclude evidence, the movant must object when the evidence sought to be excluded by the motion is offered during trial.
5. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence. Rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
6. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence.
7. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.
8. ____: ____: ____. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
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.
10. **Sentences.** In imposing a sentence, a 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.
11. ____. In considering a sentence, 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 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 Dawson County: DONALD E. ROWLANDS II, Judge. Affirmed.

Scott H. Trusdale, of Trusdale & Trusdale, P.C., for appellant.

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

Timmy Allen Timmens lived with his girl friend Tracy Giugler in Overton, Nebraska, and on July 23, 2000, Giugler was found

dead by investigators in the basement of the home she shared with Timmens. An autopsy revealed that Giugler died from blunt trauma to the head, chest, abdomen, and upper and lower extremities, with hemorrhaging and rib fractures. Timmens was arrested and charged with second degree murder. He filed a motion in limine to prohibit the introduction of evidence of his alleged flight while en route to meet investigators at his home and a motion to suppress certain statements he made to law enforcement officials while in custody. The trial court denied the motions, and a jury found Timmens guilty of second degree murder. He was sentenced to serve a term of 45 years' to life imprisonment, and now he appeals his conviction and sentence. We affirm the order of the trial court.

BACKGROUND

On July 22, 2000, Giugler's son went to Timmens' home in Overton to visit her. Timmens told Giugler's son that Giugler was not home, yet her car was at the house. The son notified Giugler's mother, Janice Ferguson. Ferguson left work and met with one of her daughters and a niece; they decided to call the 911 emergency dispatch service. Deputy Brad Sherman of the Dawson County sheriff's office was dispatched to Overton and spoke with Ferguson and her daughter. They told Sherman that they were worried about Giugler because of their mistrust of Timmens.

That same afternoon, Sherman spoke to Timmens at his residence. Timmens stated that he had not seen Giugler that day. He gave Sherman permission to look around the house to see if Giugler may have taken anything with her. Sherman went through every room on the main floor and saw that the doorway to the basement in the kitchen was covered by a sheet, which was nailed to each corner and pulled very tightly. Timmens told Sherman that they did not use the basement and seemed to watch Sherman's every move while Sherman was near the basement doorway. Sherman did not check the basement at that time out of concern for his safety.

Sherman went back to the sheriff's office and spoke to Investigator Jeff Schwarz. Jeff Schwarz then went to the Overton Family Center and talked to Timmens, who was attending the wedding reception of one of Timmens' sisters. Jeff Schwarz

notified Timmens of his desire to look in Timmens' basement. Timmens agreed to meet the investigators at his home and was to get a ride from another of his sisters, Donna Kay Shaffer.

After arriving at Timmens' residence, Jeff Schwarz observed Shaffer arrive alone. Shaffer, visibly disturbed, told Jeff Schwarz that while she was driving Timmens to his home, he jumped out of the vehicle. Shaffer testified that she agreed to drive Timmens to his house to meet the investigators. While en route, he stated, " 'I'm sorry, I don't know what happened' "; jumped out of the vehicle while it was still moving; and started running across a field. She tried following him, but he kept going. Timmens never returned to his home that evening.

A former girl friend of Timmens testified that on July 24, 2000, she and Timmens were at her home in Kearney, Nebraska, watching the news report of Giugler's murder when Timmens said, " 'I guess I did do it.' "

Jeff Schwarz obtained a search warrant for Timmens' home. He and Investigator Paul Schwarz found Giugler's body lying full length on a couch in Timmens' basement, covered by a quilt. Paul Schwarz pulled the quilt back far enough to uncover Giugler's face. He identified her and determined that she was dead.

Dr. Jerry W. Jones performed an autopsy which revealed that Giugler was beaten over her entire body from head to toe and front to back. Jones opined that the cause of Giugler's death was blunt trauma to the head, chest, abdomen, and upper and lower extremities, with hemorrhaging and rib fractures. Jones testified that the location of bruises on Giugler's hands and wrists indicated that these injuries were defensive.

A warrant was issued for Timmens' arrest, and he was apprehended in Kearney, Nebraska, on the evening of July 24, 2000. He was advised of his *Miranda* rights while being escorted to a Kearney Police Department cruiser and was taken to the Kearney Law Enforcement Center. At the time of his arrest, Timmens refused to speak to investigators. Upon arriving at the Kearney Law Enforcement Center, however, he spoke to Paul Schwarz and Investigator Randy Ricley about the death of Giugler. He gave a statement which was reduced to writing.

According to the statement, Timmens remembered being outside with his dog sometime after he arrived home on Friday

evening, July 21, 2000. He next remembered finding Giugler propped up on some clothes by the washer in the kitchen shortly after he woke up on Saturday morning. He tried to wake her up, but "felt that she was dead." He then picked her up, took her to the basement, and put her on the couch. That interview lasted approximately 3½ hours.

Timmens was then taken to the Buffalo County jail, and from there, Jeff Schwarz and a sheriff's deputy transported him back to the Dawson County jail. While in transport, Timmens began talking, so Jeff Schwarz advised him of his constitutional rights. Timmens did not tell the investigators anything relevant to the case while in transport.

After arriving at the Dawson County jail, Timmens again spoke to the investigators. According to Jeff Schwarz, Timmens stated that he must have been involved in the death of Giugler because he knew she was in the basement. He then stated that he knew he had assaulted Giugler, but did not know why or how. That interview began around 4:30 a.m., roughly 2 hours after his interview in Buffalo County was concluded. It lasted approximately 45 minutes to 1 hour.

On July 26, 2000, Timmens was placed in a room by law enforcement personnel to allow Paul Schwarz to take tissue samples from him. Paul Schwarz testified that it was not his intention to conduct an interview. Timmens told him that he knew the tissue samples were being taken for DNA comparison, and Paul Schwarz advised him that he was correct. Timmens then asked whether the procedures would stop if he discussed what had happened. Paul Schwarz responded that some techniques being used would stop, but most would continue. Timmens then began to cry, and blurted out: " 'I beat her up.' " Paul Schwarz stopped Timmens at that point and told him that they had to contact his attorney, since he was then represented by counsel. Paul Schwarz contacted Jeff Schwarz, who then contacted Timmens' attorney. Paul Schwarz ended all contact with Timmens upon the arrival of Timmens' attorney.

On September 12, 2000, Timmens was charged by information with second degree murder, a Class IB felony, in violation of Neb. Rev. Stat. § 28-304 (Reissue 1995). Timmens elected to stand mute at the arraignment, and the trial court entered a not

guilty plea on his behalf. Timmens filed a motion in limine to prevent the State from introducing evidence by Shaffer or any law enforcement officer as to his alleged flight from any motor vehicles or evidence that he left the city of Lexington around the time the crime charged in the information occurred. The trial court overruled the motion in limine in its entirety.

Timmens also filed a motion to suppress any statements he made after he was represented by counsel and after he was incarcerated in the Dawson County jail. The hearing on that motion covered not only statements made by Timmens to investigators while at the Dawson County jail and while represented by counsel on July 26, 2000, but also the statements made in Buffalo County on July 24 and 25, and those made the morning of July 25, after he arrived at the Dawson County jail. The trial court issued three separate orders denying the motion to suppress, one for each instance that statements were made by Timmens while in custody.

ASSIGNMENTS OF ERROR

Timmens claims that the trial court erred when it (1) allowed the State to present evidence of his alleged flight and failed to suppress the same; (2) sentenced him to a term of 45 years' to life imprisonment, which constitutes an excessive sentence; and (3) failed to suppress certain statements attributed to him during interrogations by law enforcement officials.

STANDARD OF REVIEW

[1] Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

[2] A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that 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).

[3] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Leonor, ante* p. 86, 638 N.W.2d 798 (2002).

ANALYSIS

Evidence of Flight

Timmens first argues that the trial court erred when it allowed the State to present evidence of his alleged flight and failed to suppress the same. Timmens filed a motion in limine for an order preventing the State from eliciting or introducing any testimony from Shaffer or any law enforcement officer as to his alleged flight from any motor vehicle or that he left the city of Lexington before, near, or after the crime charged in the information occurred. Timmens alleged that said testimony is "speculative, conjectural, conclusionary, lacking in credibility, wholly lacking in foundation, highly prejudicial, would tend to mislead the jury, and would violate [Timmens'] right to due process."

A hearing on the motion in limine was held on January 12, 2001. The trial court found the evidence to be highly relevant and admissible at trial and, therefore, overruled Timmens' motion in limine. Evidence of flight was presented at trial through the testimony of Shaffer and Jeff Schwarz. At no point during that testimony did Timmens object.

[4,5] When a court overrules a motion in limine to exclude evidence, the movant must object when the evidence sought to be excluded by the motion is offered during trial. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence. Rather, its office is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *State v. Merrill, supra*, citing *State v. Coleman, supra*.

Because overruling a motion in limine is not a final ruling on the admissibility of evidence and therefore does not present a

question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection during trial. *Id.*

Timmens did not object at trial to the admission of evidence of his flight, which he earlier tried to exclude through the motion in limine. Thus, we conclude that he failed to preserve the alleged error for appellate review.

Timmens' Statements to Police

Timmens made statements to investigators on three separate occasions while in custody: during the interview on July 24 and 25, 2000, in Buffalo County, during the interview which began at 4:30 a.m. on July 25 in Dawson County, and during the procedure in which Paul Schwarz took physical samples from him on July 26 in Dawson County. Timmens argues that all three statements should have been suppressed and that the trial court erred by failing to do so. Timmens filed a motion to suppress, and at the suppression hearing, the statements he made in all three instances were considered by the court. The trial court issued three separate orders overruling the motion to suppress, finding that the statements made in each instance were relevant and admissible.

Paul Schwarz testified at trial as to the statements Timmens gave on July 26, 2000, during the collection of physical samples. A review of his trial testimony reveals no objection to the admission of that evidence. Jeff Schwarz testified at trial as to the statements Timmens gave on the morning of July 25 in Dawson County. Again, Timmens failed to object to the introduction of that evidence.

Both Paul Schwarz and Ricley testified at trial to the statements Timmens made on July 24 and 25, 2000, after being arrested in Buffalo County, and to the written statement Timmens signed. Timmens made no objection to either the statements made or the introduction of the written statement except that the written statement was cumulative and a violation of the rule against jury note-taking. In his brief, however, Timmens objects to the statements as not being the product of his free and rational choice and not being voluntary.

[6] It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning the admissibility of that evidence. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that 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).

Although Timmens did make an objection on the basis of the evidence as being cumulative and violative of the rule against jury note-taking, he failed to preserve for review the assignment of error he is now arguing in his brief. Timmens objected to the introduction of the written statement, but not for the same reasons that he alleges in his brief.

[7,8] On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact. *State v. Harris, ante* p. 331, 640 N.W.2d 24 (2002). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002).

We conclude that Timmens failed to preserve the question of the admissibility of the statements he gave to investigators in Buffalo County and Dawson County.

Excessive Sentence

Timmens also argues that his sentence was excessive and constituted an abuse of discretion. He was found guilty of second degree murder. The statutory penalty for second degree murder is a maximum sentence of life imprisonment and a minimum sentence of 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Timmens was sentenced to a term of 45 years' to life imprisonment.

Timmens alleges that his sentence is nearer to the maximum allowed, which is not warranted under the circumstances before this court. He also alleges that pursuant to plea negotiations, he would have received a straight sentence of 25 years in prison in

return for entering a plea to the charges. Timmens further alleges that to sentence him to 45 years to life in prison constitutes an abuse of discretion, as it penalized him for utilizing his constitutionally guaranteed right of trial by jury.

[9] 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. Leonor, ante* p. 86, 638 N.W.2d 798 (2002); *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[10] In imposing a sentence, a 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. Leonor, supra*; *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001); *State v. Kula*, 262 Neb. 787, 635 N.W.2d 252 (2001).

[11] In considering a sentence, 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 observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Leonor, supra*; *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995).

Timmens has a history of violent behavior. He has had two prior felonies, and one involved violence similar to the incident at issue. He has had 15 prior misdemeanors, at least 5 of which involved violence. The trial court looked to his previous arrests, especially his prior arrest for first degree assault on a former girl friend, and to the savageness of the crime against Giugler. The court concluded that it had to incarcerate Timmens for a considerable period of time for the protection of society. Based upon all of this, the trial court found that a sentence of 45 years' to life imprisonment, with 237 days' credit, was appropriate.

We conclude that the trial court did not abuse its discretion in handing down its sentence upon Timmens. The beating Giugler received was extremely depraved, violent, and senseless.

Moreover, Timmens has a history of violating the law and of violent behavior, committing a similar type of assault on at least one other occasion in the past. We thus affirm the sentence handed down to Timmens.

CONCLUSION

We conclude that because Timmens did not object at trial to the admission of evidence regarding his alleged flight, he failed to preserve that assignment of error for appellate review. We also conclude that because Timmens did not properly object to the admission of statements he gave to police while in custody, he failed to preserve for review the argument that the trial court erred in admitting the statements. Finally, we conclude that because of the severity of the crime and Timmens' history of violent and unlawful activity, the trial court did not abuse its discretion in sentencing him to a prison term of 45 years to life.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BENNIE L. UTTER, APPELLANT.

641 N.W.2d 624

Filed April 5, 2002. No. S-01-677.

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. **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. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.
4. **Criminal Law: Statutes.** Penal statutes are to be strictly construed.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Timothy F. Shanahan for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Bennie L. Utter was convicted by a jury in the district court for Douglas County of two counts of possession of a controlled substance with intent to deliver and one count of failure to affix a tax stamp. Utter appeals his convictions on the basis that the evidence introduced at trial was insufficient to establish that he had an intent to deliver or that he was a "dealer" subject to the marijuana and controlled substances tax statutes. We affirm Utter's convictions for possession with intent to deliver but, due to insufficient evidence, reverse his conviction and sentence for failure to affix a tax stamp.

II. STATEMENT OF FACTS

On November 26, 1999, an Omaha police officer stopped a pickup truck because a person, later identified as Utter, was occupying the open pickup box. After the pickup stopped, Utter jumped out of the box and was reaching toward his waistband. The officer ordered Utter to place his hands on the side of the pickup and asked Utter if he could search him. Utter consented to the search. During the search, the officer found two plastic bags containing white substances. Neither bag bore a tax stamp.

Utter was charged with two counts of possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 2000) and one count of failure to affix a tax stamp in violation of Neb. Rev. Stat. § 77-4309 (Reissue 1996). Trial was held March 13 and 14, 2001. A forensic chemist testified that the contents of one bag were found to be

a mixture of methamphetamine and dimethylsulfone (DMS) and that the contents of the other bag were found to be a mixture of cocaine and mannitol, a cutting agent "used to make the bulk larger." A forensics report was entered into evidence which indicated that the methamphetamine/DMS mixture weighed 3.45 grams and that the cocaine/mannitol mixture weighed 7.05 grams. The chemist was unable to testify regarding what weight of the methamphetamine/DMS mixture was attributable to methamphetamine or what weight of the cocaine/mannitol mixture was attributable to cocaine.

Also at trial, an officer qualified as an expert in narcotics activity testified that in his opinion, based on the combination of the two drugs and the amount of each drug, the quantity of methamphetamine and cocaine confiscated from Utter constituted a "distribution amount."

Utter testified in his own defense. Utter stated that he had purchased the methamphetamine and cocaine for his own use and had been in possession of the drugs for only about 15 minutes prior to the search. Utter testified that prior to his arrest, he had a drug habit and regularly used both methamphetamine and cocaine. He testified that in 1999, he would typically use 3.5 grams of methamphetamine and/or 7 grams of cocaine in 1 week.

Utter also called a state probation officer who had been assigned to Utter in 1994 and 1995 as a witness. The probation officer testified that during the time he had been assigned to Utter, the officer had tested Utter for drug use approximately eight times and that five of the eight tests came back positive for cocaine use, but that Utter had not been tested for methamphetamine.

When instructing the jury on the counts involving possession with intent to deliver, the district court instructed on the lesser-included offense of simple possession. The jury found Utter guilty on both counts of possession with intent to deliver and on the count of failure to affix a tax stamp. On May 15, 2001, the district court sentenced Utter to 3 years of intensive supervised probation on each conviction and ordered the sentences to be served concurrently.

III. ASSIGNMENT OF ERROR

Utter asserts that the evidence introduced at trial was insufficient as a matter of law to sustain convictions for two counts of

possession of a controlled substance with intent to deliver and one count of failure to affix a tax stamp.

IV. STANDARDS OF REVIEW

[1] 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*, 262 Neb. 423, 632 N.W.2d 298 (2001).

[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. *First Data Corp. v. State, ante* p. 344, 639 N.W.2d 898 (2002).

V. ANALYSIS

Utter contends that the evidence introduced at trial was insufficient as a matter of law to sustain his convictions for possession of a controlled substance with intent to deliver and for failure to affix a tax stamp. Because the elements of the crimes of possession with intent to deliver and failure to affix a tax stamp differ, we first consider the evidence with regard to the convictions separately.

1. Possession With Intent to Deliver

The basis of Utter's argument regarding insufficient evidence with respect to the possession with intent to deliver charges is that the State put on no evidence of an intent to deliver other than the narcotics officer's testimony that the quantity of methamphetamine and cocaine found on Utter at the time of his arrest constituted a "distribution amount." Utter asserts that such evidence was contradicted by his own testimony regarding his drug habit and his testimony that he personally intended to use the drugs. We conclude that the evidence presented by the State was sufficient to convict Utter of two counts of possession with intent to deliver.

[3] In reviewing a conviction for sufficiency of the evidence, we must view the evidence in the light most favorable to the State. *Castor, supra*. Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

Section 28-416 makes it a crime to possess a controlled substance with the intent to deliver. Section 28-416 does not specify a quantity of controlled substance which must be possessed in order to establish intent to deliver. In the present case, the State put on evidence of the quantity of substances possessed by Utter, and the narcotics officer, whose testimony established his experience and knowledge in the field of narcotics transactions, testified that the amount and combination of drugs possessed by Utter were considered a "distribution amount." Evidence of the quantity of a substance possessed combined with expert testimony that such quantity indicates an intent to deliver can be sufficient for a jury to infer an intent to deliver. See *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992).

Utter emphasizes that he testified in his own defense that he did not intend to distribute the drugs but instead possessed the drugs for his own use. In this regard, we note that the trial court instructed the jury on simple possession as a lesser-included offense of possession with intent to deliver. The jury apparently discredited Utter's testimony and gave more weight to the testimony of the narcotics officer. On appeal, this court does not pass on the credibility of witnesses or reweigh the evidence because such matters are for the finder of fact. *State v.Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001). Although there was contradictory evidence regarding Utter's intent, the evidence put on by the State was sufficient for the jury to find an intent to deliver and

to convict Utter on both counts of possession of a controlled substance with intent to deliver.

2. Failure to Affix Tax Stamp

(a) Utter's Claim of Insufficient Evidence

Utter claims that the evidence was insufficient to convict him of the count of failure to affix a tax stamp. The basis of Utter's argument is generally that the State failed to prove under the controlling statutes that he was a "dealer" who distributed or possessed "seven or more grams of any controlled substance" and that, therefore, the evidence failed to establish that Utter was subject to the marijuana and controlled substances tax statutes, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1996). Utter asserts specifically that the State's evidence was insufficient because, although there was evidence that he possessed 3.45 grams of a methamphetamine/DMS mixture and 7.05 grams of a cocaine/mannitol mixture, the State did not establish, as it was required to do under the statutes, how much pure methamphetamine or how much pure cocaine Utter possessed. Whereas § 28-416 pertaining to possession with intent to deliver does not specify a quantity of controlled substance which must be possessed in order to establish an intent to deliver, the marijuana and controlled substances tax statutes do specify a quantity which must be possessed before one is considered a "dealer" and therefore required to pay the tax and affix the stamp.

(b) Controlling Statutes

Utter was charged under § 77-4309, which provides in relevant part, "A dealer distributing or possessing marijuana or a controlled substance without affixing the official stamp, label, or other indicium shall be guilty of a Class IV felony." Section 77-4301(2) defines "dealer" as

> a person who, in violation of Nebraska law, manufactures, produces, ships, transports, or imports into Nebraska or in any manner acquires or possesses six or more ounces of marijuana, *seven or more grams of any controlled substance which is sold by weight*, or ten or more dosage units of any controlled substance which is not sold by weight.

(Emphasis supplied.) Thus, in order to be considered a "dealer" under the tax stamp statutes, Utter would have to have been found to possess "seven or more grams of any controlled substance which is sold by weight."

The definition of "controlled substance" for purposes of §§ 77-4301(2) and 77-4309 is found at § 77-4301(1), which provides, "Controlled substance shall mean any drug or substance, including an imitation controlled substance, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Nebraska law. Controlled substance shall not include marijuana." The definition of "controlled substance" found in § 77-4301(1) includes drugs or substances possessed "in violation of Nebraska law." The statutes which delineate the drugs or substances possession of which is "in violation of Nebraska law" are found in chapter 28 of the Nebraska Revised Statutes.

Section 28-416(1) provides in relevant part that "it shall be unlawful for any person knowingly or intentionally [t]o . . . possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." For purposes of § 28-416(1), "controlled substance" is defined in Neb. Rev. Stat. § 28-401(4) (Cum. Supp. 2000), which provides in relevant part, "Controlled substance shall mean a drug, biological, substance, or immediate precursor in Schedules I to V of section 28-405." Neb. Rev. Stat. § 28-405 (Supp. 1999) contains Schedules I to V. Schedule II of § 28-405 contains both subsection (a)(4) which lists "cocaine" and subsection (c) which lists a "mixture . . . which contains . . . methamphetamine." Thus, Schedule II includes "cocaine" without reference to a mixture, § 28-405(a)(4), and a "mixture . . . which contains . . . methamphetamine," § 28-405(c). Neither DMS nor mannitol is listed in Schedules I to V of § 28-405.

Construing the controlling statutes together as they relate to a case involving cocaine and methamphetamine, we conclude that the 7 or more grams of controlled substance which would make one a "dealer" under § 77-4301(2), and therefore subject to conviction under § 77-4309, must be composed of (1) 7 or more grams of cocaine in isolation, or (2) 7 or more grams of a mixture which contains methamphetamine, or (3) 7 or more grams combined of cocaine in isolation and a mixture which contains methamphetamine.

(c) Positions of Parties

Utter argues that the State did not provide evidence that he possessed 7 or more grams of any controlled substance, as "controlled substance" is used in the relevant statutes. A chemist testified that the substances possessed by Utter were cocaine mixed with mannitol and methamphetamine mixed with DMS. The forensic report showed that the weight of the cocaine/mannitol mixture was 7.05 grams and the weight of the methamphetamine/DMS mixture was 3.45 grams. The chemist testified that she did not separate the cocaine from the mannitol or the methamphetamine from the DMS, and she rendered no estimate or opinion as to how much of the weight of each mixture was attributable to each of the components. Utter claims that because the State did not provide evidence of the weight of the pure cocaine or the pure methamphetamine, there was not sufficient evidence that he possessed 7 or more grams of "any controlled substance," § 77-4301(2), and that the evidence therefore did not establish that he was a "dealer" under the marijuana and controlled substances tax statutes, *id.*

The State argues in its brief that the "purity" of a controlled substance is not relevant to a determination of the quantity of the controlled substance involved for Nebraska tax stamp purposes. The State relies on *U.S. v. Bishop*, 894 F.2d 981 (8th Cir. 1990). The holding in *Bishop* was based on a federal drug sentencing statute which provided an enhanced penalty based on the quantity of substance involved in the offense. The court in *Bishop* quotes the relevant statute specifically referring to quantities " 'of a mixture or substance containing a detectable amount of' " certain controlled substances. 894 F.2d at 984. See, also, 21 U.S.C. § 841(b)(1)(A) (2000). The Court of Appeals for the Eighth Circuit concluded that based on 21 U.S.C. § 841, the quantity forming the basis for imposition of the enhanced penalty could be the quantity of a controlled substance mixed with another substance. The court in *Bishop* distinguished its prior decision in *U.S. v. McGeehan*, 824 F.2d 677 (8th Cir. 1987), which had interpreted a prior version of the federal statute that did not contain the "mixture" language and had stated that only the weight of the controlled substance, not the combined weight of the "mixture," could be considered. Because *Bishop* is based

on a federal statute with language which differs from the Nebraska statutes, it is distinguishable.

Although based on somewhat different reasoning, we find merit in Utter's argument summarized above.

(d) Resolution

The definition of "dealer" in § 77-4301(2) refers to "any controlled substance." Section 77-4301(1) defines "controlled substance" for purposes of the marijuana and controlled substances tax as "any drug or substance, including an imitation controlled substance, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Nebraska law." By reference to §§ 48-416(1), 28-401(4), and 28-405, quoted *supra*, it is clear that the "controlled substance[s]" in this case, for purposes of the tax stamp statute, are found in Schedule II.

Section 28-405, Schedule II, includes

> (a) Any of the following substances . . . .
>
> . . . .
>
> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, including cocaine and its salts, optical isomers, and salts of optical isomers, except that the substances shall not include decocainized coca leaves or extractions which do not contain cocaine or ecgonine[.]

Schedule II further lists "(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system: . . . (3) methamphetamine, its salts, isomers, and salts of its isomers . . . ." Neither DMS nor mannitol is listed in Schedules I to V of § 28-405. In sum, Schedule II of § 28-405 defines "controlled substance" to include, inter alia, "cocaine" and a "mixture . . . which contains . . . methamphetamine."

The Schedule II listing includes cocaine in isolation and a mixture containing methamphetamine, but it does not include a mixture containing cocaine. Compare, 21 U.S.C. § 841 applied in *U.S. v. Bishop*, 894 F.2d 981, 984 (8th Cir. 1990) (referring to

quantities " 'of a mixture or substance containing a detectable amount of' " certain controlled substances), and *People v. Esquivel-Alaniz*, 985 P.2d 22, 24 (Colo. App. 1999) (holding evidence sufficient to support conviction for possession and sale of cocaine in amount greater than 25 grams, even though pure cocaine in mixture was less than 25 grams, because Colorado statute defined "cocaine" to include " 'any compound, mixture, or preparation which contains any quantity of' " cocaine (emphasis omitted)).

[4] We are aware that § 28-416(7), which grades drug offenses involving cocaine based on the quantity involved, provides as follows:

> Any person who violates subsection (1) of this section with respect to cocaine *or any mixture or substance containing a detectable amount of cocaine* in a quantity of:
>
> (a) One hundred forty grams or more shall be guilty of a Class IB felony;
>
> (b) At least twenty-eight grams but less than one hundred forty grams shall be guilty of a Class IC felony; or
>
> (c) At least ten grams but less than twenty-eight grams shall be guilty of a Class ID felony.

(Emphasis supplied.) We find it significant that in grading drug offenses according to quantity, the Legislature specified "cocaine or any mixture or substance containing a detectable amount of cocaine." However, in contrast, § 77-4301(2) refers only to "any controlled substance" as defined in Schedule II and not to "any mixture containing a controlled substance." Penal statutes are to be strictly construed, and we are not at will to read "mixture" into the controlling statute where that concept has not been expressed by the Legislature. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001) (it is not for courts to supply missing words or sentences to statute).

Utter was convicted under § 77-4309 of being a "dealer distributing or possessing . . . a controlled substance without affixing the official stamp, label, or other indicium." Section 77-4301(2), which defines "dealer," requires involvement of 7 grams or more of a controlled substance. We are obliged to construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Estate of Eickmeyer*, 262

Neb. 17, 628 N.W.2d 246 (2001). Schedule II is applicable to the tax stamp statute and identifies a mixture containing methamphetamine and cocaine in isolation as controlled substances, but does not include a mixture containing cocaine as a controlled substance. For purposes of the marijuana and controlled substances tax statutes, 7 or more grams of a "controlled substance" must be involved in order to be a "dealer" subject to the tax. Thus, a sufficient quantity of cocaine in isolation and/or a mixture containing methamphetamine could be the basis of a finding of 7 or more grams for "dealer" purposes; however, the entire weight of a quantity identified only as "a mixture containing cocaine" could not be considered a controlled substance when assessing whether 7 or more grams are involved.

In the present case, the evidence established that Utter possessed 3.45 grams of a methamphetamine/DMS mixture, which mixture is a controlled substance for purposes of § 77-4309. However, although the evidence established that Utter possessed 7.05 grams of a cocaine/mannitol mixture, a mixture containing cocaine is not a controlled substance for purposes of § 77-4309, and the evidence did not establish how much cocaine in isolation Utter possessed. For the sake of completeness, we note that § 77-4303(2) provides that for purposes of the marijuana and controlled substances tax, the weight of a controlled substance in the dealer's possession "shall be the actual weight, if known, or *the estimated weight* as determined by the Nebraska State Patrol or other law enforcement agency. Such determination shall be presumed to be the weight of such . . . controlled substances for purposes of sections 77-4301 to 77-4316." (Emphasis supplied.) The chemist in the instant case testified that the weight of the cocaine/mannitol mixture was 7.05 grams, but made no estimate under § 77-4303(2) as to what weight of the mixture was attributable to cocaine in isolation.

In order to establish that Utter was a "dealer" under § 77-4301(2), and therefore subject to conviction under § 77-4309, the State needed to prove that he possessed "seven or more grams of any controlled substance" listed in § 28-405. The charges against Utter involved cocaine and methamphetamine, and therefore the State needed to prove that he possessed (1) 7 or more grams of cocaine in isolation, or (2) 7 or more grams of a

mixture containing methamphetamine, or (3) 7 or more grams combined of cocaine in isolation and a mixture which contains methamphetamine. The State provided evidence that Utter possessed 3.45 grams of the methamphetamine mixture, a controlled substance for tax stamp purposes. However, the State failed to provide evidence of the amount of cocaine in isolation. Thus, although the 3.45 grams of the methamphetamine mixture was properly considered by the jury, the State failed as a matter of law to put on evidence regarding pure cocaine or an estimated weight of cocaine alone, and therefore, the jury could not properly consider the cocaine mixture in its evaluation of whether Utter possessed "seven or more grams of any controlled substance" for tax stamp purposes. Therefore, there was insufficient evidence as a matter of law from which the jury could find that Utter was a dealer for tax stamp purposes, and his conviction must be reversed.

VI. CONCLUSION

We conclude that the evidence in this case was sufficient for the jury to find an intent to deliver and to convict Utter of two counts of possession of a controlled substance with intent to deliver and affirm these convictions. We conclude, however, that the evidence was not sufficient for the jury to find that Utter was a "dealer" under the definition in § 77-4301(2) and to convict him of a failure to affix a tax stamp in violation of § 77-4309. Thus, we affirm Utter's convictions on two counts of possession of a controlled substance with intent to deliver, and reverse his conviction and sentence for failure to affix a tax stamp and remand the cause with directions to dismiss the count of failure to affix a tax stamp.

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

STATE OF NEBRASKA, APPELLEE, V. SHANE R. RECEK, APPELLANT.

641 N.W.2d 391

Filed April 5, 2002. No. S-01-769.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Proof.** 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.
4. **Criminal Law: Final Orders: Appeal and Error.** An appellate court will not hear an appeal by the State pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) unless it involves a final order.
5. **Speedy Trial.** Where a motion to discharge on speedy trial grounds is submitted to a trial court, the excludable period attributable to a defendant's pretrial motion is calculated from the date the motion is filed until the date the motion is granted or denied.
6. **Speedy Trial: Good Cause.** If a trial court relies on Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995) in excluding a period of delay from the 6-month speedy trial computation, a general finding of good cause will not suffice. The trial court must make specific findings as to the good cause which resulted in the extension of time.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions to dismiss.

Susanne Dempsey, Platte County Public Defender, and James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

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

WRIGHT, J.

NATURE OF CASE

Shane R. Recek moved to dismiss a charge of manslaughter based upon an alleged violation of his statutory right to a speedy

trial. The Platte County District Court denied Recek's motion, and he appeals.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

[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. French*, 262 Neb. 664, 633 N.W.2d 908 (2001).

FACTS

An information was filed by the Platte County Attorney on June 23, 2000, alleging that Recek caused the death of Anthony Still unintentionally while in the commission of an unlawful act (count I) and used a firearm to commit a felony (count II). On July 25, Recek moved to quash count II on the basis that it was inconsistent to charge him with intentionally using a weapon to commit the unintentional act of manslaughter. On September 8, the district court sustained the motion to quash and dismissed count II.

The State attempted to appeal the dismissal pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995), and Recek moved for summary dismissal of the appeal, contending that the district court's order dismissing count II was not a final, appealable order. On February 22, 2001, this court granted summary dismissal. The State moved for a rehearing, and the motion was overruled. The mandate issued on March 27, and judgment was entered on the mandate on March 29. Recek was arraigned on April 18, and on April 24, he filed a motion to transfer the case to juvenile court. This motion was denied on May 29.

On June 7, 2001, Recek moved for discharge, claiming that his statutory and constitutional rights to a speedy trial had been violated. At a hearing on the motion, the State argued that there were applicable exceptions in Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) that tolled the running of the statute. The State asserted that the periods during which the motion to quash and

the motion to transfer were pending in the district court were excludable. Specifically, the State claimed that § 29-1207(4)(a) excluded the time between Recek's motion to quash and resolution of the State's appeal regarding the motion because the motion was not finally disposed of until the district court entered judgment on the mandate.

The district court found that the motion to quash was sustained on September 8, 2000, but that the order had been appealed by the State on September 19 pursuant to § 29-2315.01, which authorizes a county attorney to take exception to any rule or decision of the court constituting a final order made during the prosecution of a case. The district court stated that it was divested of subject matter jurisdiction after the State's appeal was instituted until the mandate of this court issued and that final disposition of Recek's motion to quash did not occur until judgment was entered on the mandate on March 29, 2001. The court concluded that pursuant to § 29-1207(4)(a), the period of time between the filing of Recek's motion to quash on July 25, 2000, and final disposition via judgment on the mandate on March 29, 2001, must be excluded in computing the time for speedy trial purposes.

The district court also noted that summary dismissal of the State's appeal reflected by implication that the dismissal of count II was not a final order but that there was nothing before the court to suggest that the State's appeal was frivolous or motivated by bad faith. The court concluded that even if it could be argued that the time during which the State's appeal was pending should not be excluded for speedy trial purposes, the time nonetheless should be excluded pursuant to § 29-1207(4)(f) because under the facts presented, the delay occurred for good cause. The court found that the period between April 24, 2001, when Recek filed his motion to transfer, and May 29, when the motion was denied, must likewise be excluded in computing the time for speedy trial pursuant to § 29-1207(4)(a). The court found that 113 days remained in the statutory 6-month speedy trial period within which Recek must be brought to trial. Therefore, the court denied Recek's statutory and constitutional speedy trial claims.

ASSIGNMENTS OF ERROR

Recek assigns as error that the district court erred in denying his speedy trial motion because the court found that the time period between "September 8, 2000 until March 2[9], 2001," was excluded from the statutory speedy trial computation by application of § 29-1207(4)(a) and (f). He does not assign as error that the court erred in failing to find a violation of his constitutional right to a speedy trial.

ANALYSIS

[3] 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 § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000).

Section 29-1207(4) provides:

> The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant . . . .
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

We therefore proceed to determine the periods of time which are excludable pursuant to § 29-1207(4). We note first that the period of time between Recek's filing of the motion to quash on July 25, 2000, and the district court's sustaining of the motion on September 8 is clearly excludable.

The State claims that the time between Recek's filing of his motion to quash and the time the district court entered judgment on the mandate on March 29, 2001, is excludable pursuant to § 29-1207(4)(a). For this to be true, final disposition of the motion to quash must not have occurred until the district court entered judgment on the mandate.

In *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997), we held that the State's right to seek review of a ruling made during the prosecution of a criminal case is limited to the procedures set forth in § 29-2315.01, which permits a county attorney to file an application to the trial court seeking leave to appeal. The State's right to appeal in criminal cases pursuant to § 29-2315.01 is limited to an appeal only after a final order has been entered in the case. See *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977).

In *Wieczorek*, the State filed an application for review of the dismissal of three counts of a four-count information before the defendant had been sentenced on the remaining count. We held that the application was filed before the entry of a final order and was therefore insufficient to confer jurisdiction. We stated that an order entered during the pendency of a criminal cause is final only when no further action is required to dispose of the matter pending.

In *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997), the district court sustained the defendant's demurrer to the second count of a two-count information alleging murder in the first degree (count I) and use of a weapon to commit a felony (count II). The State appealed the order dismissing count II purportedly pursuant to § 29-2315.01. We dismissed the appeal for lack of jurisdiction because count I was still pending.

[4] As established in *Wieczorek* and *Hall*, this court will not hear an appeal by the State pursuant to § 29-2315.01 unless it involves a final order. The case at bar is distinguishable from *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002), in which the Nebraska Court of Appeals held that the speedy trial clock does not run while the State pursues appeals under Neb. Rev. Stat. § 29-824 (Cum. Supp. 2000). The Court of Appeals stated:

> "We have held, with reference to § 29-1207(3), that the 6-month period in which the State is to retry a defendant following a successful appeal is fixed by reference to the date on which the district court first takes action pursuant to the mandate of the appellate court. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). Our rationale for that holding was that the date of the district court's first action on the mandate was the date on which the district court had reacquired juris-

> diction over the case from the appellate courts. *Id*. See, also, *State v. Belmarez*, 254 Neb. 436, 577 N.W.2d 255 (1998).
>
> "This rationale also dictates that where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court."

Hayes, 10 Neb. App. at 840, 639 N.W.2d at 426 (quoting *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999)). *Hayes* is inapplicable because in that case the State's appeal was clearly permissible pursuant to Neb. Rev. Stat. § 29-116 (Cum. Supp. 2000). Here, the State appealed pursuant to § 29-2315.01, but its appeal was dismissed for lack of jurisdiction.

The State's right to seek a review is limited to the procedure set forth in § 29-2315.01. A county attorney is permitted to file an application to the trial court seeking leave to appeal within 20 days after a final order is entered in a cause. See *State v. Hall, supra*. The granting of Recek's motion to quash was not a final order because the manslaughter charge was still pending. Since no final order had been entered, the State was without statutory authority to take the appeal.

Thus, the question is whether the time during which the State's appeal was pending should be excluded from the speedy trial calculation when there was no statutory authority to take the appeal. The district court found that final disposition of Recek's motion to quash did not occur until the court entered judgment on the mandate from this court. The district court therefore concluded that this period of delay was the result of Recek's conduct in filing the motion to quash.

[5] In *State v. Murphy*, 255 Neb. 797, 802, 587 N.W.2d 384, 388 (1998), citing *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983), we held that the pretrial motion of a defendant is " 'finally disposed' " on the date that it is granted or denied. The excludable period attributable to a defendant's pretrial motion is calculated from the date the motion is filed until the date the motion is granted or denied. *State v. Ward, supra*. Therefore, unless the time for the State's appeal can be "charged" to Recek, only the period from the filing of the motion to quash to the date

it was granted can be excluded from the time for bringing Recek to trial.

We have not addressed this issue previously; however, other jurisdictions have faced similar questions. In *Com. v. Malinowski*, 543 Pa. 350, 671 A.2d 674 (1996), the Commonwealth of Pennsylvania's appeal was determined to be a nullity because it failed to have the appeal certified. The defendant moved to dismiss, alleging that the commonwealth had failed to bring him to trial within the time period mandated by law. The court found that the commonwealth's failure to comply with proper certification procedures rendered its appeal a nullity and that, as such, the commonwealth was not entitled to exclude the time period encompassed by the appeal from the computation of the defendant's right to a prompt trial as provided by law. Rule 341(c) of the Pennsylvania Rules of Appellate Procedure provided in part: " '[A]n Appeal may be taken by the Commonwealth from any final order in a criminal matter only in the circumstances provided by law.' " (Emphasis omitted.) *Malinowski*, 543 Pa. at 358, 671 A.2d at 678. The court held that without certification, the commonwealth had no right to appeal and that without the right to appeal, the commonwealth failed to exercise due diligence by filing the appeal. Failure to file the certification rendered the suppression order unappealable.

In *State v. Ho*, 7 Haw. App. 516, 782 P.2d 29 (1989), *overruled on other grounds, State v. Hoey*, 77 Haw. 17, 881 P.2d 504 (1994), the state appealed an oral suppression order. Without a written order of suppression, there was no appellate jurisdiction. The defendant successfully argued that the appeal from such order was a nullity and that, therefore, the period of time should not be excluded.

In *State v. Grimes*, 229 Kan. 143, 622 P.2d 143 (1981), the defendant moved for a new trial. The trial court granted the motion, and the state appealed. The defendant then moved for involuntary dismissal of the appeal because the state was not authorized to appeal from the granting of a new trial. The Kansas Supreme Court held that since the state's appeal from the order was unauthorized, the time period within which the state was required to bring the defendant to trial continued to run during the unauthorized appeal.

We find the reasoning of the above jurisdictions applicable to the case at bar. The State appealed from a nonfinal order, and this court did not acquire jurisdiction to hear the appeal. Such delay was not an expected and reasonable consequence of the motion to quash and was not chargeable to Recek. Final disposition of the motion to quash occurred when the district court sustained the motion. Thus, the court erred in finding that the time during which the appeal was pending was excludable under § 29-1207(4)(a).

[6] Next, we analyze whether the time was excludable under § 29-1207(4)(f). The district court determined that the State showed by a preponderance that there existed good cause for the delay. In *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980), we held that if a trial court relies on § 29-1207(4)(f) in excluding a period of delay from the 6-month speedy trial computation, a general finding of "good cause" will not suffice. The trial court must make specific findings as to the good cause which resulted in the extension of time. Here, the court found: "[T]here is nothing before the Court to suggest the State's appeal was frivolous or motivated by bad faith." The court also noted that the legal question of whether a count of use of a weapon to commit a felony could be charged along with a manslaughter count had not previously been decided by this court. Thus, the court concluded that good cause had been shown by the State.

Good cause is not shown simply because there has been no proof that the State acted in bad faith or because the substantive issue raised by the appeal has not previously been decided. The district court's finding that the State did not act in bad faith does not equate to a showing that there was good cause for the delay. Recek has correctly asserted that such a finding would improperly shift the burden to the defendant. Rather than requiring the State to show good cause, the court would require Recek to show bad faith. Also, the fact that at the time the appeal was taken, this court had not determined the issue presented by the appeal does not establish good cause for the delay. Thus, we conclude that the State has not sustained its burden to show good cause for the delay, and the district court erred in not sustaining Recek's motion to dismiss on the ground that his statutory right to a speedy trial had been denied.

The information was originally filed against Recek on June 23, 2000. If no time periods were excluded under § 29-1207(4)(a), the last day on which the State could have brought Recek to trial would have been December 23. The State proved that 45 days were properly excluded from July 25 until September 8, when Recek's motion to quash was pending. Therefore, the State had until February 6, 2001, to bring Recek to trial and failed to do so. As a result, Recek is entitled to an absolute discharge under § 29-1208.

We also note that the time between Recek's filing of his motion to transfer to juvenile court on April 24, 2001, and the district court's denial of the motion on May 29 is not relevant to our determination because by the time Recek filed his motion for transfer, the time for bringing him to trial pursuant to § 29-1207 had already expired.

CONCLUSION

Because the State has failed to prove an exception under § 29-1207(4), the judgment of the district court is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA EX REL. LAUREY STEINKE, AN INDIVIDUAL, AND JOHN T. LANGAN, AN INDIVIDUAL, APPELLEES, V. SCOTT A. LAUTENBAUGH, DOUGLAS COUNTY ELECTION COMMISSIONER, IN HIS OFFICIAL CAPACITY, APPELLANT.

642 N.W.2d 132

Filed April 10, 2002. No. S-02-206.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Mandamus.** A grant or denial of mandamus is within the trial court's discretion.
3. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.

4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
6. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
7. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated actions, and it is not sufficient that one has merely a general interest common to all members of the public.
8. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
9. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, a separation of powers constitutional argument must be raised in the district court in order to be preserved on appeal.
10. **Schools and School Districts: Legislature.** The creation of school districts and their boundaries is a legislative function which may be delegated to another body. When such duties are delegated, they remain a function entirely within the province of the Legislature and are not subject to judicial review. However, when the Legislature delegates authority, it may place such restrictions and limitations upon the authority granted as it chooses.
11. **Statutes.** Interpreting a statute presents a question of law for judicial determination.
12. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature.
13. **Actions: Public Officers and Employees: Immunity.** When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.
14. ____: ____: ____. An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.
15. ____: ____: ____. Suits which seek to compel affirmative action on the part of a state official are barred by sovereign immunity, but if a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity.
16. **Schools and School Districts: Public Officers and Employees.** Read together, Neb. Rev. Stat. §§ 32-552 and 32-553 (Reissue 1998 & Supp. 2001) authorize an election commissioner to draw or adjust the boundaries of school districts following a federal decennial census only as is necessary to maintain substantial population equality within the districts.
17. ____: ____. Adjustment of district boundaries does not have the effect of depriving an incumbent from exercising his or her duties for the full elected term even when the

change of boundary lines places the officer's residence outside the district from which he or she was elected.

18. **Mandamus: Public Officers and Employees.** A decision by a public official contrary to law or based on a mistaken view of the law is not within the exercise of discretion lying outside the remedy of mandamus, and by mandamus, a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

H. Daniel Smith and John A. Kinney, of Dwyer, Smith, Grimm, Gardner, Lazer, Pohren, & Rogers, for appellant.

Jill Robb Ackerman and David M. Pedersen, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellees.

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

STEPHAN, J.

Douglas County Election Commissioner Scott A. Lautenbaugh appeals from an order of the district court for Douglas County allowing the issuance of a peremptory writ of mandamus directing Lautenbaugh to restore the number "9" to the adjusted territory of an Omaha school board election subdistrict and to accept John T. Langan's filing as an incumbent candidate for reelection in that subdistrict. We affirm.

FACTS

Relators, Laurey Steinke and Langan, are individual taxpayers, voters, and residents of Douglas County School District No. 001, a Class V school district commonly known as Omaha Public Schools (OPS). Prior to November 29, 2001, both were residents of OPS board election subdistrict No. 9, and Langan was the incumbent board member from that subdistrict. On that date, Lautenbaugh, in his official capacity as election commissioner, certified new boundaries for the 12 OPS board election subdistricts based upon 2000 federal decennial census data. See Neb. Rev. Stat. §§ 32-552 and 32-553 (Reissue 1998 & Supp. 2001). After Lautenbaugh's certification of new boundaries, neither Steinke nor Langan, nor any other resident of what had been subdistrict No. 9, resided in the newly designated subdistrict No. 9.

On February 5, 2002, Langan filed a "Candidate Filing Form for Non Partisan Office" with the Douglas County Election Office, indicating his intention to run for reelection to the office of OPS board member in subdistrict No. 9 at the May 14, 2002, election. This filing was rejected by Lautenbaugh because Langan was no longer a resident of subdistrict No. 9 according to the new boundaries. On the same day, relators filed a petition and an affidavit for writ of mandamus in the district court for Douglas County. The petition alleged that Lautenbaugh exceeded his authority under § 32-552(3) and abused his statutory power by "not simply adjusting boundaries, but by also switching the numbers between" subdistricts Nos. 9 and 10. The petition further alleged that the general area of former subdistrict No. 9 was labeled subdistrict No. 10 by Lautenbaugh and that the general area of former subdistrict No. 10 was labeled subdistrict No. 9. Pursuant to Neb. Rev. Stat. § 32-545 (Reissue 1998), elections for odd-numbered subdistricts will be held in 2002 and elections for even-numbered subdistricts will be held in 2004. The petition requested the issuance of a writ of mandamus directing Lautenbaugh to restore the subdistrict numbers and accept Langan's filing in subdistrict No. 9. An alternative writ was ordered by the court.

On February 12, 2002, trial was held on the provision of the alternative writ compelling Lautenbaugh to appear and show cause. Relators appeared with counsel, and Lautenbaugh appeared pro se. On cross-examination, Lautenbaugh testified that no subdistrict numbers were put in before he adjusted the boundaries. He further testified:

> [Counsel for relators:] So you had that done. So you had all of that done, but then when you put the numbers on, the numbers didn't have anything to do with population — did it — adjusting these boundaries for population when you changed the numbers?
>
> [Lautenbaugh:] No.
>
> Q. And they didn't have anything to do with keeping this area compact; did they?
>
> A. The numbers, no.
>
> Q. And they didn't have anything to do with keeping it contiguous; did it?

A. No. I drew all of them to be compact and contiguous.

Q. Basically your changing the numbers didn't have anything to do with your statutory directive; did it?

A. The one you cited, no.

Q. That's [§§ 32-]552 and [32-]553 that we looked at; isn't that correct?

A. Yes.

On redirect, Lautenbaugh testified that "[a]s it now stands, if the Relators are successful, the people in District 10 will be represented by someone who lives outside of District 10. In my opinion, that is a judgment call that I made as a proper consideration of how to redistrict." Upon being questioned by the court, Lautenbaugh testified that "how I numbered the districts after I adjusted the lines was largely then a function of whether or not a district would go unrepresented for three years with a resident incumbent or otherwise."

During the February 12, 2002, trial, the district court concluded that Lautenbaugh exceeded his statutory authority because "[r]egardless of how pure his motive was, he is not permitted to take into account a political result or political situation which occurs as a result of him performing his statutory duty to adjust the boundaries." On February 14, the district court ordered the issuance of a peremptory writ of mandamus. Lautenbaugh filed this timely appeal, which, upon relators' request to expedite due to the pending May 14, 2002, election, we moved to our docket.

ASSIGNMENTS OF ERROR

Lautenbaugh assigns that the district court erred in (1) finding that relators had standing to bring suit, (2) issuing a peremptory writ barred by the separation of powers provisions of the Nebraska Constitution, (3) issuing a peremptory writ in a case which raises only a political question, (4) accepting jurisdiction and issuing a peremptory writ barred by sovereign immunity, (5) finding that the 12 OPS subdistricts had to remain unchanged as "core territories," and (6) substituting its discretion for the discretion of the election commissioner in the drawing of subdistrict boundaries for school district elections.

STANDARD OF REVIEW

[1,2] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). A grant or denial of mandamus is within the trial court's discretion. *State ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998).

[3] A jurisdictional question which does not involve a factual dispute is a matter of law. *Sydow v. City of Grand Island, supra*.

ANALYSIS

STANDING

[4,5] Lautenbaugh asserts that relators lack standing and that, thus, the district court lacked jurisdiction to order the issuance of the writ. Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001). As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.*

[6-8] In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated actions, and it is not sufficient that one has merely a general interest common to all members of the public. *Id.* Specifically,

> "[a] person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the

> public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation."

Id. at 317, 622 N.W.2d at 630, quoting *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000), citing *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

In the instant case, Steinke alleged that she was injured by the challenged renumbering of subdistricts Nos. 9 and 10 because she will be denied the opportunity to vote for the candidate of her choice in the upcoming election, she will be denied the opportunity to vote in the upcoming election, and she will be represented for the next 2 years by a school board member who was not elected by the constituents in her subdistrict. Langan alleged that he was injured by the challenged renumbering because he will be denied the opportunity to file and run for office for OPS subdistrict No. 9, he will be denied the opportunity to vote for the school board candidate of his choice, he will be denied the opportunity to vote in the upcoming election, and he will be represented for the next 2 years by a school board member who was not elected by the constituents in his subdistrict. The issue is whether these allegations demonstrate a special injury peculiar to relators.

Lautenbaugh argues that relators have suffered no injury because they have no legal right to vote in this particular election for any particular candidate. In *Barnett v. Boyle*, 197 Neb. 677, 250 N.W.2d 635 (1977), we held that voters affected by the original division of OPS into subdistricts and the implementation of the staggered election system did not have a valid equal protection claim that they were disenfranchised by the enactment of the statute. We noted that the right to vote was merely delayed and not denied. *Barnett*, however, addressed only whether the constitutional right to vote was violated; it did not hold that a person is not injured by a delay in his or her right to vote. In fact, by reaching the merits and determining that the statute requiring election by subdistrict was constitutional, *Barnett* implicitly recognized that the plaintiffs had standing to bring the action. Relators herein have alleged a direct interest in participating in the upcoming election that will be affected by the actions of the election commissioner which they challenge as unlawful.

Lautenbaugh also asserts that relators have demonstrated no injury that is peculiar to them and not an injury suffered by the public at large. Although the injury alleged by relators was presumably suffered by all residents of the former subdistrict No. 9, those residents do not constitute the general public. Relators have alleged a special interest peculiar to them and therefore have standing to bring this action. Compare *Neb. Against Exp. Gmblg., supra* (holding taxpayer and nonprofit organization opposed to gambling lacked standing to challenge State Racing Commission's issuance of simulcast horseracing license when plaintiffs asserted only general interest common to all members of public); *Ritchhart, supra* (holding Omaha citizen and taxpayer lacked standing to challenge verbal agreements between mayor, fire chief, and communications chief because no special injury independent from that of general public alleged).

Separation of Powers

Lautenbaugh asserts that the district court violated the doctrine of separation of powers embodied in the Nebraska Constitution when it ordered the issuance of the peremptory writ. Article II, § 1, of the Nebraska Constitution provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Lautenbaugh contends that it is for "the legislature and legislature alone to design a scheme for fixing the boundaries of these [school] districts, and to delegate the power as it sees fit, and the entire matter is 'not subject to judicial review.' " Brief for appellant at 18, quoting *School District No. 49 v. School District No. 65-R*, 159 Neb. 262, 66 N.W.2d 561 (1954).

[9] Initially, we note that Lautenbaugh did not present this argument to the district court. Except in the most unusual of cases, a separation of powers constitutional argument must be raised in the district court in order to be preserved on appeal. See, *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997); *State v. Criffield*, 241 Neb. 738, 490 N.W.2d 226 (1992). Lautenbaugh had the opportunity

to raise the separation of powers issue in his answer to the alternative writ and at the hearing to show cause on that writ, but did not do so. He therefore has not preserved the issue for our review.

[10,11] Moreover, there is no violation of the doctrine of separation of powers in this case. Clearly, the creation of school districts and their boundaries is a legislative function which may be delegated to another body. *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957); *School District No. 49, supra*. When such duties are delegated, they remain a function entirely within the province of the Legislature and are not subject to judicial review. *Id.* However, when the Legislature delegates authority, it may place such restrictions and limitations upon the authority granted as it chooses. *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953). In the instant action, the courts are not being asked to redistrict, but, rather, to interpret the statutes by which the Legislature delegated authority to the election commissioner to adjust district boundaries in order to determine what restrictions and limitations, if any, the Legislature imposed upon the delegated authority. Interpreting a statute presents a question of law for judicial determination. *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993). The district court therefore did not violate the separation of powers doctrine by interpreting the relevant statutes in this case.

Political Question

In a related argument, Lautenbaugh argues that neither the district court nor this court should address the issue presented because it involves a political question. As we have noted, although this appeal relates to the legislative function of establishing school district subdivisions, and as a political consequence the representation thereof, the precise issue before this court is simply the justiciable question of the proper interpretation of applicable statutes. See *Bressler v. Chicago & N. W. Ry. Co.*, 152 Neb. 732, 42 N.W.2d 617 (1950). There is no political question involved in this case, and the district court did not err in addressing the issue.

Sovereign Immunity

Lautenbaugh asserts that the district court lacked subject matter jurisdiction to order the issuance of the writ because the state's sovereign immunity barred the suit. In *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999), we held that nothing in the mandamus statutes, Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1995), indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency. Thus, if the instant action were brought against a state agency, it would be barred.

[12-15] In this case, the suit is brought against a public official who is a county employee. See Neb. Rev. Stat. § 32-217 (Reissue 1998) (designating election commissioner as county employee). A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). As such, it acts purely as an agent of the state. *Id.* When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity. See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995). In addressing this issue, we have stated that an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity. *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). This exception to the rule of sovereign immunity exists because " 'acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state.' " *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 156, 505 N.W.2d 654, 658 (1993), quoting *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). Suits which seek to compel affirmative action on the part of a state official are barred by sovereign immunity, but if a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity. *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998).

Application of the foregoing principles demonstrates that this is not in reality an action brought against the state or one of its political subdivisions. The basis for relators' claims is that Lautenbaugh exceeded his statutory authority to adjust subdistrict boundaries, and thus, they seek relief from what they allege to be an invalid act or an abuse of authority by Lautenbaugh. In this situation, the relief requested is affirmative only to the extent that it requests Lautenbaugh's actions be nullified if determined to be invalid. Because the mandamus is brought only to remedy alleged invalid acts of a county official, the district court did not lack subject matter jurisdiction.

Issuance of Writ

Lautenbaugh contends that the district court erred in ordering the issuance of the writ because §§ 32-552 and 32-553 vest the election commissioner with complete discretion to renumber and adjust school district boundaries in a Class V school district. As noted, the creation of school districts and their boundaries is a legislative function which may be delegated to another body. *Farrell v. School Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957); *School District No. 49 v. School Dist. No. 65-R*, 159 Neb. 262, 66 N.W.2d 561 (1954). However, when the Legislature delegates authority, it may place such restrictions and limitations upon the authority granted as it chooses. *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953). Therefore, the fact that the Legislature has delegated some authority to the election commissioner of a county in which a Class V school district is located does not necessarily mean that the election commissioner may act with unfettered discretion. To determine what authority has been delegated, it is necessary to examine the statutory language.

Section 32-553(1) provides that "[w]hen any political subdivision except a public power district nominates or elects members of the governing board by districts, such districts shall be substantially equal in population as determined by the most recent federal decennial census." Section 32-553(1) also mandates that political subdivisions "shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the

passage and approval of the legislative bill providing for reestablishing legislative districts" after each federal decennial census. According to § 32-552(1), any political subdivision that makes changes to its district boundaries after a federal census must notify the election commissioner or county clerk in the county of the need of his or her office to perform such "adjustment of the boundaries of election districts."

Section 32-553(2) provides:

> The governing board of each such political subdivision shall be responsible for drawing its own district boundaries and shall, as nearly as possible, follow the precinct lines created by the election commissioner or county clerk after each federal decennial census, except that the election commissioner of any county in which a Class IV or V school district is located shall draw district boundaries for such school district as provided in this section and section 32-552.

Section 32-552(3) provides:

> The election commissioner of the county in which the greater part of a Class V school district is situated shall divide the school district into twelve numbered districts of compact and contiguous territory and of as nearly equal population as may be practical. The election commissioner shall adjust the boundaries of such districts to conform to changes in the territory of the school district and also following each federal decennial census.

[16] These statutes, read together, clearly impose limitations and restrictions upon the authority of the election commissioner when performing his or her duties relating to school districts after each federal decennial census. Section 32-553(2) provides that an election commissioner is to "draw district boundaries" as provided in §§ 32-553 and 32-552. Section 32-553(1) mandates that all districts be substantially equal in population and requires a political subdivision to "have new district boundaries drawn" only "if necessary to maintain substantial population equality" within the districts. Section 32-552(3), in turn, allows the election commissioner to "adjust the boundaries" of the districts following each federal decennial census. Read together, §§ 32-552 and 32-553 authorize an election commissioner to draw or adjust the boundaries of school districts following a federal

decennial census only as is necessary to maintain substantial population equality within the districts.

[17] In the instant case, Lautenbaugh testified that he adjusted the boundaries of the districts to account for population changes. He further testified, however, that he then assigned the number "9" to the territory which included most of former subdistrict No. 10, and the number "10" to the area which included most of former subdistrict No. 9, so that the incumbent board member in former subdistrict No. 10 would remain a resident of that district following adjustment of the boundaries. Lautenbaugh conceded that his assignment of subdistrict numbers had nothing to do with the statutory directives set forth in §§ 32-552 and 32-553, but contended that the residency of the incumbent was a "political factor" which formed the basis for a "judgment call that I made as a proper consideration of how to redistrict." We note that Lautenbaugh's alteration of subdistrict numbers was not necessary to preserve the incumbency of the school board member who had been elected from subdistrict No. 10. Adjustment of district boundaries does not have the effect of depriving an incumbent from exercising his or her duties for the full elected term even when the change of boundary lines places the officer's residence outside the district from which he or she was elected. *State v. Haverly*, 62 Neb. 767, 87 N.W. 959 (1901). See, also, *Barnett v. Boyle*, 197 Neb. 677, 250 N.W.2d 635 (1977) (noting that during transition period from election of school board members on at-large basis to election by district in alternating years, residents of some odd-numbered districts would be represented by school board members who had been elected at large).

We agree with the district court that the applicable statutes do not authorize an election commissioner to take into account political considerations when adjusting boundaries following a federal decennial census. As noted, the applicable statutes authorize the election commissioner to adjust subdistrict boundaries to maintain substantial equality in population. The statutes do not authorize the formation of new subdistricts. See *State v. Haverly, supra*. By adjusting the boundaries of what had been subdistricts Nos. 9 and 10 to reflect population changes reflected in the 2000 census data, Lautenbaugh carried out his statutory authority. By then assigning the subdistrict numbers to

the areas within the adjusted boundaries based upon the residency of an incumbent, he clearly exceeded that authority.

[18] Mandamus is an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plan and adequate remedy available in the ordinary course of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). A decision by a public official contrary to law or based on a mistaken view of the law is not within the exercise of discretion lying outside the remedy of mandamus, and by mandamus, a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty. See, *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *State ex rel. Creighton Univ. v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984). Lautenbaugh's decision to alter the numbering of subdistricts Nos. 9 and 10 was a decision contrary to law, and the district court did not err in ordering the issuance of a peremptory writ directing Lautenbaugh to return the original numbers to the subdistricts. In addition, because Langan resides within the proper subdistrict No. 9, the court did not err in ordering Lautenbaugh to accept Langan's filing.

CONCLUSION

For the reasons discussed, we affirm the order of the district court authorizing the issuance of a peremptory writ of mandamus, and we remand the cause to the district court for implementation of such relief.

AFFIRMED.

LINDA MARIE MEDLOCK, APPELLANT, V. MELVIN EUGENE MEDLOCK, APPELLEE.

642 N.W.2d 113

Filed April 12, 2002. No. S-00-1083.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
4. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
5. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. **Divorce: Property Division.** Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably.
7. ____: ____. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
8. ____: ____. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
9. **Corporations.** A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears.
10. **Corporations: Equity: Fraud.** In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice.
11. **Corporations: Fraud.** When a corporation is or becomes the mere alter ego, or business conduit, of a person, it may be disregarded.
12. ____: ____. Among the factors which are relevant in determining to disregard the corporate entity are diversion by the shareholder or shareholders of corporate funds or assets to their own or improper uses and the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
13. **Corporations: Liability.** In a case of "reverse piercing" of the corporate veil, in which the assets of the corporate entity may be used to satisfy the obligations of the controlling alter ego, factors to be considered in determining to disregard the corporate entity

are the insolvency of the individual and the extent to which the individual's ostensible poverty is supported by corporate assets.

14. **Corporations: Divorce: Property Division.** The assets of a spouse's corporate alter ego may be considered to be, and distributed as, part of the marital estate.
15. **Corporations: Courts: Equity.** The essence of the alter ego doctrine is that a court of equity will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties.
16. **Corporations.** Legal ownership, while relevant, is not a dispositive factor and does not preclude the finding of alter ego when control of the corporation is otherwise established.
17. **Corporations: Equity.** A corporation's status as a nonprofit corporation in and of itself does not bar a court from finding the corporation to be the alter ego of an individual and from applying the equitable remedy of piercing the corporate veil.
18. **Corporations.** Religious corporations are governed by the same general rules of law and equity as other corporations; in other words, they are subject to the same principles of law as any other civil corporation in courts of general jurisdiction.
19. **Constitutional Law: Legislature.** Government action passes muster under the Establishment Clause if (1) the statute or government action has a secular legislative purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it does not foster excessive government entanglement with religion.
20. **Constitutional Law: Courts: Property.** The State has a legitimate interest in resolving property disputes, and a civil court is a proper forum for that resolution. Not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment.
21. **Courts.** The application of general law, the purpose and effect of which is to advance the State's secular goals, is valid despite an indirect burden on religious observance.
22. **Courts: Property.** So long as a court is not involved in resolving underlying controversies over religious doctrine, there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.
23. ____: ____. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.
24. **Statutes.** An individual's religious beliefs do not excuse the individual from compliance with an otherwise valid law regarding conduct that the State is free to regulate.
25. **Appeal and Error.** A party cannot complain of error which that party has invited the court to commit.
26. **Corporations: Judgments: Equity.** A nonparty may be bound by an equitable judgment sustaining an alter ego action if the party's interests are so closely affiliated with the nonparty's interests that the interests are merged.
27. **Corporations.** In order for a corporation to be accorded treatment as a separate legal entity, it must exist and function as such and not merely as the alter ego of a person controlling it.
28. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
29. **Divorce: Attorney Fees.** In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Gregory Garland, of Garland Law, P.C., and Kathy Pate Knickrehm for appellant.

Amy S. Geren, of Nolan, Olson, Hansen, Fieber, Lautenbaugh & Geren, and, on brief, Brent M. Kuhn, of Harris, Feldman Law Offices, for appellee.

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

GERRARD, J.

NATURE OF CASE

This is an appeal from the decree dissolving the marriage of Linda Marie Medlock and Melvin "Buddy" Eugene Medlock. The issue presented in this appeal is whether Linda was entitled to a share of the assets of Union Oaks, Inc., a nonprofit religious corporation operated by Buddy.

FACTUAL BACKGROUND

Buddy and Linda were married in 1972 and have five children, three of whom were under the age of 19 at the time of trial. Child custody is not at issue in this appeal.

Buddy was ordained as a minister in 1971 by the Christian Brotherhood, an organization of which Buddy was one of the founders. Union Oaks was founded in 1978; the parties dispute whether Union Oaks was founded by Buddy and Linda, or solely by Buddy. Union Oaks is a tax-exempt organization under the Internal Revenue Code. See I.R.C. § 501(c)(3) (2000). Buddy is the president of Union Oaks.

The seed funding for Union Oaks was provided by the proceeds of real estate sold by Buddy and Linda. Essentially, Buddy and Linda sold their property and transferred their marital property and income to Union Oaks. Buddy and Linda have not owned any personal property since 1978. Instead, Union Oaks has provided Buddy with a parsonage, the use of various vehicles, and a salary that appears to vary from year to year. Joint tax returns,

filed between 1991 and 1998, show total annual income for the Medlocks ranging from $25,181 in 1998 to $7,779 in 1993.

Union Oaks, at the time of trial, owned assets, primarily in real estate, that the district court found to have a total value of approximately $1.3 million. George Tesar, Jr., a certified real estate appraiser retained by Linda to value the property owned by Union Oaks, valued the parsonage at $275,000, an unimproved lot adjacent to the parsonage at $43,000, and a former restaurant used as a banquet hall at $525,000. Union Oaks also owned a $12,000 motorcycle and three other vehicles and had sold six other vehicles since Linda had filed her petition for legal separation. At the time of trial, Union Oaks had cash assets of $134,381.73 and held debts owed to Union Oaks in the amount of roughly $90,000. The only debt admittedly owed by Union Oaks to anyone else was a note owed from Union Oaks to Buddy and Linda in the amount of approximately $50,000. There was conflicting evidence presented regarding the continued existence of certificates of deposit valued at approximately $207,000.

The assets of Union Oaks were accrued from the initial funding provided by Buddy and Linda through a series of real estate transactions, primarily involving "like-kind" exchanges of real property. The details of many of these transactions are rather murky. Generally speaking, Buddy's answers to cross-examination regarding his financial dealings can be characterized as evasive, as Buddy repeatedly denied knowledge or recollection of even the most basic aspects of Union Oaks' financial transactions. It is undisputed, however, that Union Oaks has received very few donations and that most corporate revenue comes from the gains on the purchase and sale of real estate by Buddy.

The debt owed from Union Oaks to Buddy and Linda was the subject of considerable dispute at trial. Buddy and Linda had acquired and jointly held several parcels of real estate prior to the formation of Union Oaks, which were transferred to Union Oaks between 1978 and 1987 in exchange for promissory notes totaling $177,094.49 at the time of execution. The balance on those notes was, or would have been, $269,811 at the time of trial. Buddy testified, however, that the transfers were meant as gifts to Union Oaks and that the notes were executed because his accountant told

him to do it that way. Buddy testified that all of the notes, except the $50,000 note previously mentioned, were "forgiven" by 1991, when Linda filed a previous petition for legal separation that had been voluntarily dismissed. Buddy was otherwise unclear on the circumstances surrounding the forgiving of the notes.

Linda testified, on the other hand, that during the course of the marriage, Buddy repeatedly told her that Union Oaks owed them the money that would have been due from the notes that were later forgiven. The figure set forth above regarding the present value of the notes is taken from an amortization schedule that Linda testified was shown to her by Buddy when Linda asked about the couple's financial situation. Linda testified that only after the couple's separation was she informed that the notes had been forgiven. In addition, Paul Curry, the former president of NP Dodge Management Company, Inc., and a friend of Buddy and Linda, testified that, in 1995 or 1996, while he was counseling Buddy regarding his separation from Linda, Buddy mentioned a note from Union Oaks to Buddy and Linda in the amount of $250,000.

There is substantial evidence in the record establishing Buddy's habit of using Union Oaks funds to pay for what can reasonably be characterized as personal expenses. Buddy testified that when he used corporate funds to pay for personal expenses, he later had those expenses charged against the balance on the remaining note that Union Oaks owed to Buddy and Linda. Charge card statements contained in the record show corporate funds to have been expended on restaurants, groceries, and travel, among other things. Buddy testified that the family's trips to Mazatlan, Mexico, were spent studying and writing, but Linda characterized them as family vacations. Buddy did specifically defend the use of corporate funds, and the Union Oaks tax-exempt identification number, to pay for visits to tanning salons. William Stevens, a certified public accountant employed by Buddy and Union Oaks, testified that Buddy claimed personal expenses paid for by Union Oaks as personal income for tax purposes, but that Stevens did not review the expenses and relied on Buddy to determine which expenses were personal in nature.

The record also contains a substantial amount of testimony regarding the board of directors of Union Oaks and the amount

of actual control that the three members of the board, in addition to Buddy, have exercised over Union Oaks. According to the Union Oaks corporate charter contained in the record, a majority of the board could remove Buddy from office and take control of the assets of Union Oaks.

Three members of Union Oaks' board of directors, in addition to Buddy, testified at trial. The first director, a member of the board since 1994 or 1995, testified that any meetings of the board were called by Buddy. Buddy testified that the board met once a year. This director testified that he never signed checks for Union Oaks, met with lawyers, or discussed any of Union Oaks' real estate transactions. In addition, this director testified that he did not review Union Oaks' books and did not recall ever disapproving any expense or proposal suggested by Buddy. This director also testified that he had not been aware that Buddy had charged personal items to the organization.

Similarly, another witness, a Union Oaks director since 1994, testified that he had not been aware of Union Oaks' ownership of a motorcycle or cars and that he had not been involved in Union Oaks' real estate transactions. This director did not know the cash balance of Union Oaks or about any notes payable to Buddy and Linda. The director did testify, however, that he did not consider himself a puppet of Buddy. A third board member also testified that he did not consider himself to be a puppet of Buddy. He testified, however, that he was not involved in Union Oaks' real estate transactions, except for "[d]uring the board meetings," and was not aware of Union Oaks' ownership of cars, holdings of cash, or certificates of deposit. A former member of the board of directors testified that he resigned from the board when he was unable to get Buddy to resolve concerns over Union Oaks' business practices.

There was relatively little evidence presented regarding the religious ministry of Union Oaks. Buddy testified that he did missionary work as part of his trips to, among other destinations, Mexico, Costa Rica, Panama, Nicaragua, and Taiwan. Buddy also claimed to have conducted weddings and funerals, taught Bible studies, and started "several churches." No independent evidence was presented to corroborate Buddy's claims. When one of the members of Union Oaks' board of directors

was asked about Union Oaks' religious activities, the only thing he could identify that Union Oaks had done for the community in the year prior to trial was to donate some money to the ministry of a local pastor. The same director later testified that in the past, Union Oaks had conducted Bible studies, used the former restaurant property for some religious purposes, held fundraisers for charity, and "been out promoting the word of God." No evidence was presented regarding any other religious activities conducted by Union Oaks.

Linda testified, generally, that she had no involvement in any personal or corporate financial transactions and that she just did what Buddy and Stevens told her to do. While she signed documents, she testified that she was not "in that loop" with regard to financial decisions, even when she served on the board. Linda testified that Buddy informed her only of financial decisions that he made himself and that Buddy expected her to be obedient.

Stevens testified that the Internal Revenue Service (IRS) had audited Buddy and Linda in 1994 for the tax years 1991 and 1992. Stevens testified that the IRS generally concluded that Buddy's status as a "minister of the Gospel" was appropriate under IRS regulations, although adjustments were made to the Medlocks' individual tax returns. While Stevens was employed by Union Oaks, he testified that he only maintained Union Oaks' cashflow and did not prepare balance sheets, payroll reports, or quarterly statements of any kind. No accounting records besides those prepared by Stevens, however, appear in the record.

PROCEDURAL BACKGROUND

On July 2, 1997, Linda filed a petition for legal separation. Buddy answered and cross-petitioned for dissolution. Trial was had, and on September 18, 2000, the district court entered a decree of dissolution.

The district court made several factual findings that were not memorialized in the decree, but that the district court stated should be present in the record for purposes of appeal. The court noted that Union Oaks had been legally established and was a separate legal entity. The court was "impressed with the fact that the Internal Revenue Service did certify this corporation as a 501C3 corporation." The court stated that

> if we had a trial on the status of the corporation, as far as its 501C3 status, we would say that I would be bound by that earlier decision of a court. And while it's not exactly the same situation, I find — I find it very persuasive that the Internal Revenue [Service] came and made an examination of the corporation and that they continued the 501C3 status.

With reference to Buddy, however, the court stated:

> I'm not impressed with the defendant's religious activities. I'm not impressed with the fact that the corporation in the last couple of years had approximately ten cars and a motorcycle and trips to various countries. But that's not for me to judge. As a general statement, I do not believe the assertions of the respondent.

The court nonetheless concluded:

> On a best — on a best case basis, from the assets he and petitioner gave to the Union Oaks, it is clear that this nonprofit corporation has grown in value to approximately $1.3 million. I don't think there's any serious dispute over that particular finding. This Court finds that under the circumstances here that this Court cannot rectify what I consider to be a travesty of this corporation.
>
> Mr. Medlock, if he can reconcile things with his board, will continue to receive automobiles, a parsonage, all of his expenses will be paid, and he will benefit greatly from the assets that he and the petitioner put into this corporation.
>
> It's a situation that this Court feels, and I don't mean to make unkind remarks or to make light of it, but it's kind of like a coin machine where you put your money in and you don't get it back. And this Court does not have Union Oaks before it as a party, and this is not a situation in a classic sense of piercing a corporate veil that we talked about in the law. This is a situation that I can take into account, in my opinion, the benefits that have and continue and will inure to the benefit of Mr. Medlock, but I have not found any case exactly like this one in Nebraska law or otherwise, nor have the attorneys brought to my attention any case that is similar on facts to this case. And in my reading of the law, I cannot take these assets of Union and cut them

> in half and say, okay, Mrs. Medlock, the petitioner, you get one-half of the assets of Union Oaks.

Based on those findings, the court went on to order the division of property. The court ordered, in part:

> First of all, we start with some of the assets. The note that has been talked about from Union Oaks to the Medlocks in the approximate amount of $50,000, the petitioner receives the entire proceeds of the note. And the order is to provide that Mr. Medlock is to be ordered to make his best efforts to obtain payment of the entire amount by 12/1/2000.
>
> Number two . . . the petitioner is to receive the 1996 Voyager automobile in her possession or an equivalent automobile. And that is to be done forthwith.

In its written decree, the court specified that Buddy was to be required to purchase the automobile from Union Oaks or purchase a comparable vehicle for Linda.

The court then considered the issues of alimony and attorney fees, stating in part:

> The next category is alimony. The Court finds that the petitioner in staying at home and raising the children and working in the ministry has seriously disrupted her education and work career; and in addition to the points that I announced earlier as findings, these facts are taken into an [sic] account in the award of alimony, as well as the — as I indicated, the long duration of the marriage.
>
> Commencing October 1, 2000, and continuing for a period of 18 years, respondent shall pay alimony of $1,400 per month to petitioner subject to the standard language regarding termination, and that is death or remarriage under the statutory language. . . .
>
> The attorney fee question in this case presents a very difficult question. The change of attorneys on the petitioner's side, the length of time in preparation, the lost time between the first attorney and the third attorney, the ability to pay of the respondent, creates a very difficult question regarding attorney fees.
>
> The Court has thought a great deal about the question of attorney fees, and under all of the circumstances the Court feels that a reasonable attorney fee in a case of this sort with

> as many days of trial as we've had and all the preparation, that an award of $10,000 of an attorney fee to be payable by the respondent to the petitioner within 60 days is an appropriate attorney fee under all of the circumstances.

Linda perfected this appeal, and we subsequently granted Linda's petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Linda assigns, summarized, that the trial court erred in (1) failing to include property which was held in the name of Union Oaks in the marital estate and (2) its award of attorney fees.

STANDARD OF REVIEW

[1-4] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). However, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001). In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

ANALYSIS

The facts of this case are certainly unique. The parties have not cited, nor has our research revealed, a case with established facts that mirror those of the instant case. Nonetheless, there are several well-established legal principles that guide our determinations regarding equitable property division and the equitable piercing of a corporate veil. We begin with those basic principles.

[5] Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is

to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). The primary issue presented in this case, whether the assets titled in Union Oaks should be included in the marital estate, arises under the first step of the process.

[6,7] Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Linda urges this court to find, pursuant to equitable principles, that Union Oaks is an alter ego of Buddy and that assets titled in Union Oaks should be considered Buddy's property for purposes of dividing the marital estate.

Alter Ego

[8-10] In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *McCollister v. McCollister*, 219 Neb. 711, 365 N.W.2d 825 (1985). See, also, *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979), *modified* 205 Neb. 149, 286 N.W.2d 444 (1980). A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988). However, " ' "[i]n equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice." ' " *Id.* at 256, 426 N.W.2d at 508. Accord, *Graham Graphics v. Baer Mktg. Internat.*, 10 Neb. App. 382, 631 N.W.2d 550 (2001), quoting *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980); *In re Application of CN Carriers, Inc.*, 1 Neb. App. 1151, 510 N.W.2d 545 (1993), citing *Brown v. Alron, Inc.*, 223 Neb. 1, 388 N.W.2d 67 (1986).

[11,12] When a corporation is or becomes the mere alter ego, or business conduit, of a person, it may be disregarded. *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 435 N.W.2d 179 (1989). Among the factors which are relevant in determining to disregard the corporate entity are diversion by the shareholder or shareholders of corporate funds or assets to their own or improper uses and the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity. See *id.*

[13] We have stated that other factors to be considered in determining to disregard the corporate entity are grossly inadequate capitalization and insolvency of the debtor corporation at the time the debt is incurred. These factors are relevant in cases in which creditors are seeking to pierce the corporate veil and hold individual shareholders liable for corporate debts. This case, however, presents the issue of "reverse piercing," in which the assets of the corporate entity may be used to satisfy the obligations of the controlling alter ego. See, e.g., *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9th Cir. 1993); *Century Hotels v. U.S.*, 952 F.2d 107 (5th Cir. 1992). In such an instance, the relevant factors do not relate to the insolvency of the corporation, but instead to the insolvency of the individual and the extent to which the individual's ostensible poverty is supported by corporate assets.

[14] Although a question of first impression in this jurisdiction, it is not unusual for a domestic relations court to pierce the corporate veil in a dissolution proceeding. See *Standage v. Standage*, 147 Ariz. 473, 711 P.2d 612 (Ariz. App. 1985). When the equitable principles set forth above have been applied to dissolution of marriage and division of the marital estate, it has generally been concluded that the assets of a spouse's corporate alter ego may be considered to be, and distributed as, part of the marital estate. See, e.g., *A & L, Inc. v. Grantham*, 747 So. 2d 832 (Miss. 1999); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982); *Barineau v. Barineau*, 662 So. 2d 1008 (Fla. App. 1995); *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992); *Goldberg v. Goldberg*, 172 A.D.2d 316, 568 N.Y.S.2d 394 (1991); *Stainback v. Stainback*, 11 Va. App. 13, 396 S.E.2d 686 (1990); *Standage, supra*; *State ex rel.*

Grabhorn v. Grabhorn, 28 Or. App. 357, 559 P.2d 923 (1977), *Lyons v. Lyons*, 340 So. 2d 450 (Ala. Civ. App. 1976).

Applying the above-stated principles to the facts of the instant case, we conclude, on our de novo review, that the record shows Union Oaks to be the alter ego of Buddy and that Union Oaks' assets should be included in the marital estate. As described above, the record demonstrates beyond reasonable question that Buddy made extensive personal use of corporate funds and assets and that Buddy carried on personal dealings in the name of the corporation. The record shows a nearly complete unity of interest between Buddy and Union Oaks. Buddy exercised nearly unfettered control of Union Oaks and regularly purchased vehicles, travel, and other goods and services in the corporate name for his family's personal use. Compare *Watson, supra*.

The record is also clear that the Medlocks did not acquire personal property in their own names because all the property that would ordinarily have been acquired over the course of a 28-year marriage was instead acquired in the name of Union Oaks. Buddy's purported poverty conflicts sharply with the affluent lifestyle he has maintained with the use of corporate assets. Buddy's ability to maintain his family's manner of living, with no reported assets and the meager income to which he will admit, is significant both to our determination that Union Oaks is Buddy's alter ego and to our conclusion that equity requires the assets of Union Oaks to be included in the marital estate.

This court confronted a similar quandary in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). In that case, the husband was provided, as an employee and minority shareholder of his family's ranch corporation, with a house, food, vehicles, and other benefits. In awarding the wife a substantial cash payment as part of the property division, we noted:

> Nevertheless, in reaching a just and equitable award, the fact remains that due to the way the parties to this marriage lived during the marriage, they did not acquire a house or a car or any property a married couple of 16 years, with above average assets, would be expected to acquire. We must consider that particular situation in this case.

Id. at 701, 380 N.W.2d at 285. See, also, *Dormann v. Dormann*, 8 Neb. App. 1049, 606 N.W.2d 837 (2000). Similar circumstances

are present here. Furthermore, in the instant case, the assets acquired by the parties prior to the formation of Union Oaks were transferred to Union Oaks and form the basis of the corporation's current value. In *Grace, supra*, we ordered a cash award as compensation for the inadequacy of the marital estate. In *Grace*, however, the ranch corporation was clearly a separate legal entity, of which the husband was only a minority shareholder. In this case, on the other hand, Union Oaks has been shown to be Buddy's alter ego, and the distribution of assets from the corporation is a more appropriate remedy.

On our de novo review of the record, we determine that the evidence conclusively shows, insofar as the issues in this divorce case are concerned, that Union Oaks is the alter ego of Buddy, and has been since it was established. The assets which came into Union Oaks during the time of the parties' marriage were in fact part of the marital estate and subject to division upon dissolution. See *Zisblatt v. Zisblatt*, 693 S.W.2d 944 (Tex. App. 1985). The district court erred in concluding otherwise.

Buddy argues, however, that ordinary equitable principles cannot be applied in this case because Union Oaks is a nonprofit corporation, purportedly organized for religious purposes, and because Union Oaks was not a party to the divorce proceedings. We address each of these arguments in turn.

Nonprofit Status

The fact that Union Oaks is organized as a nonprofit religious corporation distinguishes this situation from an ordinary situation involving a corporate alter ego. Buddy argues that because he did not legally own Union Oaks, it cannot be considered an alter ego. See, generally, Nebraska Nonprofit Corporation Act, Neb. Rev. Stat. § 21-1901 et seq. (Reissue 1997 & Cum. Supp. 2000).

[15,16] The essence, however, of the alter ego doctrine is that a court of equity "'"'will examine the whole transaction, looking through corporate forms to the substance of things, to protect the rights of innocent parties . . . .'"'" See *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 256, 426 N.W.2d 504, 509 (1988). Consequently, courts have generally held that legal ownership, while relevant, is not a dispositive factor and does not preclude the finding of alter ego when control of the

corporation is otherwise established. See, *Century Hotels v. U.S.*, 952 F.2d 107 (5th Cir. 1992); *Shades Ridge Holding Co., Inc. v. U.S.*, 888 F.2d 725 (11th Cir. 1989); *Towe v. Martinson*, 195 B.R. 137 (D. Mont. 1996); *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251, 50 Ill. Dec. 934 (1981). Because the record clearly establishes such control in this case, as stated above, our finding that Union Oaks is Buddy's alter ego is not affected by the fact that Buddy does not legally own the corporation.

The primary distinction between nonprofit corporations and for-profit corporations is found in the nondistribution constraint, which bars the nonprofit corporation from distributing profits or net earnings to those who control the corporation. See, § 21-19,127 (providing that nonprofit religious corporations "shall not make any distributions"); § 21-1914(10) (defining "distribution" as "the payment of a dividend or any part of the income or profit of a corporation to its members, directors, or officers"). See, also, I.R.C. § 501(c)(3) (defining corporation exempt from taxation as corporation "no part of the net earnings of which inures to the benefit of any private shareholder or individual").

However, the nondistribution constraint does not preclude nonprofit corporations from engaging in commercial activity, as Union Oaks has clearly done. The term "commercial nonprofit" is broadly used by commentators to describe any nonprofit engaged in significant commercial activity, even when the commercial activity is an ancillary endeavor used to subsidize noncommercial activities that are the nonprofit's principal mission. Evelyn Alicia Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is it Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. Rev. 1761 (1995). In the instant case, for example, Union Oaks, while organized as a nonprofit corporation, engaged in the sale and purchase of real estate in the same manner that might be expected of a for-profit real estate business. The nondistribution constraint does not bar such activity, so long as the income accrued is used in a way that is consistent with the nonprofit purpose of the organization. See, *id.*; § 21-1928 (setting forth general powers of nonprofit corporation). Well-known examples of significant commercial activity used by nonprofit entities to raise money include the merchandising of Sesame Street products and the sale of Girl Scout cookies.

When commercial nonprofits are relatively small, such as Union Oaks, their operational character is analogous to those for-profit organizations commonly referred to "closely held corporations" or "close corporations." See Lewis, *supra*. The reality of blurring between for-profits and nonprofits is continuing to change the legal rules that apply to nonprofits, and as nonprofits have become more business-like in character, many laws once considered inapposite have become relevant. See *id.* Consequently, as stated by Professor Lewis:

> The relevance of divorce law to nonprofits may not be immediately evident. But this reflects one of the problems addressed by this Article: The subtleties of sector-blurring are masked by organizational forms that once accurately reflected organizational substance, but that now have lost their accuracy. The traditional for-purpose/for-profit dichotomy between nonprofits and businesses is no longer sufficiently substantial to justify equating organizational form with substance. Today, many nonprofits serve both for-purpose and for-profit goals . . . . Therefore, many of the legal changes now applicable to nonprofits reflect logical extensions of settled law to the altered reality of nonprofits. Such extensions are based on a fundamental jurisprudential tenet: Similar factual situations dictate similar legal treatment.

Id. at 1773. See, also, generally, 18 Am. Jur. 2d *Corporations* § 47 (1985) (stating that status of entity as nonprofit corporation in and of itself does not bar application of equitable remedy of piercing corporate veil).

Accordingly, the courts which have confronted the situation have held that nonprofit corporations are subject to the same rules of law as for-profit corporations with respect to the equitable remedy of "reverse piercing" of the nonprofit corporate veil under an alter ego theory of liability. See, e.g., *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9th Cir. 1993); *U.S. v. Kitsos*, 770 F. Supp. 1230 (N.D. Ill. 1991), *aff'd* 968 F.2d 1219 (7th Cir. 1992); *Loving Saviour Church v. United States*, 556 F. Supp. 688 (S.D. 1983), *aff'd* 728 F.2d 1085 (8th Cir. 1984); *Barineau v. Barineau*, 662 So. 2d 1008 (Fla. App. 1995). See, also, e.g., *Lakota Girl Scout C., Inc. v. Havey Fund-Rais. Man., Inc.*, 519

F.2d 634 (8th Cir. 1975); *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251, 50 Ill. Dec. 934 (1981) (holding individual liable for obligations of alter ego nonprofit corporation).

In *Barineau, supra*, the Florida District Court of Appeal applied reverse piercing, under an alter ego theory, specifically in the context of equitable distribution in a dissolution of marriage. In that case, the trial court entered summary judgment in favor of Faith Chapel, Inc., a nonprofit corporation alleged to be the husband's alter ego. The appellate court reversed the trial court's ruling and remanded the case, stating that basic corporation law is that nonprofit corporations are not exempt from the doctrines of piercing the corporate veil and the alter ego theory. See *id.* The court stated that "[t]he arguments presented by [the husband] do not convince us that the court may never inquire whether a non-profit corporation is the alter ego of a party in a dissolution proceeding for the purpose of achieving equitable distribution." *Id.* at 1009. Instead, the court adopted the wife's theory that "if Faith Chapel is determined to be [the husband]'s alter ego, and if it is determined that the corporation is engaged in improper conduct involving assets that are rightfully marital assets, such findings can be taken into account in equitable distribution." *Id.*

[17] We agree with the foregoing analysis and likewise hold that a corporation's status as a nonprofit corporation in and of itself does not bar a court from finding the corporation to be the alter ego of an individual and from applying the equitable remedy of piercing the corporate veil. Applying that holding to the present case, we determine that application of those equitable principles to Union Oaks is appropriate. Union Oaks, while organized as a religious nonprofit, has nonetheless been financed by its activities as a commercial nonprofit, specifically by real estate transactions. The record is clear that Union Oaks has received few if any donations and that Buddy's real estate transactions have been the primary foundation for Union Oaks' assets. If Union Oaks had been financed by donations from third parties, intended to support religious activities, the equities of this situation would be far different. Under the circumstances presented, however, Union Oaks may be appropriately subjected to the same rules of law that would be applied to a for-profit corporation.

First Amendment

[18] Buddy argues that Union Oaks is exempt from scrutiny under the First Amendment to the U.S. Constitution, because Union Oaks is a religious organization. The religious activities of Union Oaks, or lack thereof, were the subject of considerable dispute in the district court. However, we need not address the legitimacy of Union Oaks' religious status, as the neutral principles of law set forth above are in any event applicable to Union Oaks. Religious corporations are governed by the same general rules of law and equity as other corporations; in other words, they are subject to the same principles of law as any other civil corporation in courts of general jurisdiction. See, generally, 1A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 80 (perm. ed., rev. vol. 1993 & Cum. Supp. 2001).

[19] Buddy does not specify whether his First Amendment claim is made pursuant to the Establishment Clause or the Free Exercise Clause. Neither clause, however, supports Buddy's claim that the First Amendment bars the equitable remedy applied above. In Establishment Clause cases, a three-part test has been elaborated by the Supreme Court. Government action passes muster under this clause if (1) the statute or government action has a secular legislative purpose, (2) its principal or primary effect must neither advance nor inhibit religion, and (3) it does not foster excessive government entanglement with religion. *Donovan v. Tony and Susan Alamo Foundation*, 722 F.2d 397 (8th Cir. 1983), *aff'd sub nom. Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985), citing *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

[20-22] Measured by this standard, the application of equitable distribution principles to Union Oaks, on the facts of this case, does not violate the Establishment Clause. The State has a legitimate interest in resolving property disputes, and a civil court is a proper forum for that resolution. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969). Not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. *Id.* The application of general law, the purpose and effect of which is to advance the State's secular goals, is valid

despite an indirect burden on religious observance. See *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961). So long as a court is not involved in resolving underlying controversies over religious doctrine, "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Presbyterian Church*, 393 U.S. at 449. In this case, there is no dispute presented regarding Union Oaks' religious doctrine, if any, and we have applied the same well-established principles of law to Union Oaks that would be applied in any similar dispute involving a secular corporation.

[23,24] Similarly, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Id.* A legal determination, otherwise legitimate, "does not violate the Free Exercise Clause merely because financial detriment results." *Donovan*, 722 F.2d at 403, citing *Braunfeld, supra*. An individual's religious beliefs do not excuse the individual from compliance with an otherwise valid law regarding conduct that the State is free to regulate. See *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

Moreover, the activities of Union Oaks most at issue here relate to its commercial activity, not a course of conduct asserted to be an expression of religion. For instance, driving a Sunday school bus does not constitute a religious practice merely because the bus is owned by a religious organization, the driver is an ordained minister, and the bus is taking church members to a religious ceremony. *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 66 Cal. Rptr. 2d 1 (1989), *vacated on other grounds* 499 U.S. 914, 111 S. Ct. 1298, 113 L. Ed. 2d 234 (1991). Where, as here, a nominally religious nonprofit corporation is engaged in a discrete commercial enterprise, it subjects itself to the same general rules of law otherwise applicable to such enterprises. See, generally, *Tony & Susan Alamo Foundation v. Sec'y of Labor, supra*.

The application of general rules of family law and corporate law to a situation involving a religious corporation offends neither the Establishment Clause nor the Free Exercise Clause. Without inquiry into the legitimacy of Union Oaks' religious

activities, we conclude that on the facts presented, the corporate veil of Union Oaks may be pierced without violating the First Amendment to the U.S. Constitution.

Jurisdiction Over Union Oaks

[25] Finally, Buddy argues that the district court and this court cannot dispose of Union Oaks' assets because Union Oaks was not made a party to the proceedings. It should be noted that Linda sought to have Union Oaks joined as a party, but that Buddy successfully persuaded the district court not to join Union Oaks. It is a general rule that a party cannot complain of error which that party has invited the court to commit. *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995).

[26,27] In any event, however, the interests of Union Oaks were adequately represented in the district court by Buddy, Union Oaks' alter ego. A nonparty may be bound by an equitable judgment sustaining an alter ego action if the party's interests are so closely affiliated with the nonparty's interests that the interests are merged. See, e.g., *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977); *Valley Finance, Inc. v. United States*, 629 F.2d 162 (D.C. Cir. 1980); *In re 1438 Meridian Place, N. W., Inc.*, 15 B.R. 89 (D.C. 1981), *Sample v. Sample*, 152 Ariz. 239, 731 P.2d 604 (Ariz. App. 1986); *Lyons v. Lyons*, 340 So. 2d 450 (Ala. Civ. App. 1976). In order for a corporation to be accorded treatment as a separate legal entity, it must exist and function as such and not merely as the alter ego of a person controlling it. See *Lyons, supra*. Clearly, there can be no argument here that Union Oaks was without notice or will be deprived of any substantive rights, where it was on notice of the relief requested by Linda and where it was brought before the court in the person of its alter ego, Buddy.

Valuation and Division

As previously stated, equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). We have concluded that assets which came into Union Oaks during the time of the parties' marriage were in fact part of the marital estate and subject to division upon dissolution.

The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gibilisco, supra*. Having determined that Union Oaks' assets are part of the marital estate, it remains to value and divide those assets between the parties.

Although the district court did not include the assets of Union Oaks in the marital estate, it did state, for the record, the value of Union Oaks. The court concluded that the value of Union Oaks had grown to approximately $1.3 million. This court, like the district court, is somewhat frustrated in an attempt to place a more precise value on Union Oaks' assets, due to Union Oaks' questionable fiscal discipline and Buddy's reticence to answer even the most basic financial questions. Nonetheless, the district court's figure of $1.3 million is supported by the record and is perhaps even somewhat conservative, given that Union Oaks' real estate holdings, cash assets, and accounts receivable, by themselves, added up at the time of trial to just under $1.02 million. On a de novo review of the record, we find no basis for concluding that the district court's valuation of Union Oaks' assets, at $1.3 million, constituted an abuse of discretion, and we conclude that the valuation is proper in all respects. Cf. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986) (appellate court will affirm trial court's valuation of closely held corporation if such method of valuation has acceptable basis in fact and principle).

[28] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001). In this case, however, we find the record is too stale for this court to attempt an in-kind distribution. See *Kellner v. Kellner*, 8 Neb. App. 316, 593 N.W.2d 1 (1999). While this appeal was pending, Union Oaks may have engaged in further commercial activity, thus changing the manner in which Union Oaks' assets are held, or Union Oaks' board of directors may have asserted its authority in some manner.

We note that action by Union Oaks' board of directors, even the removal of Buddy from his position of control over the

corporation, would not affect the equitable remedy to which Linda is entitled, because Union Oaks was the alter ego of Buddy at all relevant times during the marriage and the assets acquired by Union Oaks during the marriage are properly considered marital property. Nonetheless, absent current information regarding Union Oaks' assets, we cannot appropriately exercise our appellate power to enter an order equitably dividing the marital estate; under the circumstances, the equitable division of the marital estate is properly committed to the discretion of the district court based upon the principles expressed in this opinion.

Consequently, we reverse the district court's judgment with respect to property division, except that we affirm the district court's judgment with respect to the $50,000 note from Union Oaks to the Medlocks and the automobile awarded to Linda. We remand the cause to the district court with directions to distribute those assets of Union Oaks as may be necessary to equitably divide the marital estate. We do not comment on whether cash payment or in-kind distribution will be the appropriate means for such distribution, but instead entrust the details of the distribution to the district court's discretion based upon the evidence presented.

[29] We also recognize that the district court's alimony award and award of attorney fees may now change given the substantially altered circumstances presented by our resolution of this appeal. The record reveals that some of the real estate held by Union Oaks was income producing, and the possible transfer of these income-producing assets may alter the equities involved in the award of alimony. See, *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988); *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001); *Hafer v. Hafer*, 3 Neb. App. 129, 524 N.W.2d 65 (1994). Similarly, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Thus, we also reverse the district court's awards of alimony and attorney fees. We specifically do not find that the district court abused its discretion in entering those awards; rather, we simply direct the district court to reconsider the issues

of alimony and attorney fees in light of the changed circumstances of the division of marital property between the parties.

CONCLUSION

The district court's judgment regarding division of marital property, alimony, and attorney fees is reversed, with the exceptions noted above. The district court's dissolution decree is affirmed in all other respects. The cause is remanded to the district court with directions to equitably divide the marital estate, including the assets of Union Oaks, valued at $1.3 million, and revisit the issues of alimony and attorney fees in light of the property division.

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

RENAE SPRADLIN, APPELLANT, V. DAIRYLAND INSURANCE COMPANY AND SENTRY INSURANCE A MUTUAL COMPANY, APPELLEES.

641 N.W.2d 634

Filed April 12, 2002. No. S-00-1108.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader.
2. **Demurrer: Pleadings.** 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. **Demurrer.** When a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which the demurrer is sustained.
5. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds upon which it was asserted is well taken.
6. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
7. **Statutes: 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.

8. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.

Appeal from the District Court for Phelps County: TERRI HARDER, Judge. Affirmed.

Lori L. Phillips, for Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellees, Dairyland Insurance Company (Dairyland) and Sentry Insurance a Mutual Company (Sentry), issued to appellant, Renae Spradlin, an insurance policy that included underinsured motorist coverage. Spradlin was involved in an automobile accident which resulted in the death of a passenger in her automobile, Cashe Klein. Rebecca L. Klein, the mother of Cashe, assigned to Spradlin her cause of action against Dairyland and Sentry. Spradlin brought a cause of action against Dairyland and Sentry pursuant to the wrongful death statutes. See Neb. Rev. Stat. § 30-809 (Reissue 1995). Dairyland and Sentry filed a demurrer, which the trial court sustained, and Spradlin appealed. We affirm the order of the trial court.

BACKGROUND

On June 4, 1998, Spradlin was operating her automobile in a westerly direction approaching an intersection in rural Phelps County, Nebraska. At the same time, Kenton Benson was operating his automobile in a southerly direction, approaching the same intersection. The entrance to the intersection from the north was controlled by a stop sign. Benson did not yield to Spradlin's automobile when he entered the intersection and collided with Spradlin's automobile. As a result, Cashe, a minor child, who was a passenger in Spradlin's automobile, was killed.

At the time of the accident, Spradlin owned an insurance policy that provided underinsured motorist coverage, which she had purchased from Dairyland and Sentry.

Cashe's mother, Rebecca, was appointed personal representative of Cashe's estate and assigned to Spradlin her causes of action against Dairyland and Sentry in her capacity as personal representative and as surviving parent of Cashe. Benson's insurance carrier, Shelter Insurance, provided a total of $50,000 of coverage, which was divided equally between Cashe's estate and Spradlin's family. The $25,000 received by Cashe's estate was allegedly insufficient to compensate for all of the damages sustained by the estate.

On June 2, 2000, Spradlin filed a petition in the district court for Phelps County against Dairyland and Sentry for the wrongful death of Cashe. Pursuant to Neb. Rev. Stat. § 25-806(2) and (6) (Reissue 1995), Dairyland and Sentry filed a demurrer to Spradlin's petition, asserting that the petition did not state facts sufficient to constitute a cause of action and that Spradlin had no legal capacity to sue for the wrongful death of Cashe. The trial court sustained Dairyland and Sentry's demurrer, gave Spradlin 30 days to amend her petition, and later dismissed Spradlin's cause of action. Thereafter, Spradlin appealed to the Nebraska Court of Appeals. On its own motion, this court removed the case to its docket.

ASSIGNMENT OF ERROR

Spradlin claims that the trial court erred in sustaining Dairyland and Sentry's demurrer.

STANDARD OF REVIEW

[1] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[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. *J.B.*

Contracting Servs. v. Universal Surety Co., 261 Neb. 586, 624 N.W.2d 13 (2001).

[3] 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. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

ANALYSIS

Spradlin argues that she stated facts sufficient to constitute a cause of action and alleges that Rebecca validly assigned to Spradlin her cause of action. The assignment stated:

> THE UNDERSIGNED, in consideration of the parties' agreement with respect to the division of proceeds recovered from Shelter Insurance and the Estate of Kenton Benson, assigns to Renae Spradlin in her individual capacity as biological mother of Dylan Hauser and Andrew Spradlin, and as conservator of the Estate of Dylan Hauser and Estate of Andrew Spradlin, all of her rights and interests in and unto any cause of action, claims and damages sustained by herself individually and as parent, guardian and personal representative of Cashe Klein, deceased, arising out of or in connection with an accident occurring on June 4, 1998, in Phelps County, Nebraska in which Cashe Klein was killed. This assignment is an assignment only of claims the undersigned may have against Renae Spradlin's insurance carrier pursuant to and under the underinsurance provisions of said policy.

The language contained in the assignment delineates the intent of Rebecca to transfer her present interest in the wrongful death cause of action to Spradlin. As a result, Spradlin argues that she possesses Rebecca's rights in pursuing the wrongful death cause of action. In taking such a position, Spradlin necessarily argues that Nebraska law allows for a wrongful death cause of action to be assigned.

We initially note that Dairyland and Sentry cited two reasons in support of their demurrer: (1) The petition does not state facts sufficient to state a cause of action and (2) Spradlin has no legal capacity to sue for the wrongful death of Cashe. In the order sustaining the demurrer, the trial court did not specify the ground upon which it relied.

[4,5] In *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998), we stated that when a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which the demurrer is sustained. If the trial court does not specify such grounds, an appellate court is not informed in regard to wherein the complaint was determined to be deficient. However, an order sustaining a demurrer will be affirmed if any one of the grounds upon which it was asserted is well taken. *Noffsinger v. Nebraska State Bar Assn.*, 261 Neb. 184, 622 N.W.2d 620 (2001).

[6] According to Neb. Rev. Stat. § 30-810 (Reissue 1995), an action for wrongful death "shall be brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin." As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The use of the word "shall" in § 30-810 precludes anyone but the personal representative from bringing the cause of action.

[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. *Burlington Northen Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001); *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

The plain language of the statute allows only the personal representative to bring the action and only the widow, widower, or next of kin to benefit. We therefore hold that a wrongful death cause of action cannot be assigned.

[8] A statement of facts sufficient to constitute a cause of action, as used in § 25-806(6), means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Coburn v. Reiser, supra*. Since Rebecca could not have validly assigned her wrongful death action to Spradlin, Spradlin could not have validly brought the claim against Dairyland and Sentry. Under the plain language of § 30-810, Spradlin is not a proper plaintiff in a cause of action for the wrongful death of Cashe. Thus, Dairyland and Sentry

cannot be legally liable to Spradlin for the wrongful death of Cashe, and Spradlin has failed to state facts sufficient to constitute a cause of action.

CONCLUSION

We conclude that the plain language of § 30-810 does not allow for the assignment of a wrongful death cause of action. That being so, Spradlin has failed to state facts in her petition sufficient to constitute a cause of action. Thus, the trial court was correct in sustaining the demurrer to Spradlin's petition and dismissing the action.

AFFIRMED.

HENDRY, C.J., not participating.

MICHELE MCCORMICK, CONSERVATOR OF THE ESTATE OF ALYSSA M. WICKERT MCCORMICK, A MINOR, AND PATRICK AND MICHELE MCCORMICK, PARENTS OF ALYSSA M. WICKERT MCCORMICK, A MINOR, APPELLANTS, V. CITY OF NORFOLK, APPELLEE.

641 N.W.2d 638

Filed April 12, 2002. No. S-00-1332.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** Neb. Rev. Stat. § 13-908 (Reissue 1997) of the Political Subdivisions Tort Claims Act sets forth a general waiver of immunity subject to certain limited exceptions stated in Neb. Rev. Stat. § 13-910 (Reissue 1997).
3. **Political Subdivisions: Highways.** The placement of traffic control devices is a discretionary function of a political subdivision under Neb. Rev. Stat. § 13-910(2) (Reissue 1997).
4. **Demurrer: Pleadings.** If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted.
5. **Political Subdivisions Tort Claims Act: Governmental Subdivisions: Pedestrians: Motor Vehicles: Pleadings.** A petition which purports to impose a duty to warn or otherwise protect pedestrians based upon a governmental entity's acts or omissions regarding traffic control devices in response to changed traffic circumstances cannot form the basis of a valid duty-to-warn claim under the Political Subdivisions Tort Claims Act.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Richard L. Swenson, of Wintroub, McCreary, Lunz & Jersey, for appellants.

C.J. Gatz and Todd B. Vetter, of Gatz, Fitzgerald & Vetter, for appellee.

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

CONNOLLY, J.

The appellants, Patrick and Michele McCormick, filed this action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), for personal injuries sustained by their 9-year-old daughter, Alyssa M. Wickert McCormick. The district court sustained the demurrer of the appellee, City of Norfolk (City), and dismissed the petition. The court found that the City's acts and omissions were immune from liability under § 13-910(9). The court found that the petition could not be amended to state a claim against the City and dismissed the petition. We affirm.

BACKGROUND

In their amended petition, the McCormicks alleged the following facts, which this court accepts as true in reviewing the order sustaining the City's demurrer:

On May 16, 1998, Alyssa was hit by a car while walking her bicycle in a marked crosswalk across Fourth Street at the intersection of Fourth and Elm Streets. Alyssa suffered severe and permanent injuries because of the accident. She is restricted to a wheelchair and requires 24-hour care.

Fourth Street has a high volume of traffic, runs in a north-south direction, and is unimpeded by traffic control signals or pedestrian crossing devices at the intersection. Before the accident, the City had actual or constructive knowledge of numerous motor vehicle collisions and motor vehicle-pedestrian collisions at this intersection. The City also had knowledge that the intersection was used by persons of like age, intelligence, and experience as

Alyssa. The traffic on Elm Street runs in an east-west direction and is stopped at the intersection by stop signs.

The McCormicks alleged that the City's failure to install traffic signals or other types of warning devices to protect pedestrians had created a dangerous and hazardous condition. They also alleged that pedestrians of Alyssa's age, intelligence, and experience would not appreciate the danger. They further alleged that although the choice of what type of warning or protection to use was discretionary, the decision whether to do so was not a planning-level decision involving policy judgment. The McCormicks have not alleged that the City failed to comply with any adopted policies.

The City demurred on the ground that the McCormicks' amended petition failed to set forth facts sufficient to constitute a cause of action. The court found that because § 13-910(9) provides immunity to the City for its acts or omissions, the McCormicks had failed to state a cause of action. It concluded that they could not amend their petition to correct its defects.

ASSIGNMENTS OF ERROR

The McCormicks assign that the district court erred in finding that § 13-910(9) provided immunity to the City and in sustaining the City's demurrer.

STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Northwall v. State, ante* p. 1, 637 N.W.2d 890 (2002).

ANALYSIS

Paragraph 9 of the petition states:

> That the failure of the [City] to install a traffic signal or any other types of warning device to protect pedestrians using the crosswalk and proceeding either in an easterly or westerly direction across 4th Street at the intersection of 4th Street and Elm Street on May 16, 1998, rendered that intersection dangerous and hazardous for pedestrian use; that on May 16, 1998, the [City] had actual or constructive notice

> or knowledge of the dangerous and hazardous condition of the intersection . . . and that said intersection, in its hazardous state, was under the control of the [City]; that the dangerous condition or hazard was not readily apparent to [Alyssa], who was likely to be injured by the dangerous or hazardous condition of the intersection and as such, the [City] had a non-discretionary duty to warn of the danger or take other protective measures that would prevent injury as a result of the dangerous or hazardous condition of the intersection of 4th and Elm Streets. That the [City's] failure to warn or take other protective measures in this situation constituted actionable negligence and was not a planning-level decision involving a social, economic, or political policy judgment and, therefore, did not come within the discretionary function exemption of the Political Subdivision[s] Tort Claim[s] Act.

In the petition, the McCormicks admitted that stop signs were in place for traffic crossing Fourth Street on Elm Street in an east-west direction. They also admitted that there was a marked crosswalk for pedestrians crossing Fourth Street. We read the petition to assert that the City's failure to install traffic control devices for traffic moving in a north-south direction on Fourth Street created a dangerous condition or hazard. The McCormicks further alleged that this dangerous and hazardous condition gave rise to a duty to warn or take other measures to protect pedestrians who are crossing Fourth Street.

[2] The court granted the City's demurrer because it found that the City was immune from liability under the exception in § 13-910(9). Section 13-908 of the Political Subdivisions Tort Claims Act sets forth a general waiver of immunity subject to certain limited exceptions stated in § 13-910. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). Section 13-910 provides:

> The Political Subdivisions Tort Claims Act . . . shall not apply to:
>
> . . . .
>
> (9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the political

> subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision.

The City contends that under the second sentence of § 13-910(9), its decisions regarding the installation of traffic control or warning devices do not give rise to a cause of action. It claims that its decisions to install a crosswalk and stop signs rather than traffic signals or other devices are immune from liability as discretionary functions. The McCormicks, however, argue that the second sentence is only a cautionary reminder that this exception does not result in liability when such placement or removal is the result of a discretionary act. We agree.

Section 13-910(9) distinguishes between a political subdivision's liability for failure to maintain or replace existing signs, signals, or warning devices and its liability for acts or omissions concerning their placement or deliberate removal. It states that the City's acts or omissions regarding their placement or removal are exempt from the general waiver of immunity when they are the result of a discretionary act. Thus, the City's immunity ultimately depends upon whether the acts or omissions regarding its alleged failure to install traffic controls or pedestrian crossing devices are discretionary within the meaning of § 13-910(2).

Section 13-910(2) provides an exception to liability for "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused." A political subdivision can be liable in tort "to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act." See § 13-902.

Neb. Rev. Stat. § 60-6,121 (Reissue 1998) indicates that the Legislature intended political subdivisions to have discretion in the installation of traffic control devices:

> Local authorities in their respective jurisdictions shall place and maintain such traffic control devices upon

> highways under their jurisdictions *as they deem necessary* to indicate and to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn, or guide traffic. All such traffic control devices erected pursuant to the rules shall conform with the manual.

(Emphasis supplied.) See, also, *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984) (holding that when official must make judgmental decision within regulatory framework, acts are discretionary).

Further, the installation of traffic control devices involves balancing the competing needs of pedestrian safety, engineering concerns, commerce, and traffic flow—which in itself involves safety issues—with limited financial resources. These decisions are normally the type of economic, political, and social policy judgments that the discretionary function exception was designed to shield. See, e.g., *Rapp v. State*, 648 P.2d 110 (Alaska 1982); *Aguehounde v. District of Columbia*, 666 A.2d 443 (D.C. 1995); *Department of Transp. v. Konney*, 587 So. 2d 1292 (Fla. 1991); *Nawrocki v Macomb Co Rd Comm*, 463 Mich. 143, 615 N.W.2d 702 (2000); *Nevada Power v. Clark County*, 107 Nev. 428, 813 P.2d 477 (1991); *Weiss v. New Jersey Transit*, 128 N.J. 376, 608 A.2d 254 (1992); *Winwood v. Dayton*, 37 Ohio St. 3d 282, 525 N.E.2d 808 (1988); *Ochoa v. Taylor*, 635 P.2d 604 (Okla. 1981); *City of Midland v. Sullivan*, 33 S.W.3d 1 (Tex. App. 2000). But see *Alexander v. Eldred*, 63 N.Y.2d 460, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984) (holding that city did not have immunity where evidence that traffic engineer had not reviewed current traffic study and believed that city had no power to install stop sign on private road established that traffic plan was based on both inadequate study and unreasonable basis).

[3] "Because immunity necessarily implies that a 'wrong' has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied." *Nawrocki*, 463 Mich. at 157, 615 N.W.2d at 710. We are also cognizant that every intersection has some inherent danger and that there are, potentially, unlimited theories of recovery that could be raised against governmental entities for failing to install traffic control devices. The immunity provisions of § 13-910(2) and (9) signify that this is the type of public policy decision the Legislature

intended to preclude courts from reviewing. We conclude that the placement of traffic control devices is a discretionary function of a political subdivision.

The McCormicks, however, argue that the discretionary function exception does not apply when (1) a governmental entity has actual or constructive knowledge of a known dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons likely to be injured by the dangerous condition or hazard. See, *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999); *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

In *Lemke*, we relied on two Florida cases for the duty-to-warn exception to the discretionary function immunity. Florida recognizes an operational-level duty to warn the public of a known dangerous condition which is not readily apparent to those who could be injured by the condition—when the governmental entity has created the danger through a discretionary decision. See, *City of St. Petersburg v. Collom*, 419 So. 2d 1082 (Fla. 1982); *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982).

The Florida Supreme Court has explained that this exception applies only when a dangerous condition arises out of the design or planning decision itself. See *Department of Transp. v. Konney, supra*. In *Konney*, a jury awarded damages to the decedent's personal representative on a duty-to-warn theory. The plaintiffs had alleged that a rural intersection should have been upgraded by installing flashing beacons and rumble strips instead of stop signs to warn drivers of the intersection. The Florida Supreme Court reversed. The court concluded that the evidence established that the intersection was not a known dangerous condition when it was created. It held that the plaintiffs could not establish a cause of action by asserting that the county had a duty to upgrade the intersection because of changed circumstances. See *id*.

The McCormicks' petition did not allege that the City's initial design or planning decisions regarding this intersection were inherently dangerous or that the decisions caused a dangerous condition or hazard. Rather, they allege that the City's duty to warn arose out of its failure to install traffic control devices after it had actual or constructive notice of numerous accidents at the

intersection. In their brief, the McCormicks concede that "[t]he design of this street itself was adequate as it was. All it needed was the addition of a traffic light, a pedestrian crossing signal, a stop sign at the crosswalk or some other form of warning or protection of the children using that crosswalk." Brief for appellants at 7.

[4,5] If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000). The McCormicks' petition purports to impose a duty to warn or otherwise protect pedestrians based upon the City's acts or omissions regarding traffic control devices in response to changed traffic circumstances. We conclude that these circumstances cannot form the basis of a valid duty-to-warn claim under the Political Subdivisions Tort Claims Act.

CONCLUSION

The McCormicks' petition has failed to state a valid duty-to-warn claim against the City and cannot be amended to correct the defect. The district court's sustainment of the City's demurrer is affirmed.

AFFIRMED.

JEFFREY W. HENERY, SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROL LEE HENERY, DECEASED, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT AND CROSS-APPELLEE, AND DOUGLAS L. HENDERSON, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

641 N.W.2d 644

Filed April 12, 2002. No. S-01-498.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **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.
3. **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.

4. ____: ____. 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.
5. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** An "innocent third party" under Neb. Rev. Stat. § 13-911 (Reissue 1991) is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.

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

Thomas O. Mumgaard and Michelle Peters for appellant.

Ronald J. Palagi and Steven H. Howard, of the Law Offices of Ronald J. Palagi, for appellee Jeffrey W. Henery.

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

MILLER-LERMAN, J.

NATURE OF CASE

During a police pursuit, a motor vehicle driven by Douglas L. Henderson collided with a building, and the vehicle's passenger, Carol Lee Henery (Henery), was killed. Jeffrey W. Henery, the special administrator of Henery's estate (special administrator), filed a petition in the district court for Douglas County alleging that the City of Omaha was liable for damages due to Henery's death by operation of Neb. Rev. Stat. § 13-911 (Reissue 1991) in that Henery was an "innocent third party" whose death was proximately caused by the vehicular pursuit by an Omaha police officer. The city filed an answer generally denying liability. Independently of its answer, the city filed a third-party petition against Henderson, generally alleging that Henderson was responsible for Henery's death and seeking judgment against Henderson in the event the city were found liable for damages for Henery's death.

The district court concluded that Henery was an "innocent third party" within the meaning of § 13-911 and concluded that the city was liable for damages due to Henery's death. The district court entered judgment against the city and in favor of the special administrator of Henery's estate in the amount of $185,211.22. The city appeals from the district court's judgment.

Henderson filed a cross-appeal. We affirm the district court's judgment against the city and in favor of Henery's estate. Due to the lack of a final order as between the city and Henderson, we dismiss Henderson's cross-appeal.

STATEMENT OF FACTS

The relevant facts are not in dispute. At approximately 1:30 a.m. on July 28, 1991, Omaha police officer Charles Matson, patrolling in a marked police cruiser, observed a vehicle with two occupants driving north on Park Avenue at an excessive rate of speed. It was later determined that Henderson was the vehicle's driver and that Henery was a passenger in the car. Matson estimated that the vehicle was exceeding the posted speed limit by approximately 20 miles per hour. When the vehicle did not slow down, Matson initiated pursuit of Henderson as a speeder and suspected drunk driver.

Henderson turned his vehicle east onto Leavenworth Street. Matson followed in pursuit. Near 19th and Leavenworth Streets, Matson activated his overhead rotating lights. Several times during the police pursuit, he also gave short blasts of his police siren in an attempt to gain Henderson's attention. The parties have stipulated that Henderson was aware or should have been aware of Matson's pursuit and that he was "resisting apprehension by maintaining or increasing his speed, ignoring Officer Matson, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the circumstances."

Matson lost sight of Henderson's vehicle after it crested a hill at 16th and Leavenworth Streets. As he approached the same hill, Matson heard screeching tires and a loud crash. Once he had gained the top of the hill, he saw that the vehicle driven by Henderson had left Leavenworth Street near 14th Street, traveled across a vacant lot, and crashed along its passenger side into a brick building.

Henery sustained serious injuries as a result of the accident and died without recovering consciousness. It was later determined that passenger Henery's blood alcohol level was 0.123. The driver, Henderson, was injured in the accident, and although he refused to undergo chemical tests to determine whether he was intoxicated, blood drawn for purposes of medical treatment

was tested and the report listed an alcohol concentration of approximately "25MG/DL."

The parties agree that prior to the accident, Henderson and Henery had spent the evening together visiting bars and consuming alcohol. The parties also agree that at the time of the accident, Henderson was visibly intoxicated, displaying slurred speech and impaired motor functions.

On April 23, 1993, the special administrator of Henery's estate filed a petition in the district court for Douglas County pursuant to the Political Subdivisions Tort Claims Act, § 13-901 et seq. (Reissue 1987). As one of its theories of recovery, the petition alleged that the city was liable for damages due to Henery's death by operation of § 13-911 (Reissue 1991) in that Henery was an innocent third party whose death was proximately caused by the vehicular pursuit by Matson, the Omaha police officer. Section 13-911 provides as follows: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." Section 13-911 defines "vehicular pursuit" as

> an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

In its amended answer, the city generally denied that it was liable for damages for Henery's death. Independent of its answer, the city filed a third-party petition against Henderson. As later amended, the city's third-party petition alleged that the "sole proximate cause of the collision between the vehicle driven by [Henderson] and the building was the negligence and/or willful disregard and intentional acts of [Henderson]." The city prayed that if the special administrator were awarded a judgment in his suit against the city, the city would receive a judgment against Henderson in the same amount.

The special administrator's petition against the city and the city's third-party petition against Henderson came on for trial on November 13, 2000. The special administrator and the city appeared at trial. Henderson did not appear either personally or through counsel. The trial lasted 2 days. The record contains almost 400 pages of testimony from 14 witnesses. Approximately 65 exhibits were received into evidence.

During the trial, Matson testified that he did not observe Henery commit any crimes and that he was not aware of any reason for Henery to flee from police. He also testified that he had no knowledge that Henery planned or encouraged Henderson's flight from the police. Finally, he testified that he was unaware that Henery "did anything wrong" the morning of July 28, 1991.

In an order filed January 16, 2001, the court concluded that "the requirements of Neb.Rev.Stat. Sec. 13-911, creating . . . liability on the part of [the city] have been met." The court's order further stated that "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT pursuant to Neb.Rev.Stat. Sec. 13-911, the [special administrator] is entitled to a judgment against [the city] in the amount of $185,211.22." The district court's order did not resolve the city's third-party petition against Henderson.

In an order filed April 13, 2001, in accordance with the provisions of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000), the district court found that there was no reason to delay the entry of the final judgment in favor of the special administrator and against the city. Accordingly, the district court ordered that the January 16 order was a final judgment as between the special administrator of Henery's estate and the city.

On April 30, 2001, the city filed its notice of appeal from the district court's April 13 order. On May 25, Henderson filed a separate notice of appeal. The city and the special administrator have filed briefs in this appeal. Henderson has not submitted a brief.

ASSIGNMENT OF ERROR

In its appeal, the city assigns one error. The city claims the district court erred in concluding that Henery was an "innocent third party" within the scope of § 13-911 and in entering judgment against the city and in favor of the special administrator of Henery's estate.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 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. *Hunt v. Trackwell, supra*.

ANALYSIS

Rules of Statutory Construction.

[3,4] This appeal presents a question of statutory construction. 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. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (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.*; *Hunt v. Trackwell, supra*.

Innocent Third Party: § 13-911.

On appeal, the city does not challenge the district court's conclusions that Matson was in vehicular pursuit of Henderson and that such pursuit was the proximate cause of Henery's death, both of which are statutory requirements which must be met before the city can be found liable for damages under § 13-911. Instead, the city argues that Henery was not an "innocent third party" as that phrase is used in § 13-911 and that, therefore, the city does not owe damages to Henery's estate.

The city correctly notes that "innocent third party" is not defined within the statute. The city claims that when the Legislature enacted § 13-911 and its predecessor, Neb. Rev. Stat. § 25-21,183 (Cum. Supp. 1982), it "intended only to protect persons who were hurt through no fault or negligence of their own." Brief for appellant at 13. The city argues that "the Legislature never expected recovery by actual participants in a vehicular pursuit." *Id.* at 10. According to the city, Henery's estate cannot recover damages because Henery placed herself in

danger by her "own foolish actions." *Id.* at 13. The city's arguments are unavailing in this case.

Section 13-911 imposes liability upon the city for the damages, injuries, or death sustained by an "innocent third party" as a result of vehicular pursuit involving a city law enforcement officer when the pursuit is an attempt by a law enforcement officer "to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is . . . resisting apprehension." The word "innocent" used to describe the third party to whom damages shall be paid under § 13-911 qualifies the individual who is not the occupant sought to be apprehended and who is, therefore, not the object of the pursuit. See *id.* As used in § 13-911, "innocent" refers to the third party as distinguished from the "one or more occupants" sought to be apprehended, although the third party may be found in the vehicle being pursued.

Our reading of § 13-911 is consistent with *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), in which this court affirmed a decision by the trial court to the effect that a motorcycle passenger who sustained fatal injuries during a police pursuit of the motorcycle's driver was an "innocent third party" within the meaning of the version of § 13-911 then in force and that the city was liable for damages occasioned by the passenger's death. There was no indication in *Stewart* that the motorcycle passenger was the object of apprehension by law enforcement officers.

Following our decision in *Stewart*, the Legislature in 1996 amended § 13-911 to provide for reimbursement to the city from various entities for sums paid under the statute. Despite this court's decision in *Stewart*, the Legislature did not amend § 13-911 to define an "innocent third party." Specifically, the Legislature did not amend the statute to provide that a passenger in a fleeing vehicle being pursued by law enforcement personnel is not an "innocent third party." When 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. Nebraska Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

[5] Statutory language is to be given its plain and ordinary meaning. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). In the absence of anything to the contrary, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*; *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). We conclude that by its use of the phrase "innocent third party" in § 13-911, the Legislature was concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended. "Innocent" as used in the statute describes an individual who is a "third party" under § 13-911. An "innocent third party" under § 13-911 is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.

In the instant case, Matson testified that Henery had not done "anything wrong" and that he had no knowledge that she planned or encouraged Henderson's flight from police. There is no evidence that law enforcement attempted to apprehend Henery. Although Henery may have exhibited poor judgment in riding with Henderson, she did not lose her "innocent third party" status under § 13-911 based only on such choice. There is no evidence that Henery participated in, promoted, provoked, or persuaded Henderson to flee from Matson. Accordingly, we conclude, as a matter of law, that Henery was an "innocent third party" within the provisions of § 13-911. We find no merit to the city's sole assignment of error, and we affirm the district court's decision.

Section 13-911 requires the city to pay damages for the death, injury, or property damage sustained by an "innocent third party" proximately caused by the action of a law enforcement officer employed by the city during a vehicular pursuit. To the extent dicta in *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), suggest that contributory negligence or assumption of the risk are defenses to a cause of action under § 13-911, such language is disapproved.

Henderson's Cross-Appeal.

As noted above, Henderson filed a separate notice of appeal in this case, which we treat as a cross-appeal. Henderson has

failed to file a brief or otherwise indicate from what order he is appealing. See Neb. Ct. R. of Prac. 1E and 9D(4) (rev. 2000). Despite this procedural omission, we have reviewed the record in this appeal and find no final order entered by the district court with regard to the city's third-party petition against Henderson. Absent a final order, this court is without jurisdiction to consider Henderson's cross-appeal. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). Accordingly, we dismiss Henderson's cross-appeal.

CONCLUSION

Henery was an "innocent third party" within the meaning of § 13-911. We affirm the district court's decision entering judgment against the city and in favor of Henery's estate pursuant to § 13-911 for Henery's death which occurred as a result of a vehicular pursuit by a law enforcement officer of a vehicle in which Henery was a passenger. Because the record does not contain a final, appealable order in the city's case against Henderson, we are without jurisdiction to consider Henderson's cross-appeal.

AFFIRMED. CROSS-APPEAL DISMISSED.

R.W. ET AL., APPELLANTS, V. DANIEL B. SCHREIN, M.D., APPELLEE, AND THE MEDICAL PROTECTIVE COMPANY OF FORT WAYNE, INDIANA, GARNISHEE-APPELLEE.

642 N.W.2d 505

Filed April 19, 2002. Nos. S-00-808 through S-00-812.

1. **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.
2. **Judgments: 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. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.

4. **Collateral Estoppel.** Four conditions must exist for the doctrine of collateral estoppel to apply: (1) the identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
5. **Res Judicata: Judgments.** The doctrine of res judicata applies to bar relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
6. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
7. **Contracts: Words and Phrases.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
8. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
9. **Malpractice: Physician and Patient: Liability.** It is the physician's deviation from the recognized medical standard of care during the course of treatment that is the essence of a claim for medical malpractice, and there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.
10. **Sexual Assault: Intent.** An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse.
11. **Insurance: Contracts.** Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
12. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.

Appeals from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellants.

Mark A. Christensen and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for garnishee-appellee.

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

STEPHAN, J.

As children, the five appellants in these actions were patients of Daniel B. Schrein, M.D., who was then a pediatrician practicing in Omaha. Now adults, appellants brought actions to recover damages for sexual abuse perpetrated upon them by Schrein under the guise of medical treatment. After obtaining default judgments against Schrein, appellants commenced these garnishment proceedings against The Medical Protective Company of Fort Wayne, Indiana (Medical Protective), Schrein's professional liability insurer. The district court for Douglas County determined that the claims were not covered under the policy and entered summary judgment in favor of Medical Protective. Appellants perfected these appeals, which we moved to our docket and decide together in this opinion because the dispositive issues are common to each.

I. BACKGROUND

This controversy is before us for the second time. In *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998), Medical Protective sought a declaratory judgment determining that it had no duty to defend or indemnify Schrein with respect to the claims of five former patients that they were sexually abused by Schrein during purported examinations or treatments. The district court entered summary judgment in favor of Medical Protective based upon its determination that Schrein's conduct was not within the scope of professional services as contemplated by the insurance policy. The individual claimants appealed, but Schrein did not cross-appeal. This court held that declaratory judgment with respect to the claimants was improper because the facts pertaining to the issue of coverage had not yet been developed. We noted that the record did not reflect "the specific claims that may be brought against Schrein, e.g., whether the claims involve solely sexual acts or intentional torts, or include other acts or professional negligence." *Id.* at 30, 582 N.W.2d at 291. We further noted that we lacked "the requisite knowledge of what discovery may reveal or, more importantly, what verdict may be rendered by the fact finder." *Id.* We concluded that declaratory relief with respect to the claimants was not necessary because "[a]ny of Medical Protective's defenses or

assertions of noncoverage can be presented without any consequential harm to Medical Protective if or when any of the claimants seeks to garnish policy proceeds as a result of a judgment against Schrein." *Id.* at 31, 582 N.W.2d at 291. However, we determined that because the claimants lacked standing with respect to contractual issues between Medical Protective and Schrein, including the existence of duties to defend or indemnify, our holding did not affect the declaratory judgment rendered in favor of Medical Protective against Schrein.

Appellants herein filed separate actions for professional malpractice against Schrein. Appellant R.W. filed a petition on November 23, 1998, alleging he was Schrein's patient from 1972 to 1990. R.W. alleged that in January 1987, Schrein diagnosed him with and was treating him for recurring meatitis. He alleged that at approximately that time, he developed an antibiotic-induced scrotal infection which Schrein diagnosed as excoriation of the scrotum. R.W. alleged that during an examination, Schrein applied ointment to R.W.'s penis and manipulated it to the point of ejaculation. After commenting about needing to do a sperm count, Schrein forced R.W. to ejaculate again.

Appellant G.N. filed a petition on November 23, 1998. G.N. alleged that he was Schrein's patient from 1986 to 1990. G.N. alleged that from the time he was 11 years old, Schrein would have him sit nude on Schrein's lap while Schrein stroked his body and discussed sexual behavior. G.N. alleged that in 1989, Schrein treated him for meatitis during a physical examination and asked that he return for a followup visit. He alleged that in February 1990, Schrein had him sit on Schrein's lap while he performed a procedure involving insertion of a metal rod into G.N.'s penis.

Appellant C.T. filed a petition on November 23, 1998. C.T. alleged that she was Schrein's patient from 1979 to 1990. She alleged that during the course of examinations, Schrein would have her sit on his lap while nude and would discuss sexual behavior. C.T. alleged that in 1989, while conducting her first pelvic examination, Schrein fondled her breasts, inserted his fingers in her vagina, and manipulated her vulva. C.T. further alleged that before she got dressed, Schrein had her sit on his lap while he

tickled her thighs and asked if she had any boyfriends and if she was sexually active.

Appellant L.N. filed a petition on November 23, 1998. L.N. alleged that during the course of examinations, Schrein would have her sit on his lap nude while he stroked her body and discussed sexual behavior. L.N. also alleged that during examinations, Schrein digitally penetrated her vagina, watched her dress and undress, and made her turn around in front of him when she was nude.

Appellant M.M. filed a petition on October 1, 1998. M.M. alleged that in 1990, when he was 13 years old, he went to Schrein for a routine medical evaluation and treatment concerning the medical condition of being overweight. M.M. alleged that during this visit, Schrein performed a physical examination and diagnosed urinary meatitis. According to the petition, Schrein applied an ointment to M.M.'s penis and manipulated it to the point of ejaculation.

The petitions of all of the above appellants alleged that Schrein knew or should have known that his minor patients were especially vulnerable and readily subject to manipulation and control by their physician. The petitions alleged that this emotional reaction of a patient toward a physician is referred to in the medical community as "transference" and that Schrein had a duty to properly recognize and manage transference as it developed. Each petition alleged that Schrein had a professional, fiduciary, and ethical duty to avoid sexual contact and that his failure to do so fell below the standard of care. Each petition also alleged that Schrein failed to provide proper medical treatment for the conditions presented and performed unnecessary medical examinations and treatments.

Schrein was served by publication in all of the above actions. He failed to answer or appear, and default judgments were entered against him in each case. Each judgment recited that sexual contact with a patient by a fiduciary caused the harm for which damages were sought. The default judgments, which were prepared and submitted by counsel for appellants, also recited that "the acts and omissions of Defendant Schrein arose out of his medical treatment of [appellants] during the course and scope of professional services" in violation of the standard of care.

On March 25, 1999, each appellant issued summons in garnishment upon Medical Protective, alleging that he or she believed Medical Protective held property, in the form of a liability policy, belonging to Schrein. In its answers to the garnishment interrogatories, Medical Protective denied that it held property of Schrein and alleged that its policy of insurance issued to Schrein did not cover payment of damages which were not based upon professional services and that any coverage was further excluded because damages incurred by appellants were the result of criminal, willful, or sexual acts. Appellants each filed applications to determine garnishee liability. See Neb. Rev. Stat. § 25-1030 (Reissue 1995). All parties filed motions for summary judgment. In orders dated July 28, 2000, the district court granted Medical Protective's motions for summary judgment in all five garnishment proceedings. Appellants filed timely appeals, and we granted their respective motions to bypass. The cases were consolidated for oral argument.

II. ASSIGNMENTS OF ERROR

Each appellant assigns, restated, summarized, and consolidated, that the district court erred in (1) allowing Medical Protective to collaterally attack the underlying judgments against Schrein; (2) determining that Medical Protective had a right to assert policy defenses against Schrein in the garnishment proceedings; (3) determining that appellants' claims did not arise from the rendering of "professional services" by Schrein and were therefore not covered under the professional liability insurance policy issued by Medical Protective; (4) determining that there was no coverage under the policy for the additional reason that the claims against Schrein fell within specific coverage exclusions for criminal, willful, or sexual acts; and (5) determining that public policy did not compel that Schrein's victims be compensated.

In addition, R.W. further assigns that the district court erred in (1) finding that his claim against Schrein was barred by the statute of limitations, (2) failing to find that Neb. Rev. Stat. § 25-21,156 (Reissue 1995) was applicable and that his petition was timely filed pursuant thereto, (3) failing to find that his petition and malpractice suit against Schrein relate back to the filing of the

declaratory judgment, and (4) failing to apply the doctrine of judicial estoppel against Medical Protective as it relates to the statute of limitations.

III. STANDARD OF REVIEW

[1,2] 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (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. *Id.*

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 609 N.W.2d 664 (2000).

IV. ANALYSIS

1. Preliminary Issues

(a) Collateral Estoppel and Res Judicata

[4,5] Appellants argue that under principles of collateral estoppel and res judicata, the issue of whether Schrein was engaged in the rendition of professional services at the time the damages were incurred has been conclusively established by the findings in the default judgments that Schrein's acts arose out of medical treatment during the course and scope of providing professional service in violation of the standard of care and therefore cannot be raised in the garnishment proceedings. Four conditions must exist for the doctrine of collateral estoppel to apply: (1) the identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the

issue in the prior action. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). Similarly, the doctrine of res judicata applies to bar relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996). Both doctrines require an identity or privity of parties.

The only parties to these actions at the time the default judgments were entered were appellants and Schrein. Medical Protective received no notice of the filing of the actions until the commencement of garnishment proceedings. In order for the doctrines of collateral estoppel or res judicata to apply, it must be shown that Medical Protective was in privity with the parties. In the previous appeal, *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998), we held that because the claimants, who are now appellants in the instant cases, lacked standing with respect to contractual issues between Medical Protective and Schrein, our holding did not affect the declaratory judgment entered in favor of Medical Protective against Schrein which determined that there was no duty to defend. In *Torrison*, 250 Neb. at 176, 549 N.W.2d at 132, we noted that "'"[p]rivity requires, at a minimum, a substantial identity between the issues in controversy and [a] showing [that] the parties in the two actions are really and substantially in interest the same."'" (Quoting *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).) We concluded that no privity existed between an insurer and an insured where there was no duty to defend the claim which was the subject of the action. Here, because Medical Protective was not in privity with any party to these actions at the time the default judgments were entered, the doctrines of collateral estoppel and res judicata do not foreclose consideration of whether the claims arose out of "professional services" for purposes of determining garnishee liability.

(b) Proper Defenses of Garnishee

Appellants also argue generally that as a garnishee, Medical Protective is precluded from attacking any aspect of the

underlying default judgments sought to be enforced in the garnishment proceedings. In response, Medical Protective argues that it is entitled to raise any defense in this garnishment action that it could have raised in the underlying malpractice actions.

In *Medical Protective v. Schrein*, 255 Neb. 24, 31, 582 N.W.2d 286, 291 (1998), we held that declaratory relief with respect to whether specific claims were covered under the professional liability policy was unnecessary, in part because "[a]ny of Medical Protective's defenses or assertions of noncoverage can be presented without any consequential harm to Medical Protective if or when any of the claimants seeks to garnish policy proceeds as a result of a judgment against Schrein." We reaffirm that holding here.

In the instant case, Medical Protective relies primarily upon three policy defenses it could have raised against Schrein and thus may properly raise in the garnishment proceedings. First, Medical Protective argues that because the policy required that Schrein give it notice of actions filed against him and he failed to do so, a condition precedent to coverage under the policy was not met. Second, Medical Protective argues that Schrein's actions were not "professional services" covered under the policy. Third, Medical Protective argues that the exclusionary clauses of the policy for criminal or sexual acts negate any coverage under the policy. We limit our discussion to the second issue, which is dispositive of these appeals.

2. Rendering of "Professional Services"

[6-8] The applicable language of the insurance policy issued to Schrein provides that Medical Protective will pay damages "based on professional services rendered or which should have been rendered . . . by the insured or any other person for whose acts or omissions the insured is legally responsible, in the practice of the insured's profession." An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*,

262 Neb. 746, 635 N.W.2d 112 (2001). While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). We conclude that the language of the insuring agreement is unambiguous. The question, then, is whether Schrein's actionable conduct constituted "professional services."

In two prior cases, this court has addressed the issue of whether certain conduct constituted "professional services." In *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), a physician's employee mistakenly poured benzine instead of water into a sterilization container, resulting in an explosion and a fire. The physician was insured by a policy covering damages arising out of " 'malpractice, error or mistake of the insured, or of a person for whose acts or omissions the insured is legally responsible . . . in rendering or failing to render professional services.' " (Emphasis omitted.) *Id.* at 13, 157 N.W.2d at 871. Noting that the precise question presented was whether the damages arose out of the rendering or failure to render professional services, we stated:

> The insurer's liability is thus limited to the performing or rendering of "professional" acts or services. Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

(Citations omitted.) *Id.* at 13-14, 157 N.W.2d at 871-72. Finding that the boiling of water for sterilization was "not a part of any patient's treatment per se any more than any other routine cleaning or arranging procedure incidental to the proper general operations of the plaintiffs' offices," we concluded that the act was not a professional service covered by the language of the insurance policy. *Id.* at 14, 157 N.W.2d at 872.

[9] We recently revisited the *Marx* holding in *Iwanski v. Gomes*, 259 Neb. 632, 640, 611 N.W.2d 607, 613 (2000), which presented the question whether "a doctor commits malpractice by engaging in sexual relations or having consensual sex with an individual with whom the doctor concurrently maintains a physician-patient relationship." After recognizing our holding in *Marx*, we concluded that in order to establish that conduct by a physician constitutes malpractice, the acts of the physician upon which the claim is based must " 'be such as exacts the use or application of special learning or attainments of some kind' " that would constitute the " 'performing or rendering of "professional" acts or services.' " *Iwanski*, 259 Neb. at 641, 611 N.W.2d at 614 (quoting *Marx, supra*). In addressing whether the acts of the physician fell within this definition, we referred to case law from other jurisdictions interpreting "professional services" coverage in insurance contracts. We then stated:

> We agree that the fact that sexual misconduct occurs in a medical professional's office "does not automatically transmute the act into a professional service [because the] location of an act's occurrence is not determinative of liability." *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636, 638 (Fla. App. 1994). When the only connection between the sexual misconduct and treatment is that the activity occurred in the medical professional's office, such a connection is too remote from the actual rendering of proper services to impose liability upon the medical professional for malpractice. See *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992).
>
> We conclude, based on the foregoing rationale, that there must be a causal relationship between the alleged harm and the complained-of professional act or service. When there is

> a claim of medical malpractice based on unwanted sexual contact, the determination of liability should focus not solely on the locale of the alleged harm or the professional status of the actor, but, rather, on the context of the alleged medical service involved in the action. In other words, it is the physician's deviation from the recognized medical standard of care *during the course of treatment* that is the essence of a claim for medical malpractice, and *there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.*

(Emphasis in original.) (Emphasis supplied.) *Iwanski*, 259 Neb. at 642, 611 N.W.2d at 614. In applying this standard to the facts, we held that the relationship between the adult parties was consensual and that as to the only incident related to the direct provision of medical services, the evidence established that the sexual act between the patient and the physician took place well after the physician had completed a gynecological examination. We thus held that there was no actionable claim for "professional negligence." *Id.* at 643, 611 N.W.2d at 615.

While the conduct upon which each appellant's claim is based occurred in Schrein's office during what purported to be medical examination and treatment, it is clear from the record that there was no causal connection between any legitimate medical procedure and the harm which appellants suffered. Kevin Cahill, Ph.D., a clinical psychologist who examined four of the appellants, provided affidavits upon which their damage awards were based. Cahill characterized the conduct which caused their psychological injuries as "sexual abuse" and "sexual molestation." William H. Batey, a psychotherapist who examined C.T. and provided the factual basis for her damage award, similarly stated that the injury was "a fairly direct outcome of her sexual molestation experience with her pediatrician." Neither Cahill nor Batey established any causal relationship between the harm experienced by appellants and any professional act or omission on the part of Schrein. Harlan C. Schriner, Jr., M.D., a board-certified pediatrician, stated in affidavits offered by Medical Protective in each of these cases that in his opinion, the actions of Schrein which caused injuries to appellants

> amount to no more than intentional sexual abuse. Schrein's actions do not constitute or arise out of professional services and do not constitute professional negligence. The actions could not have been unintentionally or negligently done. I am appalled at the suggestion that such actions could be considered to be a part of professional services rendered by a pediatrician in Nebraska. Although Schrein's actions were immoral and unethical, he did not breach the applicable standard of care.

[10] Appellants offered no evidence to rebut Schriner's opinion that Schrein's actions were unrelated to any professional medical services and did not constitute "professional negligence." They argue that because the abuse occurred in Schrein's office while he was purporting to examine or treat his patients, it necessarily fell within the coverage for "professional services." However, appellants did not establish any harm attributable to any failure to properly diagnose or treat a medical condition. Rather, their injuries and damages flowed solely from the affirmative acts of abuse and molestation committed by Schrein under the guise of medical examination and treatment. While these circumstances make Schrein's conduct all the more reprehensible, they do not transform his acts of abuse into "professional services" for purposes of the professional liability insurance policy. An intent to inflict injury can be inferred as a matter of law in cases of sexual abuse. *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). It is clear from the record that when Schrein chose to sexually abuse his patients, he was no longer providing "professional services." See, e.g., *St. Paul Fire &c. v. Alderman*, 216 Ga. App. 777, 455 S.E.2d 852 (1995) (holding physician's digital penetration and clitoral manipulation of patient during examination for urinary tract infection and leg cyst solely for satisfaction of physician's prurient interests and not "professional services" within meaning of liability insurance policy), and *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636, 639 (Fla. App. 1994) (holding oral surgeon's sexual assault of anesthetized patient not causally connected to provision of professional services "regardless of the 'pretense of medical care used by the insured to catch his victim unaware' "), cited with approval in *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000).

Appellants refer to Schrein's betrayal of their trust as the "essence of the transference phenomenon." As we noted in *Iwanski*, 259 Neb. at 643, 611 N.W.2d at 615, "[t]ransference has been defined as ' "[t]he process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly." S. Waldron-Skinner, *A Dictionary of Psychotherapy* 364 (1986).' " (Quoting *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698 (Minn. 1990).) We further noted that while transference was not confined solely to psychiatric treatment and the mental health profession, it is not a recognized component in the medical treatment of physical conditions. There is no evidence in the record that transference was in any way involved in Schrein's molestation of appellants, and thus, as was true in *Iwanski*, there is no genuine issue with respect to professional negligence in the mishandling of the transference phenomenon.

In their petitions, appellants alleged that in addition to being liable for his own acts, Schrein was vicariously liable for the failure of an office nurse employed by him to report her "suspicious findings" regarding Schrein's actions to authorities. Although this argument was not addressed by the district court or developed in the briefs, appellants' counsel contended at oral argument that this allegation brought the case within the provision of the policy which provided coverage for professional services rendered by "any other person for whose acts or omissions the insured is legally responsible." We disagree. Medical Protective offered evidence that the determination of what constitutes immoral or unethical conduct on the part of a physician is not a topic as to which a nurse receives or needs special training, learning, or attainment, and the claim therefore does not involve "professional services" provided by the nurse. Because this evidence was uncontroverted, there was no genuine issue of material fact as to whether the action or inaction of the nurse for which Schrein was alleged to be vicariously liable constituted "professional services" within the meaning of the policy.

3. Public Policy

Appellants contend that the district court erred in "finding that public policy did not compel that the innocent children victims

of Dr. Schrein be compensated." The phrasing of this assignment of error misconstrues the issue before us. There is no doubt that appellants are entitled to compensation from Schrein based upon their default judgments. The question in this garnishment proceeding, however, is whether Medical Protective is obligated to provide that compensation on Schrein's behalf under the terms of the professional liability insurance policy it issued to him.

[11,12] As we have previously stated in this opinion, an insurance policy is a contract. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured. *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). In this case, the parties to the contract of insurance are Medical Protective and Schrein. Therefore, the precise legal issue presented by this assignment of error is whether a professional liability insurance policy contravenes public policy when it does not include a duty to pay a physician's liability to a patient whom he sexually abused.

Appellants cite the Nebraska Hospital-Medical Liability Act as the source of public policy supporting their entitlement to compensation. See Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1998 & Cum. Supp. 2000). They argue that because Schrein was qualified under the act, which requires that he submit proof of liability insurance, the act provides their exclusive remedy against him. Appellants therefore contend that a determination that the policy did not provide coverage for their claims denies them of "legislatively mandated" insurance coverage.

Section 44-2801(2) states that the intent of the act is "to serve the public interest by providing an alternative method for

determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to [e]nsure the availability of malpractice insurance coverage at reasonable rates." The act specifically defines "[m]alpractice or professional negligence" to mean a failure to meet certain specified standards "in rendering professional services." § 44-2810. As we have noted, the conduct upon which Schrein's liability to appellants is based was not the rendering of professional services, but, rather, sexual abuse. The Nebraska Hospital-Medical Liability Act makes no reference to such conduct and therefore cannot be regarded as establishing a public policy requiring that a professional liability insurance policy must provide coverage for sexual abuse inflicted by a physician upon his patient. The fact that Schrein's coverage is limited to liability incurred in the performance of professional services is not inconsistent with the purpose or language of the act. See *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993) (holding insurance policy which did not provide coverage for physician's sexual assault of patient not inconsistent with state's Medical Malpractice Act).

Other courts have rejected arguments that professional liability insurance policies should be construed to provide coverage under circumstances similar to those before us based upon a public policy favoring compensation of victims. In *Roe v. Federal Ins. Co.*, 412 Mass. 43, 54 n.9, 587 N.E. 2d 214, 220 n.9 (1992), the court noted that the dispositive issue was "not what coverage is desirable, but rather what coverage does the policy provide in fact and law." Another court noted that a policy which did not provide coverage for a physician's sexual misconduct with a patient was not inconsistent with public policy which prohibited the acts in question and invalidated contracts indemnifying a person against loss from willful wrongdoing. *Chicago Ins. Co. v. Manterola*, 191 Ariz. 344, 955 P.2d 982 (Ariz. App. 1998). Similarly, in *N.M. Physicians Mut. Liability*, 116 N.M. at 100, 860 P.2d at 742, the court rejected a claim that coverage for "professional services" should be held to exist on public policy grounds in a case involving a sexual assault on a child by a physician, stating: "Despite our sympathy for LaMure's victim,

denying LaMure indemnification supports the public policy of preventing an insured from being shielded from the negative consequences of his crimes, and of enforcing fair private contracts as written absent conflicting statutorily expressed public policy." See, also, *Austin v. State Farm Mut. Auto Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001) (holding it is against public policy to insure against liability for one's own intentional acts). We likewise conclude that despite our sympathy for appellants in these cases, there is no clearly articulated public policy which would permit or require us to disregard the unambiguous coverage provisions of Schrein's insurance policy and the fact that his acts did not fall within the coverage provided.

V. CONCLUSION

For the reasons discussed, we conclude that Medical Protective was entitled to summary judgment in its favor because Schrein's liability to appellants was not based on the provision or failure to provide professional services, and therefore, no coverage existed under the professional liability insurance policy which Medical Protective issued to Schrein. Having made this determination, we need not and do not reach the issue of whether any policy exclusion applies or whether R.W.'s claim was barred by the statute of limitations. The judgments of the district court are affirmed.

AFFIRMED.

WRIGHT and MCCORMACK, JJ., not participating.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLEE, V. KUM & GO, L.L.C., DOING BUSINESS AS KUM & GO #359, APPELLANT, AND NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE AND CROSS-APPELLANT.

642 N.W.2d 154

Filed April 19, 2002. No. S-01-305.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act.

2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
3. ____: ____: ____. A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
6. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
7. **Administrative Law: Liquor Licenses: Statutes: Intent.** The Nebraska Liquor Control Commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998, Cum. Supp. 2000 & Supp. 2001), including provisions covering any and all details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act.
8. ____: ____: ____: ____. The Nebraska Liquor Control Commission may not adopt rules and regulations that are in conflict with the Nebraska Liquor Control Act. The power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed legislative intent.
9. **Administrative Law: Statutes.** A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose.
10. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
11. **Administrative Law: Statutes.** An administrative agency may not employ its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
12. ____: ____. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
13. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
14. **Words and Phrases.** The plain, ordinary, and popular meaning of the word "church" includes a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building used predominately for the honor of God and religion, and a place where persons regularly assemble for worship. A building which is used predominately for the honor of a religion would likewise include buildings in which people assemble for non-Christian worship, such as a mosque, a synagogue, or a temple.

15. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
16. **Administrative Law: Statutes.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction.
17. **Statutes.** A statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous.
18. ____. In the absence of ambiguity, courts must give effect to statutes as they are written.
19. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellant.

Don Stenberg, Attorney General, Hobert B. Rupe, and, on brief, Laurie Smith Camp for appellee Nebraska Liquor Control Commission.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellee City of Omaha.

Amy A. Miller for amicus curiae American Civil Liberties Union of Nebraska Foundation.

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

GERRARD, J.

NATURE OF CASE

Neb. Rev. Stat. § 53-177(1) (Cum. Supp. 2000) provides that no license shall be issued for the retail sale of liquor within 150 feet of any church. The issue presented in this appeal is whether the "House of Faith," located in leased storefront quarters, is a "church" within the meaning of § 53-177.

PROCEDURAL BACKGROUND

Kum & Go, L.L.C., filed an application with the Nebraska Liquor Control Commission (Commission), on May 21, 1998, for a retail class B liquor license for Kum & Go's location at 503 North 33d Street in Omaha, Nebraska. The Omaha City Council voted, on June 30, to recommend denial of Kum & Go's applica-

tion. However, the Commission granted Kum & Go's application on August 25. The City of Omaha brought a petition for judicial review in the district court. The district court concluded that the Kum & Go location was 139 feet from the House of Faith, which the district court determined was a church within the meaning of § 53-177. Consequently, the district court reversed the decision of the Commission granting Kum & Go a liquor license.

Kum & Go appealed to this court; in a memorandum opinion, we reversed the decision of the district court and remanded the cause to the district court with instructions to remand the case to the Commission. See *City of Omaha v. Nebraska Liquor Control Comm.*, 259 Neb. xix (case No. S-99-452, May 17, 2000). We concluded that the Commission had erred in not applying its own rule defining a "church" for purposes of § 53-177, and we instructed the district court to remand the case for a consideration of Kum & Go's application under the appropriate rule. We specifically declined to comment on the validity of the rule. See *City of Omaha, supra*.

After remand, on August 22, 2000, the Commission again granted Kum & Go a retail class B liquor license. The Commission determined that the House of Faith was not a "church" as defined by the Commission. The City of Omaha appealed to the district court pursuant to the Administrative Procedure Act. The district court determined, in an order filed on February 13, 2001, that the Commission's definition of "church" was arbitrary and that the House of Faith was a church under the plain meaning of the word. The district court vacated the order of the Commission granting Kum & Go a liquor license and reversed the decision of the Commission. Kum & Go appeals.

FACTUAL BACKGROUND

Mary L. Sherman testified before the Commission by affidavit, dated August 3, 1998, that she was an ordained Pentecostal minister and pastor of the House of Faith. Sherman averred that the House of Faith had a congregation of between 75 and 150 members and regularly accepted new members.

Sherman averred that the House of Faith had been located at 502 North 33d Street, in Omaha, for over 9 years. Sherman testified that the House of Faith rented the building on North 33d

Street and, prior to that time, had held services at the House of Faith Church at 3219 Q Street in Omaha. Sherman also testified that before the House of Faith moved into the building on North 33d Street, the building housed a Baptist church.

Sherman testified that the House of Faith offered religious worship services each Sunday and Friday, prayer meetings each Monday, and choir practice each Saturday. Sherman stated that the House of Faith regularly held services at least four times per week that were open to any person wishing to attend. Sherman also stated that the use of the building was exclusively for worship or religious purposes.

Sherman testified that the House of Faith had maintained a bank account, in the name of the House of Faith, for at least 12 years prior to Sherman's testimony. Sherman stated, however, that because she did not draw a salary as pastor of the House of Faith, the House of Faith had not incorporated or applied for tax-exempt status under Nebraska law.

Photographic evidence in the record shows that the House of Faith is located in a storefront property and has a large white cross prominently displayed on the door. A sign over the door identifies the building as occupied by the House of Faith, "Evangelist M. Sherman (Pastor)," and lists a schedule of services including Sunday school and church services, Monday Bible class, Tuesday prayer service, and a Friday night service. The evidence also reveals that the House of Faith is directly across the street from the Kum & Go location. A report from the city's planning department established that the Kum & Go location was 138 feet from the House of Faith building.

Kum & Go adduced testimony before the Commission hearing officer from Gary Braaten, a district supervisor for Kum & Go. Braaten was the supervisor of the location at issue in this proceeding. Braaten testified that he was aware that the House of Faith was across the street from the Kum & Go location. Braaten stated that the management of the Kum & Go store had reported seeing about a dozen people going in and out of the House of Faith on Sunday mornings, but no other activity at the House of Faith.

Kum & Go also presented evidence that the House of Faith was not listed in the Omaha telephone book or city directory.

Kum & Go presented the affidavit of Michael Howard, superintendent of the office of permits and inspections of the City of Omaha, indicating that as of July 8, 1997, no certificate of occupancy had been issued that would permit the occupancy of the House of Faith property for religious assembly as required by city ordinances. A letter from the Douglas County assessor's office indicated that there was no record that the House of Faith property was classified as a tax-exempt organization.

ASSIGNMENTS OF ERROR

Kum & Go assigns, consolidated, that the district court erred in finding that (1) the Commission's regulation was arbitrary and beyond its authority and (2) there was not sufficient evidence to support the Commission's findings using the plain meaning of the term "church." On cross-appeal, the Commission also assigns that the district court erred in finding that the Commission's rule defining "church" for purposes of § 53-177 was arbitrary and beyond the Commission's authority.

STANDARD OF REVIEW

[1-4] Appeals from orders or decisions of the Commission are taken in accordance with the Administrative Procedure Act. See Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2000). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Urwiller v. Neth, ante* p. 429, 640 N.W.2d 417 (2002). A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id*. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[5,6] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. See *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998). To the extent, however, that the meaning and

interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

ANALYSIS

Validity of Regulation

Section 53-177(1) provides, in relevant part, that "[n]o license shall be issued for the sale at retail of any alcoholic liquor within one hundred and fifty feet of any church . . . ." The Legislature has not defined the word "church" for these purposes. However, the Commission has adopted 237 Neb. Admin. Code, ch. 2, § 012.05 (rev. 1997), which provides that " '[c]hurch' shall mean a building owned by a religious organization, used primarily for religious purposes, and having tax-exempt status under Neb. Rev. Stat., Sec. 77-202 (1) (c) (Cum. Supp. 1992)." The Commission determined, pursuant to § 012.05, that the House of Faith was not a church within the meaning of § 53-177(1). The district court, however, determined that the Commission's definition of "church," set forth in § 012.05, was invalid because it was inconsistent with the plain meaning of § 53-177(1).

[7,8] The Commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998, Cum. Supp. 2000 & Supp. 2001), including provisions covering any and all details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act. See § 53-118. See, also, *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963); *State ex rel. Nebraska Beer Wholesalers Assn. v. Young*, 153 Neb. 395, 44 N.W.2d 806 (1950). However, the Commission may not adopt rules and regulations that are in conflict with the act. *Terry Carpenter, Inc., supra*; *Young, supra*. The power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed legislative intent. *Terry Carpenter, Inc., supra*; *Young, supra*.

[9-12] Generally, a legislative enactment may properly confer general powers upon an administrative agency and delegate to

the agency the power to make rules and regulations concerning the details of the legislative purpose. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996). See, also, *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984) (Legislature can delegate power to make rules and regulations to implement policy of statute). Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *City of Lincoln v. Central Platte NRD, ante* p. 141, 638 N.W.2d 839 (2002). However, an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *County of Dodge, supra*. See, also, *Creighton St. Joseph Hosp., supra.* In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *County of Dodge, supra*.

[13,14] Obviously, then, the Commission may not define "church" in a manner that is inconsistent with the plain meaning of the word. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Ottaco, Inc. v. McHugh, ante* p. 489, 640 N.W.2d 662 (2002). This court has determined that the plain, ordinary, and popular meaning of the word "church" includes a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building used predominately for the honor of God and religion, and a place where persons regularly assemble for worship. See *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996), citing *Calvary Baptist Church v. Coonrad*, 163 Neb. 25, 77 N.W.2d 821 (1956). A building which is used predominately for the honor of a religion would likewise include buildings in which people assemble for non-Christian worship, such as a mosque, a synagogue, or a temple. See *Latenser, supra*. In *Calvary Baptist Church, supra*, this court specifically defined "church," essentially as set forth above, in the context of § 53-177.

The Commission's definition of "church," however, differs substantially from the plain and ordinary meaning of the word. Most significantly, § 012.05 requires that a church be owned by a religious organization, both by the express terms of the regulation and because property must be owned by an educational, religious, charitable, or cemetery organization to be eligible for a property tax exemption pursuant to Neb. Rev. Stat. § 77-202 (Cum. Supp. 2000), which is in relevant part identical to § 77-202 (Cum. Supp. 1992).

[15] Whether or not a building is a church, however, does not depend on the legal ownership of the building. The plain meaning of the word "church" encompasses buildings in which persons regularly assemble for religious worship, regardless of whether the building is owned or rented by those persons. Section 012.05, however, plainly states that a "church" must be owned by a religious organization. In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001). The mandatory criteria for a church, set forth in § 012.05, are contrary to the plain meaning of the word as used in § 53-177 and may arbitrarily exclude from their definition a number of churches that are entitled to the protection of the statute.

We also note that the criteria set forth by § 012.05 are in some ways more inclusive than the plain meaning of "church." A parsonage, owned by a religious organization and furnished to a member of the clergy, and used primarily to promote the objects and purposes of a faith, is used exclusively for religious purposes and exempt from taxation. See, § 77-202 (Cum. Supp. 2000); *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993). Arguably, a parsonage would then be a "church" as defined by § 012.05, despite the fact that a parsonage is not a church under the plain meaning of the word.

[16-19] The Commission argues that its interpretation of the statute is reasonable and has the benefit of being objective and easy to apply. We have stated that although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. *Affiliated Foods Co-op v. State*, 259 Neb. 549, 611 N.W.2d 105

(2000). However, a statute is open for construction to determine its meaning only when the language used requires interpretation or may reasonably be considered ambiguous. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000). In the absence of ambiguity, courts must give effect to statutes as they are written. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *First Data Corp. v. State, ante* p. 344, 639 N.W.2d 898 (2002). Because the language of § 53-177(1) is clear, see *Calvary Baptist Church v. Coonrad*, 163 Neb. 25, 77 N.W.2d 821 (1956), the statute is not susceptible to construction, regardless of whether the Commission's definition is easier to use. We also note that this court's exposition of the plain meaning of "church" in the context of § 53-177, set forth over 45 years ago, has not evoked an amendment of the statute, and we presume that the Legislature has acquiesced to our declaration of the statute's meaning. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

In short, the Commission's definition of "church," as set forth in § 012.05, is contrary to the plain meaning of the word "church" as used in § 53-177(1), and is thus invalid. While a building's ownership by a religious organization, and incident tax exemption, is relevant evidence in inquiring whether a building is a church, ownership is not dispositive of the inquiry. The district court did not err in determining that § 012.05 was invalid as contrary to the plain language of § 53-177, the statute under which the regulation was promulgated. Kum & Go's first assignment of error and the Commission's assignment of error on cross-appeal are without merit.

Application of Plain Meaning of Statute

Having correctly found that the Commission's regulation was invalid, the district court proceeded, on its de novo review, to consider whether the House of Faith is a church under the plain meaning of § 53-177(1). This is a factual determination, and the district court's factual findings will be affirmed where competent evidence supports those findings. See *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998).

The record, as summarized above, clearly supports the district court's finding that the House of Faith is a church within the meaning of § 53-177(1). While there was a conflict in the evidence regarding the size and frequency of religious services at the House of Faith, there was ample evidence from which the district court could have concluded that the House of Faith was a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building used predominately for the honor of God and religion, and a place where persons regularly assemble for worship. See *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996).

Kum & Go calls our attention to the fact that the House of Faith did not own the building at issue, did not have a property tax exemption, was not listed in Omaha telephone directories, and had not filed a certificate of occupancy with the City of Omaha. Even considering these facts, however, Sherman's testimony regarding the religious services and other activities conducted by the House of Faith is sufficient to support the district court's factual finding that the House of Faith is a church. The district court's judgment conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Kum & Go's second assignment of error is without merit.

CONCLUSION

The district court did not err in concluding that the Commission's definition of "church," set forth in § 012.05, is contrary to the plain meaning of the word as used in § 53-177, and the district court's factual finding that the House of Faith is a church is supported by competent evidence. We therefore affirm the judgment of the district court which vacated the order of the Commission granting Kum & Go a liquor license and reversed the decision of the Commission.

AFFIRMED.

MURIEL H. NYE AND CHARLES A. NYE, APPELLANTS, V. FIRE GROUP PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, APPELLEE.

642 N.W.2d 149

Filed April 19, 2002. No. S-01-319.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment under the statutory grounds listed in Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2000) only if the litigant shows that the district court abused its 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. **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 questions independently of the conclusion reached by the trial court.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Court Rules: Legislature: Statutes.** A district court is not free to displace duties that the Legislature statutorily requires to be performed by the clerk of the court by reassigning the duties to its bailiff.
7. **Motions for New Trial: Judgments: Notice: Appeal and Error.** The right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment.
8. **Summary Judgment: Notice.** The failure of the clerk of the court to send notice of a summary judgment is beyond the control of the parties and within the statutory grounds for vacating or modifying an order under Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 2000).

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and vacated.

Charles A. Nye, pro se, and for appellant Muriel H. Nye.

Ann M. Grottveit and Robert J. Becker, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee.

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

CONNOLLY, J.

This is an appeal from a district court's order denying a motion to vacate or modify a summary judgment under Neb. Rev. Stat. § 25-2001(4) (Cum. Supp. 2000). The appellants, Muriel H. Nye and Charles A. Nye, claimed that they never received notice of the court's order. The district court overruled the appellants' motion to vacate or modify because it found that its bailiff had mailed notice in compliance with Neb. Rev. Stat. § 25-1301.01 (Cum. Supp. 2000).

The issue raised by this appeal is whether the mailing of notice of a judgment by a judge's bailiff, instead of the clerk of the district court, satisfies the requirements of § 25-1301.01. We reverse and vacate the entry of the summary judgment because § 25-1301.01 mandates that the clerk of the district court mail notice of civil judgments.

BACKGROUND

The Nyes filed a petition in district court to quiet title to property in Douglas County that was next to the tract on which they lived. They alleged that they had used the adjacent property in an open, adverse, exclusive, and continuous manner for over 10 years by erecting a snow fence and collecting and burning leaves on the property. The appellee, Fire Group Partnership (Fire Group), is the record owner of the adjacent property. Fire Group answered and filed a motion for summary judgment. In an order dated November 22, 2000, the district court granted Fire Group's motion for summary judgment. The court found that the evidence showed permissive use rather than continuous, exclusive, and notorious possession that would have put the owner on notice of the Nyes' claim to the property.

Charles Nye asserted in his affidavit that on January 19, 2001, he contacted Fire Group's counsel to discuss a settlement. Fire Group's counsel responded that the court had already sustained its motion for summary judgment. On January 22, Nye asserted that he told the trial judge that his conversation with Fire Group's counsel was the first knowledge that he had had of the court's summary judgment order and that he had never received a copy of it. The judge gave him a copy of the order at that time and made the following notation on the docket sheet on the same

day: "The plaintiff's copy of the order was mailed on November 22, 2000 to . . . the address provided in the plaintiff's pleadings."

On February 6, 2001, the Nyes filed a motion to vacate or modify the order. They alleged that they did not have knowledge of the order until January 21 and that the clerk of the court had not mailed them notice of the judgment as required under § 25-1301.01. They further alleged that this omission constituted grounds to vacate or modify the order under § 25-2001(4). At a hearing on the motion, the Nyes submitted an affidavit from the chief deputy clerk of the district court. In the affidavit, the clerk stated that her office did not send out a notice of the summary judgment to the Nyes and that her office does not send out summary judgment notices. The court stated that summary judgment orders were sent out by the bailiff in that court and not by the clerk. The court found that the order was mailed to the Nyes in compliance with § 25-1301.01. The motion was overruled.

ASSIGNMENTS OF ERROR

The Nyes assign, restated, that the district court erred in denying their motion to vacate or modify its summary judgment order against them based on its findings that they had received notice of the summary judgment order and that § 25-1301.01 was complied with by the bailiff's notification of judgment.

STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment under the statutory grounds listed in § 25-2001 only if the litigant shows that the district court abused its discretion. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000) (overruling, in part, *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997)).

[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. *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002).

[3,4] Statutory interpretation presents a question of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913

(2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

The Nyes contend that the district court erred in finding that the requirements of § 25-1301.01 were satisfied and in denying their motion to vacate or modify the summary judgment order.

Fire Group contends that the court did not abuse its discretion in denying the Nyes' motion to vacate or modify the summary judgment order. It argues that the bailiff was the appropriate officer to mail the order under that court's practices and that the order was timely mailed.

Section 25-2001 sets out certain circumstances under which a district court may vacate or modify an order in a subsequent term. The Nyes claimed that the district court's summary judgment order should be vacated or modified under subsection (4), which provides, in relevant part: "A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . for mistake, neglect, or omission of the clerk . . . ."

The district court impliedly found that there was not a "mistake, neglect, or omission of the clerk" under subsection (4) by concluding that § 25-1301.01 was satisfied by the bailiff's mailing of notice to the Nyes. Section 25-1301.01 provides:

> Within three working days after the entry of any civil judgment, except judgments by default when service has been obtained by publication or an appearance of the defaulting party has been made, *the clerk of the court* shall send a postcard or notice by United States mail to each party whose address appears in the records of the action, or to the party's attorney or attorneys of record, advising that a judgment has been entered and the date of entry.

(Emphasis supplied.)

[5] 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. Central Platte NRD, ante* p. 141, 638 N.W.2d 839 (2002).

Under § 25-1301.01, the notice of civil judgments must be sent to the parties by the clerk of the court except in two circumstances not at issue here. Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2000), in turn, defines a judgment as "the final determination of the rights of the parties in an action." The district court's summary judgment order specified that the evidence adduced did not support a claim of adverse possession and concluded that the defendants were entitled to judgment as a matter of law. The order, therefore, was a final determination of the rights of the parties in this action and a civil judgment within the meaning of § 25-1301.

Fire Group relies upon *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995), in its argument that the statutory grounds for vacation or modification are not satisfied when the clerk complies with the standard practice of the district court in sending out notice. Fire Group's reliance on *Roemer* is misplaced. In that case, the clerk sent notice of an order to show cause but the notice was not received due to the plaintiff's failure to notify the clerk of a change of attorney and new address. Here, unlike *Roemer*, the clerk of the court did not send the notice of judgment to the parties.

The district court's assertion that notice was sent by its bailiff will not cure the clerk's omission under § 25-2001(4) in the absence of evidence that the Nyes received actual notice of the judgment in a timely fashion. In general, the clerk of the court is the officer responsible for keeping court records and filings. See Neb. Rev. Stat. §§ 25-2204 through 25-2214.01 (Reissue 1995) (setting out general duties of clerk of district court). A bailiff is the officer responsible for preserving order and taking charge of the jury, guarding prisoners, and other services which are reasonably necessary for the court's proper functioning. See Neb. Ct. R. of Dist. Cts. 12 (rev. 2000) (setting forth duties of court personnel).

[6] A district court is permitted to assign additional court duties to the bailiff to perform. See *id*. But a district court is not free to displace duties that the Legislature statutorily requires to be performed by the clerk of the court by reassigning the duties to its bailiff. Compare *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988).

In holding that notice of judgment sent by the court's bailiff does not comply with the requirements of § 25-1301.01, we are not exalting form over substance. This case aptly illustrates the problems that can arise when notice is not sent by the clerk. If the clerk had made a court entry indicating that the notice had been mailed, a presumption of regularity would have attached to his or her actions, and the Nyes' claim that they did not receive notice would be without merit under *Roemer*. See, e.g., *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001) (holding that presumption of regularity is afforded to clerks of court performing their official duties). But when both the court and clerk admit that notice of the judgment was not sent by the clerk, no presumption arises.

[7] This court has held that the right of a party to move for a new trial or to appeal cannot ordinarily be defeated by the clerk of the court's failure to give the parties notice of the entry of the judgment. See, *Tietsort v. Ranne*, 200 Neb. 651, 264 N.W.2d 860 (1978); *Pofahl v. Pofahl*, 196 Neb. 347, 243 N.W.2d 55 (1976); *Simmons v. Lincoln*, 176 Neb. 71, 125 N.W.2d 63 (1963).

[8] The failure of the clerk of the court to send notice of the summary judgment was beyond the control of the Nyes and within the statutory grounds for vacating or modifying an order under § 25-2001(4). Unless the omission is corrected, the Nyes will be denied the opportunity to appeal the decision. Therefore, the court's refusal to vacate or modify the decision granting the summary judgment should be reversed and vacated.

CONCLUSION

The district court abused its discretion by overruling the Nyes' motion to modify or vacate its summary judgment order when the evidence showed that the clerk of the district court had not sent notice of the judgment to the Nyes.

REVERSED AND VACATED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN L. APKER, RESPONDENT.

642 N.W.2d 162

Filed April 19, 2002. No. S-01-538.

1. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the 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.
2. ____: ____. A proceeding to discipline an attorney is a trial de novo on the record.
3. **Appeal and Error.** Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
4. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.
5. ____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
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 and 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.
7. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
8. ____. In an attorney disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
9. ____. An attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation.
10. ____. For the purpose 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.
11. ____. 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.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for respondent.

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

PER CURIAM.

NATURE OF CASE

On May 9, 2001, the office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against John L. Apker, the respondent. Apker filed an answer in which he substantially admitted the facts alleged in the formal charges. A referee was appointed to consider the charges and take evidence in the matter. In a report filed October 11, 2001, the referee concluded that Apker's conduct breached disciplinary rules and recommended a sanction of a 1-year suspension from the practice of law, retroactive to October 13, 2000, when Apker had voluntarily ceased the practice of law. Both Apker and the Counsel for Discipline take exception to the recommended sanction. The only issue presented in this proceeding is the appropriate sanction for Apker's unethical conduct.

BACKGROUND

[1] Neither Apker nor the Counsel for Discipline has taken exception to the referee's findings of fact. When no exceptions to the 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. *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001). The referee's report sets forth his findings of fact substantially as follows:

Apker was admitted to the practice of law in the State of Nebraska on April 23, 1987. He has been engaged in the practice of law in Omaha, Douglas County, Nebraska, since that date and at all times relevant to these proceedings.

Apker and the firm of Dwyer, Smith, Gardner, Lazer, Pohren and Forrest were asked to represent Virginia J. Gonzalez, guardian and conservator of F.G. Schlosser (Schlosser) in an action against Virginia M. Zalovich. Schlosser has five adult children: John Schlosser, Kenneth Schlosser, Barbara Lambries, Gonzalez, and Wanda L. Zielinski (collectively the Schlossers). Zalovich also has children who were not identified.

Schlosser is a widower. Zalovich is divorced. Schlosser and Zalovich decided to live together. They built a house together in 1990 which they owned jointly (the House). Schlosser and

Zalovich never married. They jointly prepared a revocable trust agreement (the Trust Agreement) which provided for the distribution of their interests in the House upon their death or moving from the House. The Trust Agreement provided that in that event the House would be sold, the proceeds would be distributed one-half to the Schlossers and one-half to the Zalovich children. The language was ambiguous regarding the requirement for sale if only one party died or moved from the House.

While Schlosser and Zalovich were cohabitating in the House, Schlosser became obsessed with having to pay real estate taxes on the House. To avoid paying these taxes, in September 1998, Schlosser transferred his interest in the House to Zalovich by a quitclaim deed, so that Zalovich now owns the House outright. The Trust Agreement was rewritten with generally the same terms and signed by Zalovich alone.

At some point, Schlosser developed signs of dementia and the inability to manage his own personal and financial affairs. The Schlossers requested and received court appointment of Gonzalez as Schlosser's guardian and conservator. Although Gonzalez is guardian and conservator, she consults with the other Schlossers on matters of importance to their father, Schlosser, and relies on individual siblings in their areas of expertise. She relies upon Kenneth Schlosser on legal matters, John Schlosser for investment matters, and the others on medical matters. Apker communicated with Gonzalez and the Schlossers primarily through Kenneth Schlosser.

After appointment of Gonzalez as guardian, Schlosser moved out of the House and into a hospital for care. In June 1999, Schlosser moved to a nursing home and has not returned to live in the House. The Schlossers then asked Zalovich to sell the House and distribute the Schlossers' share of the proceeds under the terms of the Trust Agreement. Zalovich refused on the basis that the Trust Agreement did not require her to move out of and sell the House, but that if it did, she would revoke it.

Apker was asked by the Schlossers to file an action to enforce the terms of the Trust Agreement as they interpreted it. The action was filed in the district court for Sarpy County in the name of Gonzalez, as guardian and conservator of the Estate of F.G. Schlosser, against Zalovich to enforce the terms of the

revokable trust requiring the sale of the House and distribution of one-half of the proceeds to the Schlossers. After depositions were taken, Zalovich filed a motion for summary judgment. The motion was heard on June 7, 2000, in the district court.

The district judge indicated at the argument on Zalovich's motion that he was leaning against Apker's position. Kenneth Schlosser and Barbara Lambries attended the hearing. Apker met with Kenneth Schlosser and Barbara Lambries after the hearing. Apker advised them that he believed they would not succeed on this motion and that he did not recommend an appeal of an adverse ruling. There was no agreement at the time as to whether they would appeal an adverse ruling. Kenneth Schlosser and Barbara Lambries delayed any decision until after they received the judge's order, reviewed it, and consulted with other siblings.

The court issued its order on June 9, 2000, granting Zalovich's motion for summary judgment and dismissing Gonzalez' petition (the Order). The district judge set out his reasoning in a two-page letter to counsel dated on the same date (the Opinion).

Apker received and reviewed the Order and the Opinion on June 15, 2000, and set them aside. When he got back to the Order on July 23, Apker wrote a letter to the Schlossers (the Gonzalez letter) advising them of the decision and enclosing copies of the Order and the Opinion. Before making copies of the Order and the Opinion, Apker removed the filing stamp from the Order and the date from the Opinion. The time for appeal of the Order had expired when Apker wrote the letter.

In the Gonzalez letter, Apker recapitulated the court's Order and Opinion. He went on to state:

> Although I do not agree with the Judge's interpretation of the trust, I do not feel that this decision should be appealed for several reasons. First, it is doubtful that the Court of Appeals or Supreme Court will reverse [the district court] on an interpretation question. . . .
>
> Second, the cost (both financial and emotional) in this case is significant. Any further litigation only will further deplete your father's resources. Given the slim chance of prevailing, I cannot recommend that an appeal be commenced.

The Gonzalez letter did not state that the time to appeal had already expired. Although Apker prepared the Gonzalez letter, he signed it "John L. Apker/LJM."

Upon receiving the Gonzalez letter, the Schlossers consulted another attorney, Pamela A. Car. Car noted that the Order was missing the customary filing stamp and date and that the Opinion was missing a date. Car wrote a letter to the district judge on August 14, 2000, inquiring about the authenticity of the copies of the court's undated Order and Opinion received by the Schlossers before she made "any appropriate referral to the disciplinary committee." A copy of this letter was also sent to Apker.

Apker responded to Car's letter to the district judge in a letter to Car dated August 18, 2000 (the Car letter), in which he made the following statements:

> Prior to receiving your letter, I did not realize that there was a problem in the delivery of the Order from [the district court] to our clients. . . .
>
> According to my time sheets, I received the Order from [the district court] on June 20, 2000 and dictated a letter to Mr. Ken Schlosser and Virginia Gonzalez on that same day. I revise[d] the letter on . . . June 23, 2000 (again according to my time records) and believed the letter had been sent. Obviously, it was not.
>
> My copy of the Order from [the district court] is the same as the Court file in that it reflects the date and the stamp. At no point in time was it my intention to delay the Order from getting to Mr. Schlosser and Ms. Gonzalez. My letter, in fact, directly mentions the appeal. It would seem incongruous to dictate a letter discussing an appeal if, in fact as you allege, my intent was to prohibit Schlosser and Gonzalez from appealing the Court's Order.
>
> I must admit I was quite dumbfounded by the content of your letter. In reviewing our file and my time charges, I was unable to ascertain why the letter had been delayed. However, upon further investigation, I learned the truth of the matter.
>
> In conversations with my secretary, she admitted that she had inadvertently misplaced the letter and had only discovered it in late July. Without intending to harm the

> clients, she admitted to changing the date of the letter and in removing the date stamp and date line to the Order.
>
> She also admitted to changing my time records to read "July" as opposed to "June" in an attempt to atone for her error.
>
> I have asked her to prepare an affidavit stating these facts and will provide that document to you and your clients next week.
>
> To further bolster the facts, if you look at the letter, my secretary executed it on July 23, 2000. July 23, 2000 was a Sunday. We do not work on Sundays and even if we (the attorneys) do work, we do not have our staff come in. Not only that, but it would have been difficult for me to prepare a letter on this date since I was in Rockford, IL the week of July 23 through July 28, 2000.
>
> I was also curious as to why I did not immediately get the Order out on June 12, 2000 (the date I believe it would have been delivered to my office). Unfortunately, I was in Des Moines that week and did not actually review the Order until June 20, 2000. Obviously, had the letter gone out on June 23, 2000, Schlosser and Gonzalez would have had ample time to decide whether or not to appeal.

Apker has never produced such an affidavit from his secretary.

Apker altered the time records on his client billing to show the date of his "[l]etter to clients regarding Order" was June 20, 2000, instead of July 20, when it was actually performed. He also changed the date for his revision of the letter to show June 23, when the letter was actually revised July 23.

In September, Apker realized that his conduct had been "inappropriate," and on September 20, 2000, he contacted his attorney to discuss reporting his conduct to the Counsel for Discipline. Apker met with his attorney on September 22. When Apker's attorney contacted the office of the Counsel for Discipline, Apker's attorney was advised that the Counsel for Discipline had already received a complaint from Car regarding Apker's conduct.

Apker replied to Car's complaint by letter dated October 5, 2000. In this letter he stated:

> Regarding the second allegation, I did receive the letter and Order from [the district judge] and, unfortunately, but

> not intentionally, did not send the correspondence to my client until July 23, 2000. . . .
>
> . . . .
>
> Concerning the charge of tampering with the documents by removing the date, I admit to removing the date from [the district judge's] Order and letter. However, my intention was not to mislead my clients but, rather, to save myself the embarrassment of admitting that I had inadvertently overlooked sending the Order and letter to my clients in a timely manner. Since my clients had already advised me not to appeal from the anticipated adverse ruling, my recommendations not to appeal were a repetition of our prior discussions in [the District] Court. My references to my secretary in my letter of August 18, 2000, to Ms. Car were the result of my attempt to avoid the embarrassment of admitting that I had failed to timely forward information to my clients.
>
> . . . .
>
> I am extremely disappointed and embarrassed by my behavior and will cooperate fully with your office to resolve this matter. Please contact either myself or Mr. Douglas if you require additional information.

On October 13, 2000, Apker began a leave of absence from his firm at his request. He has subsequently turned down a job offer as trust officer with a bank because this charge is pending. He has been a stay-at-home father since October 13, and he has not practiced law since that date.

The Counsel for Discipline charged Apker with two counts of misconduct: count I, relating to the Gonzalez letter and alteration of the Order and the Opinion, and count II, relating to the Car letter. Based on the above-stated factual findings, the referee concluded that Apker's conduct on counts I and II constituted violations of Canon 1, DR 1-102(A)(4), of the Code of Professional Responsibility (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and Canon 6, DR 6-102(A), of the Code of Professional Responsibility (attempting to exonerate himself from or limit his liability to client for his personal malpractice).

In considering the appropriate sanction, the referee noted that Apker had deliberately and knowingly deceived and misled his

client. However, the referee also observed that Apker's conduct was limited to an incident with one client over a period of only 2 months and that there was no evidence that Apker's conduct was reflective of how Apker had treated other clients at other times. Apker has no record of prior discipline. The referee noted that Apker self-reported his violation, admitted the factual allegations of the complaint, and had been fully cooperative with the Counsel for Discipline.

The referee also stated that the "most persuasive mitigating factor" was that Apker voluntarily discontinued the practice of law, effective October 13, 2000. The referee concluded that Apker deserved leniency in light of the mitigating factors. The referee recommended a sanction of a 1-year suspension from the practice of law, to be retroactive to October 13, 2000.

ASSIGNMENTS OF ERROR

Neither Apker nor the Counsel for Discipline takes exception to the factual findings of the referee or the conclusion that Apker violated DR 1-102(A)(4) and DR 6-102(A). However, both Apker and the Counsel for Discipline take exception to the recommended sanction. The Counsel for Discipline takes exception to the recommendation that Apker's suspension be made retroactive to October 13, 2000. Apker takes exception to the recommendation of a suspension and argues that a private reprimand would be the appropriate sanction.

STANDARD OF REVIEW

[2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001).

ANALYSIS

[3,4] Under existing case law, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception. *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive. *Id.* Accordingly, we find, on our de novo examination of

the record, clear and convincing evidence that Apker's conduct, set forth above, violated DR 1-102(A)(4) and DR 6-102(A).

[5,6] Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Lopez Wilson, supra*. 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 and 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. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

[7] The referee determined that leniency is appropriate because of the mitigating factors present in this case. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

[8,9] As the referee noted, the record indicates that Apker's conduct in representing Gonzalez was an isolated incident and did not represent a pattern of unethical conduct. In an attorney disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation. *Id.* Furthermore, Apker has been cooperative with the Counsel for Discipline during the investigation, and an attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation. See *id.* Apker has also admitted his misconduct and acknowledged responsibility for his actions, which reflects positively upon his attitude and character and is to be considered in determining the appropriate discipline. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

However, these mitigating factors cannot obscure the nature of Apker's indefensible conduct in this incident, isolated though it may have been. Apker not only neglected a matter entrusted to him, depriving a client of the right to appeal an adverse judgment, but engaged in deception, prevarication, and forgery in attempting to conceal his neglect; when that was discovered, Apker attempted to shift the blame for his actions to an innocent party. Given those circumstances, a private reprimand, as suggested by Apker, is not appropriate to the nature of the offense.

The referee also found, as a mitigating factor, that Apker had voluntarily ceased the practice of law as of October 13, 2000, and that Apker's suspension from the practice of law should be made retroactive to that date. In two recent cases, this court has imposed a period of suspension and made that suspension retroactive. See, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000); *State ex rel. NSBA v. Aupperle*, 256 Neb. 953, 594 N.W.2d 602 (1999). Those cases are distinguishable from this case, however, in that in *Jensen* and *Aupperle*, this court had temporarily suspended the respondents' licenses to practice law during the pendency of the disciplinary proceedings. In this case, no temporary suspension was requested or entered by this court.

[10] In *Jensen, supra*, and *Aupperle, supra*, it was appropriate for this court to make the suspensions retroactive to the respective dates on which this court had first suspended the respondents' licenses to practice law. In this case, although Apker has voluntarily ceased to practice law, his license to practice law has not yet been suspended by this court. To make a suspension from the practice of law retroactive under these circumstances would be to allow the respondent to choose the time and circumstances of his own suspension and would not serve the purposes of attorney discipline. Nonetheless, for the purpose 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. *Abrahamson, supra*. While we do not find that a retroactive suspension is appropriate where a temporary suspension has not been ordered by this court, we nonetheless consider Apker's voluntary cessation of the practice of law as a mitigating factor in determining what sanction should be imposed.

[11] Absent mitigating factors, the conduct set forth above would merit no less than 1 year's suspension from the practice of law. However, each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *Frederiksen, supra*. Given the mitigating factors present in this case, including Apker's voluntary cessation of the practice of law on October 13, 2000, we conclude that a suspension of 6 months, effective from the date of this opinion, is warranted.

CONCLUSION

It is therefore the judgment of this court that John L. Apker be suspended from the practice of law for a period of 6 months, effective immediately, after which period Apker may apply for readmission to the bar. Apker is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997).

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. MONTE G. SIDDENS, APPELLANT.

642 N.W.2d 791

Filed April 19, 2002. No. S-01-918.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Paul E. Cooney for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

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

HENDRY, C.J.

NATURE OF CASE

Monte G. Siddens was charged with first degree murder and use of a deadly weapon to commit a felony in connection with the January 28, 2000, death of Gary L. Jones. Jones, a clerk at a retail gun store and pawnshop in Lincoln, Nebraska, was killed when he exchanged gunfire with Siddens, who was attempting to rob the store.

On June 28, 2001, pursuant to a plea agreement, Siddens pled guilty to first degree murder and the State agreed to dismiss the charge of use of a deadly weapon to commit a felony. The State

further agreed that it would not offer any evidence of statutory aggravating circumstances at the sentencing proceeding. On July 23, the Lancaster County District Court sentenced Siddens to life imprisonment. Siddens appeals.

ASSIGNMENT OF ERROR

Siddens asserts that he was "denied due process and effective assistance of counsel, contrary to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 11, of the Constitution of the State of Nebraska."

STANDARD OF REVIEW

Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

ANALYSIS

Siddens assigns as error that he was denied due process and effective assistance of counsel. However, in his brief, Siddens fails to set forth any arguments as to how his due process rights were violated. Siddens also does not provide any arguments as to what his trial counsel did or failed to do that would constitute ineffective assistance of counsel. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dunster, supra*; *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

CONCLUSION

For the foregoing reasons, we do not address Siddens' assignment of error. We therefore affirm Siddens' conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EUSEBIO L. BECERRA, APPELLANT.

642 N.W.2d 143

Filed April 19, 2002. No. S-01-1111.

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. **Constitutional Law: Criminal Law: Right to Counsel.** Under the U.S. Constitution, a defendant in a criminal case has a right to effective assistance of counsel.
3. **Constitutional Law: Right to Counsel: Appeal and Error.** The assistance of counsel provision in the U.S. Constitution applies to direct appeals only.
4. **Postconviction: Constitutional Law: Right to Counsel.** A prisoner does not have a constitutional right to effective assistance of postconviction counsel.
5. ____: ____: ____. Any right to effective assistance of counsel under 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. **Kidnapping: Sentences.** Neb. Rev. Stat. § 28-313 (Reissue 1995) creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.
7. ____: ____. The factors which determine which of the two penalties under Neb. Rev. Stat. § 28-313 (Reissue 1995) is to be imposed are not elements of the offense of kidnapping, and their existence or nonexistence should properly be determined by the trial judge.
8. **Kidnapping: Sentences: Statutes.** *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in Neb. Rev. Stat. § 28-313 (Reissue 1995).

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

Eusebio L. Becerra, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

CONNOLLY, J.

The appellant, Eusebio L. Becerra, was convicted by a jury of kidnapping as a Class IA felony. He moved for postconviction relief, claiming he received ineffective assistance of postconviction counsel in his first postconviction proceeding. He also claims

that his trial counsel was ineffective under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because his trial counsel failed to object to a jury instruction. He argues that the instruction did not allow the jury to consider whether he was guilty of kidnapping as a Class II felony, which carries a lesser sentence. We affirm because we do not recognize a claim for ineffective assistance of postconviction counsel. Further, trial counsel was not ineffective because *Apprendi* applies only when a case involves an increase in penalty beyond the statutory maximum.

BACKGROUND

Becerra was convicted in 1996 of kidnapping under Neb. Rev. Stat. § 28-313(1) (Reissue 1995) and use of a weapon to commit a felony. We affirmed the convictions and sentences on direct appeal in *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998) (*Becerra I*). In 2001, we affirmed the denial of his first motion for postconviction relief. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001) (*Becerra II*). The facts about the kidnapping are set forth in full in *Becerra I*.

At the sentencing hearing, Becerra's counsel requested that the trial court consider sentencing Becerra to a period of probation or minimal incarceration. The court responded that kidnapping is a Class IA felony and that life imprisonment is the only possible sentence allowed by statute. On direct appeal, Becerra assigned as error that he was denied effective assistance of counsel at trial. He argued that his trial counsel failed to offer a jury instruction on the lesser-included offenses of kidnapping as a Class II felony or false imprisonment. *Becerra I*. We determined that we were unable to address the issue on direct appeal because the record was unclear about what instructions were tendered by Becerra's counsel. *Id*. We then stated that in any event, kidnapping as a Class II felony is not a separate offense from kidnapping as a Class IA felony. *Id*. We stated that the provisions of § 28-313 regarding kidnapping as a Class II felony are only mitigating circumstances which may reduce the penalty for kidnapping and that the existence or nonexistence of the mitigating circumstances is a matter properly considered by the court at sentencing. *Id.*

First Postconviction Proceeding

In his first motion for postconviction relief, Becerra alleged that his constitutional right to effective assistance of counsel was violated by (1) his trial counsel's failure to discuss with him a plea bargain offer allegedly made by the prosecution; (2) his trial counsel's failure to perform adequate discovery, resulting in trial counsel's failure to object to alleged misrepresentations by a law enforcement officer who testified at trial concerning a statement made by Becerra; (3) his trial counsel's failure to understand the charges against Becerra, thus prejudicing his defense; and (4) his appellate counsel's failure to properly raise, on direct appeal, the issue of his trial counsel's inability to understand the charges. *Becerra II*.

Becerra testified at an evidentiary hearing that his trial counsel did not tell him of an offer of a plea bargain. Becerra's trial counsel testified that Becerra told him emphatically that he did not wish to enter into plea negotiations. He further told Becerra that a mandatory life sentence would be imposed if he was convicted of kidnapping. Other testimony indicated that Becerra was never offered a plea bargain and that he was told that the maximum penalty for a kidnapping conviction was life in prison. The district court denied relief, and based on the testimony at the evidentiary hearing, we affirmed. *Becerra II*.

Becerra also argued on appeal that his trial counsel was ineffective by failing to request a lesser-included offense instruction on false imprisonment. In addition, he claimed that his postconviction counsel was ineffective for failing to argue the issue to the trial court. Becerra did not raise the issue of whether the jury should have been instructed concerning kidnapping as a Class II felony. We stated that Becerra did not include any claims about jury instructions in his motion for postconviction relief. Thus, we did not consider this assignment of error because it was not presented to the district court. We then held that Becerra was not denied effective assistance of counsel when his attorney did not request a lesser-included offense instruction on first degree false imprisonment. *Becerra II*.

Second Postconviction Action

In July 2001, Becerra filed the motion for postconviction relief that is the subject of this appeal. In his motion, Becerra

alleges that he learned that he was not told about a plea bargain. Becerra alleges that in 1998, an attorney, Michael Levy, called Becerra's family and left a message stating that he had learned from a prosecutor that a plea bargain offer was made. Becerra alleges that a family member kept the tape-recorded message and still has it. Levy was then hired to represent Becerra in his first postconviction proceeding. Becerra alleges that because Levy was acting as his attorney, he could not testify about what the prosecutor said, thus prejudicing Becerra in the postconviction proceeding. As a result, Becerra alleges that he received ineffective assistance of postconviction counsel.

In addition, Becerra alleges that his trial, appellate, and postconviction counsel were ineffective. He argues they were ineffective because they failed to raise the issue that the jury was not instructed to consider whether he was guilty of kidnapping as a Class II felony, which carries a lesser sentence. He alleges that the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), should be applied retroactively to his case and requires that the jury decide whether he is guilty of kidnapping as a Class II felony instead of as a Class IA felony.

The district court determined that Nebraska does not recognize a claim for ineffective assistance of postconviction counsel. The court then determined that *Apprendi* did not apply to Becerra's case. The court denied Becerra's motion.

ASSIGNMENT OF ERROR

Becerra assigns, rephrased, that the district court erred in denying his motion for postconviction relief.

STANDARD 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. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

ANALYSIS

Becerra contends that he received ineffective assistance of counsel in his first postconviction action. He concedes that we have previously held that Nebraska does not recognize a claim for ineffective assistance of postconviction counsel. See, *State*

v. Hunt, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000). He argues, however, that a 1993 amendment to Neb. Rev. Stat. § 29-3004 (Reissue 1995) creates a liberty interest in effective assistance of postconviction counsel.

Neb. Rev. Stat. § 29-3001 (Reissue 1995) 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."

[2,3] 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).

[4,5] In *State v. Hunt, supra*, we noted that postconviction relief is civil in nature. States have no obligation to provide a postconviction relief procedure, and when they do, the Due Process Clause of the U.S. Constitution does not require that the state supply a lawyer. We held that a prisoner does not have a constitutional right to effective assistance of postconviction counsel. *State v. Hunt, supra*. We noted that § 29-3001 provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of his or her rights, rendering the judgment void or voidable under the Constitution of the United States. We then held that any right to effective assistance of counsel under § 29-3004 is statutory only and cannot render a prisoner's conviction void or voidable under the U.S. or Nebraska Constitution. *State v. Hunt, supra*.

The reasoning of *Hunt* applies equally to Becerra's case. Although Becerra claims that § 29-3004 creates a liberty interest in effective assistance of postconviction counsel, we held in *Hunt* that any rights created by § 29-3004 are statutory only. Becerra cannot obtain postconviction relief for ineffective assistance of postconviction counsel.

Becerra next contends that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), it was improper for the district court to decide whether he should be sentenced to kidnapping as a Class IA felony instead of as a Class II felony. Thus, Becerra argues that his trial counsel was ineffective in failing to object to jury instructions that did not allow the jury to decide which felony he was guilty of. Becerra also contends that his appellate and postconviction counsel were ineffective for failing to raise the issue. We note that this is the first opportunity for Becerra to raise the *Apprendi* issue.

Section 28-313 provides:

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> (a) Hold him for ransom or reward; or
>
> (b) Use him as a shield or hostage; or
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony; or
>
> (e) Interfere with the performance of any government or political function.
>
> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

When Becerra was sentenced, a Class IA felony carried a penalty of life imprisonment, while a Class II felony carried a penalty of 1 to 50 years. See Neb. Rev. Stat. § 28-105 (Reissue 1995).

In *Apprendi v. New Jersey, supra*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable

doubt. The Court stressed that the fact must increase the penalty. The Court made a distinction between facts in aggravation of punishment and facts in mitigation of punishment. The Court stated that when the issue involves mitigating facts under which the defendant can escape the statutory maximum, core concerns involving the jury and burden of proof requirements are absent. See *id*.

[6-8] *Apprendi* is inapplicable to Becerra's case. We have held that § 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping. The factors are simply mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should properly be determined by the trial judge. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in § 28-313.

We conclude that *Apprendi* does not apply to this case. Accordingly, Becerra was not entitled to a jury instruction requiring the jury to evaluate whether he was guilty of kidnapping as a Class II felony. The district court did not err in denying Becerra's motion for postconviction relief.

CONCLUSION

We conclude that § 29-3004 does not provide a postconviction claim for ineffective assistance of postconviction counsel. We further conclude that Becerra was not entitled to postconviction relief based on the U.S. Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Accordingly, we affirm.

AFFIRMED.

GERRARD, J., participating on briefs.

KLH Retirement Planning, Ltd., a Nebraska limited partnership, appellee, v. Vincent Okwumuo et al., appellants, and Cornhusker Bank et al., appellees.

642 N.W.2d 801

Filed April 25, 2002. No. S-00-1302.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Judicial Sales: Property: Foreclosure: Taxes.** Under Neb. Rev. Stat. § 77-1912 (Reissue 1996), a sheriff's sale of real property after a foreclosure order for delinquent taxes is governed by the provisions for sales on execution under Neb. Rev. Stat. § 25-1501 et seq. (Reissue 1995 & Cum. Supp. 2000).
4. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.
5. **Foreclosure: Records: Presumptions: Notice.** A district court clerk's failure to include a signed copy of an order of sale in the record will not overcome the presumption of regularity that the order was properly issued when the master commissioner's return to the order of sale specifically states that the order was received and the publication and sale comply with the order and foreclosure decree.
6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. **Judicial Sales: Notice.** The requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1995) apply to a publication of notice given under Neb. Rev. Stat. § 25-1529 (Reissue 1995) governing sales on execution.
8. **Mortgages: Foreclosure: Notice.** Under Neb. Rev. Stat. § 25-1531 (Reissue 1995), a court errs in confirming a mortgage foreclosure sale when the facts show that the mortgagee did not comply with the notification requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1995).

Appeal from the District Court for Lancaster County: Earl J. Witthoff, Judge. Reversed.

James A. Cada and Edward F. Hoffman, of Cada & Associates, for appellants Vincent Okwumuo and Sabrina Okwumuo.

Harvey Froscheiser for appellant F & F Oil Co., Inc.

Ward F. Hoppe and S. Grace Acosta, of Hoppe & Harner Law Office, for appellee Cornhusker Bank.

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

CONNOLLY, J.

Vincent Okwumuo, Sabrina Okwumuo, and F & F Oil Co., Inc. (F & F Oil), (collectively the appellants) appeal from a district court's order confirming a judicial sale under a decree foreclosing a real estate mortgage. The appellants objected to the confirmation on various grounds, including lack of notice and inadequacy of sale price. The district court found that the sale was made in conformity with the law and sold for fair value. We reverse because the appellee Cornhusker Bank failed to give notice of the sale in accordance with Neb. Rev. Stat. § 25-520.01 (Reissue 1995).

BACKGROUND

On September 28, 1995, the Lancaster County treasurer sold property owned by Vincent and Sabrina in Lincoln at a private tax sale for delinquent taxes. On January 24, 1996, KLH Retirement Planning, Ltd. (KLH), took assignment of the tax sale certificate and also paid the taxes for the subsequent years. On October 13, 1998, after the 3-year redemption period had expired, KLH filed a petition in district court seeking to foreclose its tax sale certificate. See Neb. Rev. Stat. § 77-1902 (Reissue 1996). The petition named the owners and other lienholders as defendants. KLH alleged that the other liens were inferior to its interests and asked that its lien be decreed superior and that the property be sold to satisfy its lien. The other liens included (1) a deed of trust filed by Cornhusker Bank, (2) a deed of trust filed by F & F Oil, and (3) a federal tax lien filed by the Internal Revenue Service (IRS).

In March 1999, all of the parties entered a joint motion and stipulation for entry of judgment. They agreed that KLH had a valid first lien and was entitled to foreclose and sell the property as a result of its ownership of the tax sale certificate. They agreed that Cornhusker Bank had a valid second lien, F & F Oil had a valid third lien, and the IRS had a valid fourth lien.

The district court issued its decree of foreclosure in March 1999. The court found that all four of the liens were valid and that

the total amount owed on the liens was $92,776.45, plus interest. The court found that unless the liens were redeemed or satisfied before June 1, 1999, the real estate should be sold. The liens were not redeemed or satisfied. Between June 9, 1999, and June 27, 2000, KLH asked the court four times to issue an order of sale for the property, but none of the published sales ever took place.

On August 10, 2000, KLH filed a notice that its tax sale certificate had been redeemed in full and that it was releasing its interest in the property. On August 11, Cornhusker Bank requested an order of sale, but the record contains only an unsigned, proposed order. On September 13, Cornhusker Bank filed a proof of service that it had sent a copy of the notification to the attorneys of the remaining parties. The notification, stating that the sale would take place on September 19, was first published in The Daily Reporter on August 25.

The master commissioner's return to order of sale indicates that he received the order on August 16, 2000, and caused notification to be published in The Daily Reporter for 4 consecutive weeks, beginning August 25. He then sold the property through public auction on September 19 to "Hot to Trot Specialty Foods, Inc.," for $39,000.

On October 2, 2000, F & F Oil filed a motion to set aside the sale because, among other reasons: (1) Cornhusker Bank had not complied with § 25-520.01 and (2) the amount of the sale price, $39,000, was inadequate when the property had a value of over $100,000. Vincent and Sabrina also filed a motion to set aside the sale. Their allegations were identical with one exception. They additionally alleged that Cornhusker Bank told them on September 12, 7 days before the sale, that the balance due on the mortgage was the monthly payment of $481 and that the bank accepted a payment of $481 on September 14.

On October 16, 2000, a hearing was held on the two motions to set aside the September 19 sale and Cornhusker Bank's motion to confirm the sale. At the hearing, Cornhusker Bank's counsel submitted an affidavit in which he stated that his office had sent a copy of the published notification of sale to the attorneys of record for the other parties on September 13, 2000. Vincent and Sabrina submitted, without objection, a valuation of the property for tax assessment purposes performed in August 2000. That

assessment used a cost method to determine that the value of the land without improvements was $21,247 and that the value of the improvements was $104,353, for a total value of $125,600. No other appraisals or evaluations were submitted as evidence.

In November 2000, the court entered an order confirming the sale. The court found that the sale was made in conformity with the law in all respects and that the property sold for fair value under the circumstances and conditions of the sale. The appellants then filed this appeal.

ASSIGNMENTS OF ERROR

The appellants assign, restated, that the district court erred in finding that the sale price of $39,000 was adequate and a fair value under the circumstances and conditions of the sale when (1) the evidence showed that the property's minimum market value was $125,600, and no contrary evidence was adduced regarding the property's value; (2) the appellants' evidence indicated that a subsequent sale of the property would realize a greater sale price than $39,000; (3) the sale price of $39,000 was less than the decree amount, which was in excess of $92,000; (4) the master commissioner was without authority to sell the property because an order of sale was not issued by the clerk's office; (5) Cornhusker Bank did not comply with the requirements of § 25-520.01; (6) the notice of sale did not comply with due process; and (7) the uncontroverted evidence showed that Vincent and Sabrina were not in default to Cornhusker Bank.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

Authorization for Judicial Sale

The appellants contend that the master commissioner was without authority to sell the property because the district court clerk did not issue an order of sale as required under Neb. Rev.

Stat. § 25-1501 (Reissue 1995). Cornhusker Bank contends that the clerk's failure to include a signed copy of the order in the court file is an insufficient reason to set aside the sale. We agree.

[3] Neb. Rev. Stat. § 77-1912 (Reissue 1996) governs the procedures for a sheriff's sale of real property after a foreclosure order for delinquent taxes. It provides, in relevant part, that the "sheriff shall sell the real property in the same manner provided by law for a sale on execution." Execution sales, in turn, are governed by Neb. Rev. Stat. § 25-1501 et seq. (Reissue 1995 & Cum. Supp. 2000).

[4] Section 25-1501 provides in part that "[e]xecutions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county." In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). Although the record contains only an unsigned, proposed order, the presumption of regularity is not overcome.

[5] We have held that a district court clerk's failure to attach his seal of office to an order of sale does not invalidate a judicial sale under a decree of foreclosure because the decree of foreclosure is "sufficient authority for the sheriff to sell the property. The issuance of the order of sale was unnecessary . . . ." *Salisbury v. Murphy*, 63 Neb. 415, 416, 88 N.W. 764, 764 (1902). Compare *Stephenson v. Murdock*, 89 Neb. 818, 132 N.W. 406 (1911) (holding that decree, not order of sale, controls sheriff's authority to sell property). The master commissioner's return to the order of sale specifically stated that he received the order of sale on August 16, 2000. Under its commands, he published notice and then sold the property. We conclude that this assignment of error is without merit.

Adequacy of Notice

The appellants next contend that the notice they received did not comply with § 25-520.01 or the requirements of due process under *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). Cornhusker Bank claims that the court was not presented with the due process issue and

that the facts of *Mennonite Board of Missions* are distinguishable. Cornhusker Bank further contends that § 25-520.01 was intended to apply to situations when service of process is performed by publication.

[6] When an issue is raised for the first time in an appellate court, it will be disregarded because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Adoption of Luke, ante* p. 365, 640 N.W.2d 374 (2002).

Neither F & F Oil nor Vincent and Sabrina raised a due process objection in their motions to set aside the sale or in their arguments to the court at the confirmation hearing. Thus, we consider only their argument that the notice of sale did not comply with § 25-520.01.

Section 25-1529 requires notice by publication in a sale on execution of real property: "Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given. The notice shall be given by publication once each week for four successive weeks in some newspaper printed in the county . . . ."

The court officer appointed to conduct the sale has the duty to publish this notice. Here, the issue is whether the party requesting the order of sale had the duty to mail a copy of the published notice to other parties with an interest in the property being sold. Section 25-520.01 provides:

> In any action or proceeding of any kind or nature . . . where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice.

Section 25-520.01 is included in the statutes governing the commencement of actions, service of process, and constructive service. See § 25-1501 et seq. Although some of its provisions are obviously intended to apply only to constructive service when a party cannot be located, its application is not limited to service of process. Neb. Rev. Stat. § 25-520.03 (Reissue 1995) states that the Legislature intended § 25-520.01 to be "cumulative and supplemental to existing legislation [and to] apply to all parties authorized by law to give notice by publication."

[7] This court has concluded that § 25-520.01 applies to the publication of notice for a judicial sale. See *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). See, also, *Hollstein v. Adams*, 187 Neb. 781, 194 N.W.2d 216 (1972). In *Kleeb*, the district court ordered a tract of property to be sold after determining the parties' interests in a partition action. The appellants argued that the district court erred in finding that § 25-520.01 was satisfied when the copy of the notice was not mailed on the fifth day after the first publication. This court, citing Neb. Rev. Stat. § 25-2221 (Reissue 1995) (computation of time), held that § 25-520.01 was not violated by mailing the notice on the following Monday when the fifth day after the first publication fell on a Saturday. *Kleeb, supra*. We conclude that § 25-520.01 applies to a publication of notice given under § 25-1529 governing sales on execution.

Cornhusker Bank, however, argues that it substantially complied with § 25-520.01 by serving notice of publication on the attorneys of record for the appellants as provided for under Neb. Rev. Stat. § 25-534 (Reissue 1995). That section allows for service or notice of any document other than a summons to be given to a party's attorney of record unless the court orders otherwise. Even if § 25-534 modifies the requirement of § 25-520.01 to mail notice to the parties, that would not overcome Cornhusker Bank's failure to mail the notice within 5 days of the first publication. Cornhusker Bank cannot, and does not, claim that it substantially complied with the 5-day notice requirement when it sent notice of publication to the parties' attorneys 19 days after the first publication.

[8] Section 25-1531 requires a court to carefully examine the proceedings and "be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter" before

confirming a mortgage foreclosure sale. As discussed, we have previously held that the notice by publication under § 25-1529 must conform to the requirements of § 25-520.01. We determine that the district court abused its discretion in confirming this sale when the facts showed that Cornhusker Bank did not comply with the requirements of § 25-520.01. Because of our ruling, we do not reach the remaining assignments of error.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN V. HALTOM, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
DANIEL C. BACON, APPELLANT.

642 N.W.2d 807

Filed April 25, 2002. Nos. S-01-485, S-01-486.

1. **Constitutional Law: Obscenity: Appeal and Error.** In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment.
2. **Obscenity: Appeal and Error.** In reviewing the determinations of the trier of fact under the three-part obscenity standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and Neb. Rev. Stat. § 28-807(10) (Reissue 1995), the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of contemporary community standards which are uniquely within the province of the trier of fact.
3. ____: ____. An appellate court should apply a de novo review in considering the third prong of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.
4. **Constitutional Law: Obscenity.** Obscenity is not constitutionally protected speech and can be prohibited or otherwise regulated without violating the prohibitions of the First Amendment to the U.S. Constitution.
5. **Obscenity: Words and Phrases.** The definition of obscenity is limited to those materials which, taken as a whole, appeal to the prurient interest in sex; which portray sexual conduct in a patently offensive way; and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
6. **Obscenity.** Material that provokes only normal, healthy sexual desires is not intended to be characterized as obscene.

7. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
8. **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.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
10. **Obscenity: Words and Phrases: Appeal and Error.** It is error in an obscenity case to define the term "prurient" as "a tendency to excite lustful thoughts."
11. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
12. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeals from the District Court for Douglas County, MARY G. LIKES, Judge, on appeal thereto from the County Court for Douglas County, EDNA R. ATKINS, Judge. Judgments of District Court reversed, and causes remanded for a new trial.

Andrew M. Ferguson and Joseph M. Acierno, of Ferguson, Chesterman & Acierno, P.C., and John Fahle, of Carter & Fahle, for appellants.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CONNOLLY, J.

John V. Haltom and Daniel C. Bacon (collectively the appellants) appeal from orders of the district court affirming their convictions and sentences in county court for preparing, distributing, or promoting obscene literature or material. The two cases were consolidated for appeal. The materials at issue are two videos depicting a variety of sexual acts.

The appellants contend that the county court erred in its instruction on the elements of the offense and in the definition of "prurient interest." We reverse, and remand for a new trial because

the jury was improperly instructed that "prurient" was defined as "a tendency to excite lustful thoughts."

BACKGROUND

Haltom is the owner of Dr. John's Lingerie and Novelty Boutique in Omaha, Nebraska. Bacon is an employee of the store. According to Haltom, the store carries a variety of merchandise including lingerie, swim wear, stockings, vibrators, rubber goods, dildos, gag gifts, and adult videos and literature. Adult videos make up approximately 15 percent of the inventory.

Two videos are the subject of this appeal. The first video was sold on January 23, 2000, and is the subject of a count against Haltom. The video, entitled "Sex Patrol," consists of nine scenes. The video has some dialog, although most of the dialog refers to sexual situations. The video depicts a variety of sex acts, including intercourse in a variety of positions and oral sex. Some of these scenes involve one woman engaging in sex acts with two men. The video also depicts various sex acts between two women and a man. The video shows ejaculation and includes a very brief depiction of spanking. The video contains several scenes involving a woman masturbating, one of which includes the use of a very large replica of a male penis. In addition, the video includes three scenes involving anal sex, including a scene in which two males simultaneously penetrate a woman, one vaginally, and the other anally.

The second video was sold on January 24, 2000, and is the subject of one count against Bacon and an additional count against Haltom. The video, entitled "Bleached Banged Blondes," consists of an advertisement for a telephone hotline, a warning that the tape contains sexual highlights and is for adults only, and nine scenes of sexual content. The video contains little dialog and nearly all of the dialog is sexual in nature. The video depicts a variety of sex acts, including intercourse in a variety of positions, oral sex, and penile-breast sex. The video also shows ejaculation and contains a scene that includes spanking. One scene depicts two women engaging in oral sex while a man watches. The man mentions on at least two occasions that the women are sisters and later joins the women in various sexual acts. The boxes containing each video portray photographs of sexual intercourse.

Omaha police officer Karen McArdle testified that in December 1999 and January 2000, she went to Haltom's store on several occasions as part of an undercover investigation. During the investigation, McArdle went to the store to arrest Haltom on five counts of distributing obscene materials that are not the subject of this appeal. During the arrest, McArdle identified herself as a police officer and spoke with Haltom after first advising him of his *Miranda* rights. She testified that Haltom told her that he had owned similar stores in Missouri and that he had previously been arrested there for distributing obscene material. The appellants initially objected to this testimony as part of a motion in limine before trial, but did not renew their objection to the testimony at trial.

McArdle testified that on January 24, 2000, she again went to the store with another officer. The officers spoke to Haltom about the purchase of a video. Bacon also assisted the officers in choosing a video. The officers purchased the video entitled "Bleached Banged Blondes." Bacon rang up the sale and gave the officers a receipt. McArdle stated that she did not know if either of the appellants had ever viewed the video.

Ronald B. Cole, a sergeant with the Omaha Police Department, testified that he conducted an undercover investigation of the store in December 1999. As part of the investigation, he spoke with Bacon. Cole testified that Bacon stated that he had watched some of the videos in the store and that he was aware that the videos depicted sexual intercourse. On January 23, 2000, Cole purchased the video entitled "Sex Patrol." Neither Haltom nor Bacon sold the video to Cole. Instead, the sale was made by another person. Cole admitted that he did not know if either Haltom or Bacon had ever viewed the video. At the end of the State's case, the appellants moved to dismiss. The motion was overruled.

Haltom testified that his store is strictly oriented to heterosexual couples. He stated that he does not carry videos depicting male-on-male sexual contact, sex with animals, sex with children, or violence. He testified that he had no reason to believe that any of the videos he received from his distributor were obscene.

Haltom testified that he has viewed a few of the videos that he sells. He stated that he had not viewed either of the two videos before they were sold to the officers. To Haltom's knowledge,

Bacon also had not previously viewed the videos. He stated that he and Bacon did watch the videos before trial. He testified that in his opinion, both videos were regular, standard adult videos. Haltom testified that he had been arrested five times in Missouri for selling obscene material, but was never convicted. Bacon did not testify.

The jury was instructed that the elements of the crime were that the defendants "did knowingly publish, circulate, sell, rent, lend, transport in interstate commerce, distribute, or exhibit any obscene material; or had in his or her possession with intent to sell, rent, lend, transport, or distribute any obscene material." The jury was further instructed:

> **"Knowingly"** shall mean having general knowledge of, reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry of the character and content of any material, taken as a whole, described in this section, which is reasonably susceptible to examination by the defendant.

The appellants objected to the instruction because it did not set out each element separately and would be confusing to the jury. The appellants also offered an alternate instruction on the elements of the offense.

The jury was instructed on the definition of obscene in instruction No. 6 as follows:

> **"Obscene"** shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct . . . and (c) the work conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

In a separate instruction, No. 8, the jury was instructed that " '[p]rurient' means material having a tendency to excite lustful thoughts."

The appellants objected to the instructions, contending that prurient was correctly defined in instruction No. 6 as a shameful

or morbid interest in nudity, sex, or excretion, but incorrectly defined in instruction No. 8. The appellants argued that the term "prurient" could not be defined only in terms of lust and that the combination of instructions would confuse the jury about the correct definition of the term. The appellants offered alternate instructions on the definition of prurient interest.

The jury found Bacon guilty of one count of preparing, distributing, or promoting obscene literature or material and found Haltom guilty of two counts of the same charge. Following the verdict, the appellants moved for judgment notwithstanding the verdict. The court overruled the motion, and the appellants filed a motion for a new trial, which was also overruled. On appeal, the district court affirmed.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in (1) instructing the jury that "prurient" means material having a tendency to excite lustful thoughts, (2) failing to instruct the jury that knowledge of the character or content of the material is an element of the crime, (3) allowing evidence of prior bad acts, (4) failing to grant their motions for judgment notwithstanding the verdict and new trial because there was insufficient evidence to convict them, and (5) failing to provide a complete and accurate record of the proceedings.

STANDARD OF REVIEW

[1,2] In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate court must review the determinations of the trier of fact under the three-part obscenity standard set forth in *Miller v. California, supra*, and Neb. Rev. Stat. § 28-807(10) (Reissue 1995). In doing so, the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of

contemporary community standards which are uniquely within the province of the trier of fact. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[3] The appellate court should apply a de novo review in considering the third prong of the *Miller v. California* test, i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review. *Id*.

ANALYSIS

The appellants contend that the district court erred when instructing the jury. They further contend that no reasonable jury could have found the videos to be obscene. We begin our review with some familiar principles concerning the regulation of obscenity.

Definition and Regulation of Obscenity

[4-6] Obscenity is not constitutionally protected speech and can be prohibited or otherwise regulated without violating the prohibitions of the First Amendment to the U.S. Constitution. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957); *State v. Harrold, supra*. The U.S. Supreme Court has limited the definition of obscenity to those materials which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. at 24. Material that provokes only normal, healthy sexual desires is not intended to be characterized as obscene. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Neb. Rev. Stat. § 28-813 (Reissue 1995) provides in part:

> (1) It shall be unlawful for a person knowingly to (a) print, copy, manufacture, prepare, produce, or reproduce obscene material for the purpose of sale or distribution, (b) publish, circulate, sell, rent, lend, transport in interstate commerce, distribute, or exhibit any obscene material, (c) have in his or her possession with intent to sell, rent, lend, transport, or distribute any obscene material, or (d) promote any obscene material or performance.

"Material" for purposes of § 28-813 includes any "motion picture . . . television production, other pictorial representation or electric reproduction." § 28-807(7). "Obscene" is defined in § 28-807(10) as follows:

> Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value.

Prurient Interest Instruction

The appellants contend that the trial court improperly instructed the jury on the definition of the term "prurient." They argue that by instructing the jury that prurient means material having a tendency to excite lustful thoughts, they could be found guilty even if the jury determined that the videos appealed to only a normal interest in sex. At trial, the State argued that the definition was approved by the U.S. Supreme Court in *Roth v. United States, supra*.

[7,8] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bao, ante* p. 439, 640 N.W.2d 405 (2002). 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. *Id.*

[9] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

The statutes regulating obscenity do not specifically define the term "prurient." But, § 28-807(10) defines obscene as including material that "predominately appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." See, also, Neb. Rev. Stat. § 28-814(2) (Reissue 1995) (requiring jury instruction using similar language).

The U.S. Supreme Court has deferred to the decision of a federal circuit court of appeals that a statute could not constitutionally define "prurient" solely in terms of "lust." *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *reversed on other grounds, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

In *Eikenberry*, the Ninth Circuit noted that the U.S. Supreme Court first attempted to define "prurient" in 1957 in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). The Ninth Circuit recognized that the Court in *Roth* initially stated in a footnote that " 'material having a tendency to excite lustful thoughts' was an example of material 'appealing to prurient interest.' " *Eikenberry*, 725 F.2d at 490, quoting *Roth v. United States, supra*. But, the court in *Eikenberry* noted that *Roth* then "referred to the Webster's New International Dictionary (Unabridged, 2d ed., 1949), which defined 'prurient' as '[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd.' " *Eikenberry*, 725 F.2d at 490. The *Eikenberry* court quoted *Roth* which ultimately concluded that there was " 'no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957).' " That section of the Model Penal Code defined an item as obscene " 'if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion.' " *Eikenberry*, 725 F.2d at 490. Thus, the *Eikenberry* court concluded that the U.S. Supreme Court did not intend in *Roth* to equate "lust" with "prurient interest."

The *Eikenberry* court also concluded that even if "lust" could be equated with "prurient interest" in 1957, the meaning of the term "lust" is interpreted differently today. The court stated:

> [W]e also recognize that the meaning of words changes as a result of contemporary usage. Obscenity jurisprudence—based as it has been on contemporary community standards and changing social mores—is an extremely fluid area of law. . . . The connotations that accompanied the word "lust" in 1957, when *Roth* was decided, are not necessarily the same ones that attach to the word today. For example, the

> most recent edition of Webster's New International Dictionary (Unabridged, 3d ed., 1976) no longer includes the word "lust" in its definition of "prurient."

725 F.2d at 490.

The *Eikenberry* court further noted that the U.S. Supreme Court's 1973 decision in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), made no reference to the term "lust" and relied solely on the definition of obscenity offered in the A.L.I.'s 1962 Official Draft of the Model Penal Code. The court further stated:

> Indeed, to permit expression that merely excites "lust" to be regulated by the state would destroy the boundaries between protected and unprotected speech. To the contemporary jury, "lust" is unlikely to connote anything more than "sexual desire." *Websters Third New International Dictionary* (Unabridged 3d ed., 1976) . . . ("lust" defined as "sexual desire or appetite"). . . . Expression that may merely stimulate sexual longing or desire is entitled to the full range of first amendment protections and cannot constitutionally be branded as obscene.

725 F.2d at 491. The court then held that a statute defining "prurient interest" using the term "lust" was unconstitutional. On appeal, the U.S. Supreme Court did not decide the proper definition of the term "prurient" and instead deferred to the conclusion of the Ninth Circuit. The Court reversed to the extent that the Ninth Circuit had invalidated the entire statute at issue when the statute had a severability clause. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985).

Several other courts have similarly concluded that "prurient interest" cannot be defined solely in terms of "lust." See *State v. LeBlang*, 530 So. 2d 601 (La. App. 1988) (error to include lust in jury instruction defining "prurient interest"). See, generally, *Little Store, Inc. v. State*, 295 Md. 158, 453 A.2d 1215 (1983).

Although we have not directly addressed the proper definition of the term "prurient," we have stated that a jury was properly instructed when given the following instruction:

> "You must determine whether the material appeals to a prurient interest in sex, for unless it does it cannot be obscene. A prurient interest in sex is not the same as a

> candid, wholesome, or healthy interest in sex. Material does not appeal to the prurient interest just because it deals with sex, or shows nude bodies. Prurient interest is a shameful or morbid interest in sex, nudity or excretion which goes beyond the customary limits of candor."

State v. Harrold, 256 Neb. 829, 846, 593 N.W.2d 299, 313-14 (1999). We further stated that this definition was taken directly from *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), and remains an accurate description of the definition under *Brockett v. Spokane Arcades, Inc., supra*.

[10] We find the reasoning of the Ninth Circuit in *J-R Distributers, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *reversed on other grounds, Brockett v. Spokane Arcades, Inc., supra*, persuasive. We do not read *Roth* to define "prurient" as a "tendency to excite lustful thoughts." Instead, *Roth* defined "prurient" in the same manner as it is used in § 28-807(10). Under § 28-807(10), obscene material "predominately appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion." We further agree that by defining "prurient" as "a tendency to excite lustful thoughts," the jury could impermissibly determine that material which provokes normal, healthy sexual desires is obscene.

Here, the jury was initially instructed in part that "obscene" material predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion. But later, in instruction No. 8, the jury was specifically told that "prurient" means "material having a tendency to excite lustful thoughts." We conclude that this definition was in error.

The State argues that when the instructions are read as a whole, there is no error. We note, however, that the court did not instruct the jury that it could not find material obscene if the material provokes normal, healthy sexual desires. When the improper definition of prurient is combined with the statutory definition, the jury still could have found the appellants guilty even if they believed the videos did provoke normal, healthy sexual desires. We determine that the jury was improperly instructed regarding the definition of the term "prurient" and that the appellants were prejudiced by the error. Accordingly, we reverse.

Sufficiency of Evidence

[11,12] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), citing *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). It would unduly lengthen this opinion to again detail the facts. We have reviewed the record and viewed the videos, and we determine that there was sufficient evidence to sustain the guilty verdicts. Because of our ruling, we do not address the appellants' other assignments of error.

CONCLUSION

We conclude that the county court improperly instructed the jury regarding the definition of the term "prurient." The appellants were prejudiced by the erroneous instruction. Accordingly, we reverse, and remand for a new trial.

Reversed and remanded for a new trial.

Lee Scott Trainum, appellee, v. Sutherland Associates, LLC, et al., appellants.

642 N.W.2d 816

Filed April 25, 2002. No. S-01-575.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** 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. **Mandamus: Attorneys at Law: Conflict of Interest.** Mandamus is a viable means of addressing perceived attorney conflicts of interest.

5. **Attorneys at Law: Appeal and Error.** If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate.
6. **Mandamus.** Mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom.
7. ____. Mandamus is the appropriate method of seeking interlocutory review of lower court orders denying disqualification of counsel.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Appeal dismissed.

Richard A. DeWitt and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., and John M. Touhy, Andrew W. Morris, and Craig Isenberg, of Mayer, Brown & Platt, for appellants.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Sutherland Associates, LLC; Sutherland Ethanol Company, LLC; Robert L.B. "Bibb" Swain; Robert Swain; and Delta-T Corporation (collectively Sutherland) appeal from an order of the district court denying disqualification of Lee Scott Trainum's counsel. We conclude that this court does not have jurisdiction over Sutherland's appeal and therefore dismiss the appeal.

BACKGROUND

From 1992 to 2000, Trainum was an employee and director of Delta-T, a Virginia corporation located in Williamsburg, Virginia. In 1998, several employees of Delta-T began taking steps toward purchasing an ethanol plant near Sutherland, Nebraska. Among these employees were Trainum, Bibb Swain, and Robert Swain. In 1999, Sutherland Associates, a Nebraska limited liability company, was formed for the purpose of purchasing the ethanol plant. Trainum, Bibb Swain, and Delta-T were the initial member managers of Sutherland Associates.

Since 1997, Sheila Marsh has served as part-time, in-house general legal counsel for Delta-T. During that time, Marsh participated in meetings with Trainum, Bibb Swain, and Robert Swain and gave legal advice regarding the creation of Sutherland Associates, the duties of Trainum and the Swains as both officers of Delta-T and member managers of Sutherland Associates, and tax-related issues. Marsh also drafted a proposed operating agreement for Sutherland Associates and negotiated loan agreements. During this time period, Trainum was not represented by separate counsel.

Marsh requested that the Richmond, Virginia, law firm of McCandlish Kaine serve as outside counsel to Delta-T on matters related to Sutherland Associates. At the time, Naila Townes Ahmed was a partner in McCandlish Kaine, and Ahmed provided a number of services to Delta-T at Marsh's request. Ahmed gave legal advice to Delta-T and Sutherland (which included Trainum at that time) regarding the membership interests in Sutherland Associates, the merger of Sutherland Associates into Sutherland Ethanol Company, and the dilution of member interests as a result of the merger. Ahmed also advised Marsh regarding communications Marsh had with the law firm of Williams, Mullen, Clark & Dobbins (Williams Mullen) over matters involved in the current lawsuit and also drafted a settlement agreement with Trainum regarding this lawsuit. Other attorneys at McCandlish Kaine provided similar services to Delta-T regarding matters at issue in this lawsuit.

On March 1, 2000, Trainum terminated his employment with Delta-T. Subsequent negotiations over Trainum's status as member manager of Sutherland Associates were conducted. On August 30, 2000, Trainum was informed by Bibb Swain that his membership interest in Sutherland Associates was being reduced from 22.5 percent to 1 percent and that Sutherland Associates would be merged into Sutherland Ethanol Company, a newly formed Nebraska limited liability company. Trainum was also notified that should the merger be approved, his interest in Sutherland Associates would be purchased for $1. Upon receipt of this information, Trainum retained Malcolm Ritsch, Jr., of Williams Mullen to represent him. Shortly thereafter, Trainum retained the

Lincoln, Nebraska, law firm of Cline, Williams, Wright, Johnson & Oldfather (Cline Williams).

On October 25, 2000, Trainum filed a petition against Sutherland alleging several limited liability company improprieties and asserting eight separate claims, including claims under Nebraska and Virginia securities laws and the Virginia Conspiracy Act. The petition was signed by Cline Williams, while Williams Mullen was listed as "Of Counsel."

On November 1, 2000, Marsh learned that Ahmed had announced her intention to leave McCandlish Kaine and join Williams Mullen. Ahmed began working for Williams Mullen on December 1, 2000, and Marsh verified this on December 6, 2000, in telephone calls to McCandlish Kaine and Williams Mullen.

Sutherland demurred to Trainum's petition on December 18, 2000, and the district court overruled the demurrer on February 7, 2001. Between those dates, the parties served on each other interrogatories and various motions to produce.

On February 14, 2001, Sutherland filed a motion to disqualify Willams Mullen and Cline Williams because Ahmed had provided legal services to Sutherland concerning this lawsuit and has since joined the law firm representing Trainum. In response to the motion to disqualify, Trainum offered the affidavits of Ritsch and Ahmed. Ritsch asserted that he had no knowledge that Ahmed had been involved in representing Sutherland and that no communication had taken place between himself and Ahmed regarding this lawsuit. Ritsch also averred that because he had not received any information from Ahmed regarding Sutherland, he had not provided any such information to any member of Cline Williams. Ahmed also asserted that she had had no communication with any Williams Mullen attorney regarding this lawsuit.

On February 20, 2001, Trainum filed a motion asking for leave to allow Williams Mullen to withdraw as counsel. The record does not reflect any action taken by the court on this motion. The district court, in an April 25 order addressing only Cline Williams, denied the motion to disqualify. Sutherland timely filed a notice of appeal from the district court's order, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Sutherland makes five assignments of error, all claiming generally that the district court erred in denying its motion to disqualify Cline Williams.

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. *In re Interest of Jaden H., ante* p. 129, 638 N.W.2d 867 (2002).

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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (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. *Id.*

In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), Freezer Services brought an original action seeking a writ of mandamus compelling the disqualification of counsel. The order at issue was, as in this appeal, an order denying a motion to disqualify counsel. This court noted that Freezer Services first attempted a direct appeal from the district court's order denying disqualification. *Id.* That appeal was dismissed for lack of jurisdiction on appellee's motion for summary dismissal. *Freezer Services, Inc. v. Waller*, 233 Neb. xxxiv (case No. 89-1255, November 16, 1989). See Neb. Ct. R. of Prac. 7B(1) (rev. 2000).

In several subsequent decisions, we again reviewed a lower court's denial of a motion to disqualify counsel. See, e.g. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). As in *State ex rel. Freezer Servs., Inc. v. Mullen, supra*, these cases were reviewed by this court in an original action for mandamus.

[4] *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), also involved review of a lower court's

alleged error in the denial of a motion to disqualify counsel. However, the issue was presented to this court by an appeal of the lower court's judgment on the merits and not by an original action for mandamus. We affirmed on the merits and did not review the district court's denial of the motion to disqualify, noting that "[a]n appellate action is an inadequate means of presenting attorney conflicts of interest for review." *Id.* at 853, 540 N.W.2d at 326 (citing *State ex rel. Freezer Servs., Inc. v. Mullen, supra*). We also noted that "mandamus is a viable means of addressing perceived attorney conflicts of interest." 248 Neb. at 854, 540 N.W.2d at 327.

[5] Each of the cases cited above were decided prior to our decision in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), which presented a district court's order granting attorney disqualification. Although the order granting disqualification was not a final order, we held that jurisdiction existed under a newly adopted exception to the final order requirement: If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. *Richardson v. Griffiths, supra.*

As in *Richardson*, the denial of the motion to disqualify Cline Williams in this case is not a final order. The question now becomes whether the *Richardson* exception to the final order requirement applies to vest jurisdiction over Sutherland's appeal in this court. We conclude that it does not.

[6] The exception adopted in *Richardson* was necessary because where the order sought to be reviewed is an order granting disqualification, mandamus is not an appropriate remedy. The general rule is that mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom. *Id.* Thus, the appellants in *Richardson* could not bring an original action for mandamus to compel the district court to vacate its order of disqualification. *Id.* However, to allow the district court's disqualification order to stand, without allowing an immediate avenue for appellate review, would have prejudiced the rights of the party whose counsel had been disqualified.

[7] Although we stated in *Richardson* that we were adopting the exception to the final order requirement in part "to provide both parties (movant and nonmovant) with an equal opportunity to seek interlocutory review of an attorney disqualification decision," it is clear that the exception was necessary in that case only to provide interlocutory review of an order granting disqualification. *Id.* at 831, 560 N.W.2d at 435. *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), and our other cases involving district court orders denying motions to disqualify make clear that mandamus is the appropriate method of seeking interlocutory review.

Our decision today to preclude use of the *Richardson* exception to directly appeal orders denying disqualification is also compelled by practical concerns. The ability of a party to file a motion to disqualify, which is subsequently denied, and then seek appellate review of that ruling under the *Richardson* exception could cause unnecessary delay in the course of litigation. Instead, a mandamus action brought as an original action in the Supreme Court would offer the parties a more expedient method of review and would prevent use of a meritless motion to disqualify to bring the proceedings to a halt.

CONCLUSION

The district court's order denying disqualification of Trainum's counsel is not a final, appealable order because it does not affect a substantial right of Trainum. While the exception to the final order requirement in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), is the appropriate method to seek review of a lower court's order granting disqualification of counsel, such exception is not the appropriate method of seeking review of a lower court's order denying disqualification. Instead, aggrieved parties should bring an original action seeking a writ of mandamus compelling counsel disqualification. Therefore, this court does not have jurisdiction over Sutherland's direct appeal, and the appeal is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating.

JOE EDWARD SCHAEFER, APPELLANT AND CROSS-APPELLEE, V. CARLA JEAN SCHAEFER, APPELLEE AND CROSS-APPELLANT.

642 N.W.2d 792

Filed April 25, 2002. No. S-01-665.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case.
3. **Divorce: Attorney Fees.** In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.
4. **Property Division: Alimony.** The attainment by one spouse of a professional degree with aid from the other is one factor a district court may consider in the division of assets and award of alimony.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Affirmed.

Tylor J. Petitt, of The Van Steenberg Firm, P.C., for appellant.

Jeffrey L. Hansen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., 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 Kimball County dissolving the marriage of Joe Edward Schaefer (Joe) and Carla Jean Schaefer (Carla). Joe contends the district court erred in determining custody of the parties' minor child, in awarding alimony, and in its distribution of the marital assets. Carla cross-appeals on the issues of alimony, child support, and property distribution.

FACTS

Joe and Carla were married November 30, 1974. Three children were born during the marriage, and one child remained a

minor at the time of the dissolution proceedings. Joe was 49 and Carla was 50 at the time of the dissolution hearing.

Carla received a degree from Iowa State University in art education in 1972, prior to the marriage. Joe completed his bachelor's degree in education at Chadron State College during the early years of the marriage. Carla taught at a school in Harrison, Nebraska, from 1973 to 1977, when she returned to school at Chadron State College and obtained an endorsement in home economics. The couple returned to Harrison in approximately 1978, and Joe worked for his cousin at a mechanic shop. Their first child was born in 1978, and Carla stayed home with the children from 1978 to 1985. Carla declined a teaching job in 1979 because Joe felt it was important for her to stay home with the children. In 1985, Carla resumed teaching part time, and in 1987, she opened a home daycare business which she operated until 1996. During this time period, she also worked odd jobs, including cleaning the local bank in the evenings, baking rolls to sell at the local bakery, and caring for two local elderly women on weekends.

In 1984, Joe started a mechanic shop in Harrison which he operated until 1996. Carla testified that in approximately 1993, Joe began sleeping in a room above his shop in Harrison. He continued to come to the marital home for lunch and for dinner, and after spending time with the children, he would return to his shop to sleep. The parties have not lived together for any extended period of time since 1993.

Joe injured his hand in a work-related accident in the early 1990's, and in 1995, with the assistance of vocational rehabilitation, he returned to school at Chadron State College to earn a degree in justice studies. He sold his business during this time period. Joe testified that while he was attending Chadron State College, he also worked full time and used the money to pay for family bills. On cross-examination, however, he admitted that he did not help pay household utility bills after 1996. Carla testified that while Joe was in school, he never sent money to help with household expenses, and that it was difficult for her to provide for the family on her income.

Joe received his second degree from Chadron State College in May 1997. In August 1997, Joe entered law school in Lincoln, Nebraska, and graduated in May 2000. While attending law

school, Joe lived in Lincoln and saw his family sporadically. He borrowed money to pay for his education and testified that while in law school, he bought some items, including clothes, for the children. He admitted that no money was sent to help Carla with expenses during this time period. Joe incurred significant credit card debt while in law school. Carla did not assist Joe in paying for law school.

During law school, Joe began working part time as a legislative aid for a state senator. After graduation, he accepted a full-time position in the same capacity. He testified that the position utilized his legal skills, although he did not need to be an attorney to perform the job. Joe testified that his net income at the time of trial was $1,670 per month. He further testified that he enjoyed his job and intended to continue doing it, with the possibility of using it as a springboard into a political career.

In 1996, Carla accepted a teaching position in Kimball, Nebraska, and moved there with the children. Joe was attending Chadron State College at the time. In 1999, Carla accepted a teaching position in Coon Rapids, Iowa, where she resided at the time of the dissolution. She built a home in Iowa at the time of her move and financed it through her earnings, inheritance, and a government assistance program. Carla's net income at the time of trial was $1,800 per month.

Joe testified that during the course of the marriage, the parties borrowed approximately $51,000 from his parents. He testified that his mother kept a ledger balance documenting the amount of the loan and that he was expected to repay the entire balance. He admitted that there were no promissory notes or other documents obligating the repayment of the debt and that the last payment was made 8 years prior to trial. Carla testified that she never signed a document evidencing the loan.

The parties' three children resided with Carla at all relevant times. The oldest child recently completed college, the middle child is now attending college, and the minor child continues to reside with Carla in Iowa. At the time of the dissolution hearing in December 2000, the minor child was a 16-year-old high school junior. Both parties testified that Carla was the primary caregiver for the children throughout the marriage. The deposition of the minor child was admitted into evidence

at the dissolution hearing. The minor child generally testified that she preferred to live with Joe.

The parties bought a home while they lived in Harrison and continued to own it at the time of the dissolution. Carla testified that she used a portion of the inheritance she received during the marriage from the estate of her sister to pay off the mortgage balance on the Harrison home. Joe testified that the Harrison home had a value between $25,000 and $45,000 at the time of trial, and Carla testified the value was $35,000 to $45,000. Both parties offered exhibits valuing the household goods in their possession at the time of the dissolution. Both parties also offered deposition testimony from accountants relating to the value of Joe's law degree.

In an April 17, 2001, order, the district court dissolved the marriage. The court awarded custody of the minor child to Carla, reasoning that it was in the minor child's best interests to remain with Carla even though she expressed a preference to live with Joe. The court ordered Joe to pay child support in the amount of $423 per month, based upon his actual income, and alimony in the amount of $100 per month for 60 months. The court generally divided the household goods according to the goods in the possession of the parties at the time of dissolution. The court awarded Carla both the Harrison and the Iowa homes and refused to place a value upon Joe's law degree. Joe appealed, and Carla cross-appealed. Additional facts will be set forth when necessary in the analysis of the arguments made by the parties.

ASSIGNMENTS OF ERROR

Joe assigns that the district court erred in (1) granting custody of the minor child to Carla, (2) ordering Joe to pay alimony, (3) ruling that a loan from Joe's parents was not marital debt, (4) ruling that Carla's inheritance was used to pay off the Harrison home, (5) granting a certificate of deposit to Carla on the basis that its source was her inheritance, (6) ruling that a 1993 Buick LaSabre awarded to Carla was nonmarital property, (7) placing too low a value on the Harrison home, (8) improperly valuing the personal property of the parties, (9) inequitably dividing the marital assets and debts, and (10) ordering Joe to pay $2,000 of Carla's attorney fees.

On cross-appeal, Carla assigns that the district court erred in (1) failing to award an appropriate amount of alimony, (2) failing to award alimony for an appropriate term, (3) failing to use Joe's earning capacity in calculating child support, (4) not placing a value on Joe's law degree, and (5) not awarding Carla a sufficient amount of attorney fees.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002).

ANALYSIS

CUSTODY

The district court granted custody of the 16-year-old minor child to Carla, reasoning that although both parents were fit, it was clear from the record that Carla had met the daily responsibilities of raising the child and that the stronger parent-child relationship existed between Carla and the minor child. While acknowledging that the minor child expressed a desire to live with Joe, the court concluded that changing schools and hometowns during the final year of high school was not in the minor child's best interests.

Joe argues that the court erred in awarding Carla custody because he has a "wonderful relationship" with the minor child and because she wanted to live with him. Brief for appellant at 18. Although Neb. Rev. Stat. § 42-364(2)(b) (Reissue 1998) instructs the trial court to consider the child's preferences on the issue of custody, the statute also requires the court to consider all aspects of the best interests of the child. The record clearly establishes that Carla has been the primary caregiver throughout the minor child's life. The minor child wished to live with Joe primarily because she disagreed with Carla's disciplinary style. The district court did not abuse its discretion in awarding custody to Carla.

ALIMONY

The district court found that this was a long-term marriage with significant imbalances in the contributions and sacrifices

made to the marriage. Joe argues that the alimony award of $100 per month for 60 months is improper because Carla is capable of supporting herself and because the award of alimony causes his monthly expenses to exceed his monthly income. Carla cross-appeals, contending the court erred in not considering Joe's earning capacity in determining alimony.

[2] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, the polestar being fairness and reasonableness as determined by the facts of each case. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). See, also, Neb. Rev. Stat. § 42-365 (Reissue 1998). A court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996).

In his brief, Joe cites *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988), for the proposition that "it is error to order alimony in excess of the spouse's earnings." (Emphasis omitted.) Brief for appellant at 21. In *Kimbrough*, we cited *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984), for the principle that it is an abuse of discretion to award alimony in excess of the earning capacity of the paying party. The facts presented in *Kimbrough* revealed that after payment of the child support ordered by the court, the husband would have $1,162 available for his living expenses. After paying her portion of childcare expenses, the wife would have $260 remaining from her net income. Under these circumstances, we determined that the trial court's alimony award of $1,000 per month continuing until the death or remarriage of the wife was excessive and should be reduced to $400 per month for a period of 7 years, or until the death of one of the parties or the wife's remarriage, whichever occurred first.

According to the worksheets submitted under the child support guidelines, Joe has net income of $1,804.42 per month based upon gross income of $27,660 per year, and net income of

$1,945.49 per month based upon earning capacity of $30,000 per year. Joe was ordered to pay child support of $423 per month based on his actual gross income. Joe's child support obligation will terminate no later than July 14, 2003, when the minor child reaches the age of 19. In addition to his income from employment, Joe expects to receive a substantial inheritance from the estate of his brother, who died in January 2000. Carla's monthly net income, after subtraction of her pro rata share of support for their minor child, is $1,439.46. There is ample evidence in the record to support the finding by the district court that Carla made significant contributions to the 26-year marriage. Under these circumstances, we find no abuse of discretion in the alimony award of $100 per month for 60 months, capitalized on the basis of Joe's actual current income.

Child Support

Carla contends that the district court erred in using Joe's actual total monthly income of $2,305 in calculating child support. She argues that the district court should have considered Joe's earning capacity, which she calculated to be $2,500 per month. Using Joe's earning capacity would result in an increase in the child support obligation of $23 per month. Due to the insignificant variation between Joe's actual income and Carla's calculation of his earning capacity, the district court did not abuse its discretion in basing its child support calculations on Joe's actual income.

Loan From Joe's Parents

The district court held that the debt to Joe's parents was Joe's personal debt to either pay or have forgiven by his parents. Joe contends that the finding that the debt was personal is erroneous because both parties testified that the money was used to finance marital projects.

The only evidence in the record regarding the legal existence of this debt is Joe's assertion that he intended to fully repay his parents. No payment has been made on any amounts owed for at least 8 years, and neither Joe nor Carla ever signed any document evidencing the debt. Thus, even if any money borrowed was used for marital purposes, there is no evidence in this record to support the existence of an enforceable marital debt.

The district court did not err in excluding the purported debt from the marital estate.

Buick LeSabre

The court awarded Carla a 1993 Buick LeSabre that was in her possession at the time of the dissolution, determining that it was nonmarital property. Carla testified that the car was purchased in 1996 as a gift to her from her father, even though it was titled in the names of both Carla and Joe. She stated that a previous car, also purchased by her father and titled in the name of the couple, was used as a trade-in on the Buick and that her father paid the difference. Carla testified that Joe had removed a diesel engine from the previous car and replaced it. Joe argues that this evidence establishes that the car was marital property.

On the evidence presented in this record, the district court did not abuse its discretion in concluding that the car was a gift to Carla from her father. At the time the car was purchased in 1996, Joe was in Chadron and Carla was teaching in Kimball, and the car was for her personal use. Joe has presented no evidence to the contrary and no evidence of the value of any improvements he made to the previous car. We find no abuse of discretion.

Harrison Home Value

The district court found that the Harrison home had a value of $30,000. Joe contends that there is no evidence in the record to support this valuation. Joe, however, testified that the value of the home was between $25,000 and $45,000, and Carla testified that the value was $35,000 to $45,000. The district court valued the home within this range and did not abuse its discretion in doing so.

Property and Debt Distribution

Joe argues that the trial court improperly relied upon the "excessive" values Carla assigned to Joe's household property in dividing the household assets of the parties. Brief for appellant at 26. He contends that a 1995 computer was overvalued at $500, a used sofa was valued at $500, and end tables were valued at $200. We find that the parties generally agreed as to the division of household goods and that the district court did not abuse its discretion in relying upon the values placed upon the property.

In addition, Joe argues that Carla should not have been granted both her home in Iowa and the home in Harrison. Carla financed her Iowa home without any assistance from Joe, and the court clearly did not err in awarding her that asset. In addition, the district court found that awarding Carla the Harrison home was justified due to the significant imbalance in the contributions of the parties to the marriage from and after 1991. We find no abuse of discretion in this determination.

Carla's Inheritance

During the marriage, Carla inherited money from the estate of her sister. In her deposition, she testified that the value of the inheritance was approximately $13,000, and at trial, she testified that after reviewing records, she determined the value to be $16,800. Carla testified that she deposited this money into a certificate of deposit and that in November 1995, she used approximately $7,000 from this account to pay off the real estate mortgage on the parties' Harrison home. Carla further testified that she then transferred the remaining money into a money market account and that she used all but approximately $230 of the remaining amount for a downpayment on her Iowa home. The district court found that Carla used the money to pay off the loan on the house in Harrison and that Carla was entitled to the proceeds of her inheritance certificate of deposit, as it was nonmarital property.

Joe argues that the bank records in the record do not support Carla's testimony that she used a portion of her inheritance to pay off the Harrison home loan. He argues that because Carla cannot trace the inherited money, her inheritance should have been considered marital property. In this regard, the bank records do not coincide with Carla's testimony regarding the date the Harrison loan was paid in full. The records do indicate, however, that a payment was made from the certificate of deposit in November 1996 and that the remaining money was transferred to one money market account and then subsequently to another. The records also indicate that Carla made payments out of this account for her Iowa home. We have already determined that the district court did not abuse its discretion in awarding the Harrison home to Carla. With respect to the tracing argument,

there is sufficient evidence in the record to substantiate Carla's testimony regarding the expenditure of her inheritance. Although we note that the district court incorrectly referred to the certificate of deposit containing Carla's inheritance as an existing asset, the court did not abuse its discretion in finding Carla's inheritance to be nonmarital property, nor did it abuse its discretion in awarding the Harrison property to Carla.

Attorney Fees

The court ordered Joe to pay $2,000 of Carla's attorney fees. Joe argues that such an award was improper and that it was merely a penalty to him for receiving his law degree, as Carla was awarded both alimony and a larger share of the marital assets. On cross-appeal, Carla argues that the court should have awarded her $3,611.52, the entire amount requested.

[3] In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Considering the general equities of this case, the district court did not abuse its discretion in awarding $2,000 in attorney fees to Carla.

Valuation of Law Degree

Carla's primary contention on cross-appeal is that the district court erred in not considering Joe's law degree as valuable marital property. She contends that while Joe obtained the degree, she worked, took care of the children, and gave up the benefits of a second income with the expectation that the law degree would provide the family a better standard of living in the future.

Darrell Eskam, a certified public accountant, testified via deposition that the value of Joe's law degree was approximately $80,000. Eskam valued the degree by comparing the lifetime earnings of a college graduate with the lifetime earnings of a person holding a law degree, reduced to present value. Carol Lockwood, also a certified public accountant, testified via deposition that it was very difficult to value a law degree because a degree was worth something only if it was used by an individual. Lockwood did not specifically dispute Eskam's method but

disagreed with his use of an average starting salary for an associate in Lincoln or Omaha, stating that the correct average should have considered Lincoln only. Utilizing Eskam's basic method, Lockwood testified that any value of the degree was approximately $40,000.

[4] The overwhelming majority of jurisdictions that have addressed this issue have declined to expressly place a value on a professional degree. We agree with that view. See, *Guy v. Guy*, 736 So. 2d 1042 (Miss. 1999); *In re Marriage of Speirs*, 956 P.2d 622 (Colo. App. 1997); *Roberts v. Roberts*, 670 N.E.2d 72 (Ind. App. 1996); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986). As Lockwood testified, the value of a professional degree is dependent upon its use by the individual, and any method of valuation is thus purely speculative. See *id.* We note, however, that § 42-365 requires a dissolution court to divide property and award alimony in a reasonable manner, having regard for, inter alia, the circumstances of the parties and the history of contributions to the marriage. Pursuant to this statutory language, the attainment by one spouse of a professional degree with aid from the other is one factor a district court may consider in the division of assets and award of alimony in a marital dissolution proceeding. On the facts and records of this case, the district court did not abuse its discretion in its division of the assets and its award of alimony.

CONCLUSION

Both parties have filed motions for attorney fees on appeal. Because we have concluded that neither the appeal nor the cross-appeal has merit, we deny both parties' motions. Further, we note that review of this appeal was complicated by the lack of compliance with Neb. Ct. R. of Prac. 5 (rev. 2000) relating to the proper preparation of the bill of exceptions, a failure we attribute to neither party.

For the foregoing reasons, the district court did not abuse its discretion in awarding custody, child support, and alimony and in distributing the assets. The judgment of the district court is affirmed.

AFFIRMED.

KADE M. GRACEY, APPELLANT, V. FRED E. ZWONECHEK, INTERIM DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
LARRY L. JANSSEN, APPELLANT, V. BEVERLY NETH, DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
KIMBERLY D. STETSON, APPELLANT, V. EDWARD D. WIMES, DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

643 N.W.2d 381

Filed May 3, 2002. Nos. S-00-149, S-00-285, S-00-286.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to the agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Venue.** Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998), establishing the location for administrative driver's license revocation hearings, is a venue statute.
5. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
6. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

Appeals from the District Courts for Dawes and Sheridan Counties: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

David E. Veath for appellants.

Don Stenberg, Attorney General, Hobert B. Rupe, Jodi M. Fenner, and, on brief, Kyle C. Dahl for appellees.

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

McCormack, J.

NATURE OF CASE

In these consolidated cases, Kade M. Gracey, Larry L. Janssen, and Kimberly D. Stetson (collectively the appellants) appeal from the district courts' orders affirming the decisions and orders of revocation entered by the director of the Nebraska Department of Motor Vehicles (the Department) following administrative license revocation hearings. Because the appellants' respective administrative license revocation hearings were not held in the counties in which the appellants were arrested, as required by Neb. Rev. Stat. § 60-6,205(6)(a) (Reissue 1998), we reverse, and remand with directions.

BACKGROUND

Each of the three cases share common facts as they relate to the issues raised on appeal. The appellants, in separate and unrelated incidents, were contacted by law enforcement officers who detected the smell of alcohol on or about the appellants. Field sobriety tests were administered, and the appellants failed to satisfactorily complete the tests. Two of the appellants also subsequently failed preliminary breath tests.

The appellants were arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 1998 & Supp. 1999). Gracey was arrested in Dawes County, while Janssen and Stetson were each arrested in Sheridan County. Upon being arrested, each appellant was read a postarrest chemical test advisement form. This document informed the appellants that they were required to submit to a chemical test of their blood, breath, or urine and that "[r]efusal to submit to such test or tests is a separate crime for which you may be charged." The appellants agreed to submit to chemical testing. The chemical test results indicated the presence of alcohol in excess of the legal limit.

The appellants subsequently petitioned for hearings before the director of the Department to contest the revocation of their driver's licenses. Gracey's hearing was held via videoconference, with the hearing officer located in Lancaster County and all other participants located in Dawes County. Janssen's hearing utilized teleconference hearing procedures, with the hearing officer located in Lancaster County, Janssen's attorney located

in Dawes County, and the arresting officer located in Sheridan County. Stetson's hearing also used teleconference hearing procedures, with the hearing officer located in Lancaster County, Stetson and her attorney located in Dawes County, and the arresting officer located in Sheridan County.

At each hearing, the appellants objected to the venue of the hearing, as discussed in further detail below. Following the hearings, the appellants' driver's licenses were revoked by the director after finding, inter alia, that the appellants' venue objections were without merit. The appellants timely appealed their revocations to the district courts for the counties in which the arrests occurred. The district courts affirmed the director's decisions, and these appeals followed.

ASSIGNMENTS OF ERROR

Three assignments of error are common to the appellants. The appellants assign, restated, that the district courts erred in (1) finding that the license revocation hearings were held in accordance with § 60-6,205(6)(a); (2) finding that the Department's "Notice/Sworn Report/Temporary License" forms were supported by sufficient foundation and were properly received into evidence; and (3) finding that the postarrest chemical test advisement forms provided sufficient notice of the consequences of failing the chemical test.

Janssen and Stetson each additionally assign that the district court erred in finding that their license revocation hearings were held in accordance with Neb. Rev. Stat. § 84-913.03 (Reissue 1999).

Finally, Janssen raises one assignment of error unique to his case. He assigns that the district court erred in finding that his arrest was supported by probable cause.

Because the appellants' first assignment of error is dispositive, we do not address the remaining assignments of error.

STANDARD OF REVIEW

[1,2] A final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). When reviewing

an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to the agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

ANALYSIS

The appellants argue that their license revocation hearings were not held in accordance with § 60-6,205(6)(a). This statute provides that administrative license revocation hearings "shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." During each of the appellants' license revocation hearings, the hearing officer was located in Lancaster County.

[4] The argument made by the appellants has been raised before this court on several prior occasions; however, we have not yet had the opportunity to address it. In *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000), we held that § 60-6,205(6)(a) is a venue statute and that generalized objections to the method by which the hearing was being conducted were not proper objections to venue. See, also, *Davis v. Wimes, ante* p. 504, 641 N.W.2d 37 (2002); *Reiter v. Wimes, ante* p. 277, 640 N.W.2d 19 (2002). In both *Davis* and *Reiter*, we did not reach the substantive merits of the defendants' arguments because the defendants failed to properly object to the venue of their hearings and because their subsequent participation in the hearings acted as a waiver of any objection they may have had. The consolidated cases currently before us suffer from no such defect.

At Gracey's hearing, his attorney objected to "the conduct of this hearing with regard to the in-county requirement." He later stated:

> [T]he statute 60-6,205(6)(a) . . . requires that the director — the director's hearing "shall be conducted in the county

> in which the arrest occurred". The county in which the arrest occurred is Dawes County. . . . [T]he hearing today, notwithstanding the videoconferencing, the hearing is held in Lancaster County and, therefore, not in the county of arrest which is mandated by statute.

Janssen's and Stetson's objections took similar forms, with each observing that § 60-6,205(6)(a) was the relevant statute and arguing that their hearings did not comply with the statute's requirement. We conclude that the objections made by the appellants were properly aimed at the venue of their hearings and were sufficient to preserve the alleged error for appeal.

The appellants contend that the presence of the hearing officers in Lancaster County violated § 60-6,205(6)(a) because none of the appellants were arrested in Lancaster County. This argument implies that the location of the hearing officer determines the situs of the hearing, regardless of where any other participants in the hearing are located. The Department argues that the hearing simultaneously occurs at each location of the participants.

[5,6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture, ante* p. 529, 641 N.W.2d 31 (2002). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *First Data Corp. v. State, ante* p. 344, 639 N.W.2d 898 (2002). The clear and unambiguous language of § 60-6,205(6)(a) requires that a license revocation hearing be held in the county in which the arrest occurred. Contrary to the Department's arguments, the statute does not allow the hearing to be held concurrently in two or more counties. Therefore, we hold that for purposes of § 60-6,205(6)(a), the hearing is held at the location of the hearing officer.

In *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 351, 562 N.W.2d 355, 358 (1997), we were required to interpret the phrase " 'county where the action is taken.' " *Essman* involved an APA appeal of the Nebraska Commission on Law Enforcement and Criminal Justice's action at its meeting in Lancaster County. At this meeting, the commission affirmed the Nebraska Police Standards Advisory Council's decision. The advisory council had previously reached its decision as a result of

an evidentiary hearing in Hall County. We held that " 'county where the action is taken' " refers to the site (county) of the first adjudication hearing, rather than the county where the final order is issued. *Id.*

We note that the statute does allow for the parties to agree to hold the hearing in any other county. In that event, we see nothing in the statute which would bar the parties from conducting the hearing in any manner agreed upon, whether it be in person or by electronic means.

The Department argues that video or telephonic hearings are authorized by § 84-913.03 of the APA, which generally permits a hearing to be conducted by telephone, television, or other electronic means. As part of the APA, § 84-913.03 applies to the Department. We agree that § 84-913.03 allows license revocation hearings to be conducted by telephone, television, or other electronic means, and our holding does not prevent the Department from utilizing § 84-913.03. However, if the Department chooses to utilize § 84-913.03, it must still adhere to § 60-6,205(6)(a). That statute, in the absence of an agreement among the parties, requires that the hearing officer be located in the county in which the arrest occurred. Upon meeting that requirement, the Department is free to conduct the hearing via telephone, television, or other electronic means.

The Department also argues that if we determine the appellants' hearings did not take place in the county in which the arrests occurred, as we have above, then the district courts had no jurisdiction over the appeals by the appellants of their license revocations. The Department cites Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999), which states: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken . . . ." The Department claims that the "action" in the present cases are the license revocation hearings. As we have determined the hearings took place at the location of the hearing officers, i.e., Lancaster County, the Department argues that the appeals should have been brought in the district court for Lancaster County. This argument is easily disposed of by citation to Neb. Rev. Stat. § 60-6,208 (Reissue 1998), which allows an individual to appeal his or her license revocation to "the district court of the county where the alleged events

occurred for which he or she was arrested in accordance with the Administrative Procedure Act." The appellants filed appeals from their license revocations in the district courts for the counties in which they were arrested. Thus, the district courts clearly had jurisdiction over the appeals.

CONCLUSION

The clear language of § 60-6,205(6)(a) requires that license revocation hearings be held in the county in which the arrest occurred, unless the parties agree otherwise. For purposes of § 60-6,205(6)(a), we conclude that the hearing is held wherever the hearing officer is located. The appellants' hearings were not held in accordance with the statute because the hearing officers were located in a county other than where the arrests occurred. Therefore, we reverse the decisions of the district courts and remand the causes with directions to remand the appellants' cases to the Department with directions to vacate the orders of revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

VALERIE ANN SPRINGER, APPELLEE, V. TODD BOHLING, APPELLANT.

643 N.W.2d 386

Filed May 3, 2002. No. S-00-918.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or if its action is clearly against justice or conscience, reason, and evidence.
2. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
3. **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.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
5. **Negligence: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, 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.

6. **Motor Vehicles: Highways: Right-of-Way.** Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle.
7. ____: ____: ____. A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others.
8. **Motor Vehicles: Highways: Right-of-Way: Public Health and Welfare.** One traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection.
9. **Motor Vehicles: Negligence.** While one may assume, until having warning, notice, or knowledge to the contrary, that others will use a highway lawfully, one must nonetheless keep a proper lookout and watch where one is driving.
10. **Judges: Motions for New Trial.** A trial judge is accorded significant discretion in granting or denying a motion for new trial.
11. **Judges: Evidence: Witnesses: Verdicts.** The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict, and because of this unique position, the trial judge becomes the primary buffer against verdicts not supported by the evidence.
12. **Trial: Evidence.** The admission of medical bills into evidence without objection does not mean the opposing party has conceded that these costs were necessitated by the accident.
13. **Judgments: Evidence: Damages.** In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered.
14. **Juries: Damages: Proximate Cause.** Generally, a jury is entitled to determine what portion of a claimed injury was proximately caused by the incident and what portion of the medical bills was reasonably required.
15. **Juries: Verdicts.** If it appears that the jury has committed a gross error, or has rendered a verdict that is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake, it is as much the duty of the trial court to interfere, to prevent the wrong, as in any other case.
16. **Damages: Verdicts: Juries: Appeal and Error.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside.
17. **New Trial: Appeal and Error.** 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.
18. **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.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed as modified.

Joel D. Nelson, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellant.

Rolf Edward Shasteen for appellee.

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

GERRARD, J.

NATURE OF CASE

This case is before our court for a second time. The appellee, Valerie Ann Springer, was injured when the bicycle she was riding was struck by an automobile driven by the appellant, Todd Bohling. Springer had sued Bohling, but, pursuant to a jury verdict, the district court entered judgment for Bohling based upon Springer's contributory negligence. Springer appealed. See *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000). This court reversed the judgment and remanded the cause for a new trial. After a second trial, a jury verdict was returned for Springer and both parties filed posttrial motions for new trial. Springer claimed that the damages awarded by the jury were inadequate, while Bohling claimed that the jury should have been instructed on contributory negligence. The district court granted Springer's motion, but denied Bohling's. Bohling appeals the district court's order granting a new trial. For the following reasons, we affirm as modified.

FACTUAL BACKGROUND

The accident in which Springer was injured occurred near the intersection of 14th and Court Streets in Lincoln, Nebraska. This is a T-shaped intersection, such that a vehicle approaching from the east on Court Street must turn either north or south onto 14th Street. Court Street has three lanes at the 14th Street intersection: one lane for vehicles traveling east, one lane for vehicles turning north onto 14th Street, and a left-turn lane for vehicles turning south onto 14th Street. Vehicles already traveling north or south on 14th Street are not required to stop at this

intersection, but there is a stop sign facing traffic approaching from the east on Court Street.

The circumstances of the accident were set forth as follows in our opinion in *Springer*:

> Springer was riding her bicycle home from work at about 5 p.m. on October 15, 1996. Springer rode south on the sidewalk parallel to 14th Street, approaching the intersection of 14th and Court Streets. Springer rode to a private driveway on 14th Street, across from and slightly to the south of Court Street. Springer stopped there and waited for traffic on 14th Street to clear so that she could cross 14th Street and proceed east on Court Street.
>
> As Springer waited, she saw Bohling's vehicle sitting at the stop sign on Court Street in the left-turn lane. The vehicle's left turn signal was on and Bohling was evidently waiting to turn left from Court Street to proceed south on 14th Street. Springer waited between 2 to 5 minutes for traffic to clear on 14th Street.
>
> When the traffic on 14th Street cleared, Springer looked at Bohling's vehicle and confirmed that it was still stationary. Springer then looked across 14th Street where she intended to cross, and rode onto 14th Street. About halfway across the street, Springer looked to her right, and then back to her left toward Bohling's vehicle. Springer did not see the vehicle pull away from the stop sign or begin its turn. When Springer looked back to her left, Bohling's vehicle was already coming toward her. Bohling's vehicle struck Springer, and she was injured. The evidence was undisputed that Bohling never saw Springer prior to impact.

259 Neb. at 72-73, 607 N.W.2d at 837-38.

PROCEDURAL BACKGROUND

At the first trial, the district court entered a verdict for Bohling based upon a finding by the jury that Springer had been contributorily negligent. Springer appealed, assigning that the district court erred in instructing the jury regarding whether Springer failed to yield the right-of-way and that the evidence was insufficient to support the verdict. In support of the second assignment

of error, Springer's argument was essentially that there was no evidence to support a finding of contributory negligence.

We reversed the judgment and remanded the cause for a new trial, determining that

> based upon the evidence presented, it is clear that the duty to yield the right-of-way was not Springer's, but Bohling's. Since there was no evidence sufficient to support a finding that Springer failed to yield the right-of-way, it was error for the trial court to instruct the jury regarding Springer's duty to yield.

Springer v. Bohling, 259 Neb. 71, 76, 607 N.W.2d 836, 840 (2000). Since the cause was to be remanded for a new trial in any event, we specifically declined to address Springer's second assignment of error.

The present appeal is taken from the second trial in the district court. At the second trial, Bohling argued contributory negligence, based upon a theory different from the failure to yield the right-of-way, but the district court declined to give a contributory negligence instruction. The jury returned a verdict for Springer in the amount of $2,908.

Both parties filed motions for new trial. Bohling argued that the jury should have been instructed on contributory negligence. Springer argued that the damages were clearly inadequate. The district court denied Bohling's motion, but granted Springer's. The district court noted that during deliberations, the jury submitted written questions to the court, inquiring about whether Springer's damages had been paid by insurance. The district court also noted that the jury's verdict was at least $2,000 below Springer's stipulated medical expenses resulting from the accident. The district court thus vacated the verdict and restored the case to the active trial docket.

ASSIGNMENTS OF ERROR

Bohling assigns, restated, that the district court erred in (1) failing to give a contributory negligence instruction because Springer was contributorily negligent by (a) failing to maintain a proper lookout and (b) entering a place of peril or danger without due care and (2) sustaining Springer's motion for new trial because the jury's verdict was inadequate.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or if its action is clearly against justice or conscience, reason, and evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

[2,3] Whether the jury instructions given by a trial court are correct is a question of law. See *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

ANALYSIS

We initially note that this appeal is presented in a somewhat unusual procedural posture in that Bohling is claiming on the one hand that a new trial should be ordered and claiming on the other hand that the district court erred by ordering a new trial. We view Bohling's arguments as being conditional: Bohling is arguing that a new trial should be ordered at which the jury is instructed on contributory negligence, but if this court should determine that a contributory negligence instruction was properly denied, then the jury's verdict from this trial should be reinstated.

CONTRIBUTORY NEGLIGENCE

[4,5] Bohling argues that the district court should have instructed the jury on contributory negligence. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). Contributory negligence is conduct for which the plaintiff is responsible, 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. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999). The instruction requested and refused in the instant

case would have instructed the jury that it could find Springer contributorily negligent in "failing to maintain a proper lookout" and in "moving suddenly from a place of safety to a place of peril or danger."

[6-9] Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle. *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others. *Corcoran, supra.* One traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection. *Id.* However, while one may assume, until having warning, notice, or knowledge to the contrary, that others will use a highway lawfully, one must nonetheless keep a proper lookout and watch where one is driving. See *Dolberg, supra*. The foregoing principles apply to bicyclists as well as drivers of motor vehicles. See *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000).

Given the facts established at trial, there was no evidence from which the jury could have determined that Springer failed to keep a proper lookout. We have previously explained what is meant by a driver's duty to keep a proper lookout:

> "[T]he driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid a collision with any object in front of him."

Vilas v. Steavenson, 242 Neb. 801, 807, 496 N.W.2d 543, 548 (1993).

The evidence in this case established that Springer saw Bohling's vehicle stopped at a stop sign and that Springer had the right-of-way. Springer kept a proper lookout and saw Bohling's vehicle. Springer's uncontested testimony established

that before proceeding into the intersection, Springer waited for traffic to clear and looked left, right, and ahead. It would, in fact, be inconsistent with Springer's duty to keep a proper lookout if that duty was construed to have required Springer to maintain her observation of Bohling at the expense of looking in other directions for other possible hazards. At an unobstructed intersection, Springer, having the right-of-way, had the right to assume that her right-of-way would be respected unless it would have appeared to an ordinarily careful and prudent person that to proceed would probably result in a collision. See *Muirhead v. Gunst*, 204 Neb. 1, 281 N.W.2d 207 (1979).

Bohling cites this court to the proposition that "a motorist's failure to look, when looking would have been effective in avoiding a collision, is negligence as a matter of law." *Krul v. Harless*, 222 Neb. 313, 322, 383 N.W.2d 744, 750 (1986). However, that rule is applicable to situations where another vehicle is indisputably located in a favored position or a driver charged with negligence as a matter of law has executed a dangerous driving maneuver which, in part, led to a collision. *Id.* To the extent those conditions exist in the instant case, they are present in Bohling's admitted negligence and cannot be used to establish any negligence on the part of Springer.

Bohling also argues that Springer was negligent in moving suddenly from a place of safety to a place of peril or danger. We have stated: " 'When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence . . . .' " *Bixby v. Ayers*, 139 Neb. 652, 665, 298 N.W. 533, 540 (1941). It is evident that this proposition does not apply to the instant case. The undisputed facts established that Bohling's vehicle was stopped and was thus not "approaching" when Springer entered the intersection. In fact, this was the deciding factor of our decision in *Springer, supra*. Springer could not have moved " 'into the path' " of a stationary vehicle.

We confronted an argument similar to Bohling's in *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). In that case, the trial court instructed the jury on the defendant's theory that the

plaintiff had been contributorily negligent in failing to anticipate that the defendant would run a red light. We held that

> absent exceptional circumstances, a motorist on a favored street with a green light does not have the duty to anticipate the negligence of a motorist on a cross street who runs a red light. By exceptional circumstances, we mean where the driver could have easily avoided the accident by exercising the slightest degree of care. As no such extreme circumstances were present in this case, there was not sufficient evidence to support the court's submission of the issue of contributory negligence to the jury.

Id. at 304, 549 N.W.2d at 639.

Similarly, under the evidence in this case as reflected by the record, there was no factual issue presented as to whether Springer should have realized that Bohling was not going to yield the right-of-way. Bohling's proposed jury instruction was not warranted by the evidence. The district court did not err in refusing Bohling's contributory negligence instruction.

Insufficient Damages

[10,11] Bohling argues that the district court abused its discretion in determining that the damages of $2,908 were inadequate. In resolving that issue, we begin our analysis by observing that a trial judge is accorded significant discretion in granting or denying a motion for new trial. See *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict, and because of this unique position, we recognize that the trial judge becomes the primary buffer against verdicts not supported by the evidence. See *id.*

The evidence presented at trial, as briefly summarized, established that Springer required transportation by ambulance after the accident, which cost $358.10, and radiology and emergency room care, which cost $601.72. Springer required immediate surgery after the accident to insert a metal plate, seven screws, and three pins to repair a bimalleolar ankle fracture. This surgery, and inpatient hospital care, cost $3,846.

Springer also testified to the pain and fear she felt after the accident. Springer spent 3 days in the hospital after the first

surgery, spent 6 weeks on crutches, and spent 8 weeks on pain medication. Springer later required another surgery to remove the pins from her ankle. The record contains medical bills, admitted by stipulation, that total $6,115.72.

The district court, in its written order, clearly articulated its reasoning for granting Springer's motion for new trial. In addition to citing the above uncontroverted evidence, the court stated:

> This court found, as a matter of law, that the plaintiff was not negligent and that the sole cause of the accident and the injuries sustained by the plaintiff was the negligence of the defendant; the jury was instructed accordingly. The jury returned a verdict of $2,908.00. During deliberations, the jury submitted a written question(s) to the court, primarily inquiring about whether the plaintiff's medical expenses had been paid by insurance. After conferring with counsel, it was agreed that the court would inform the jury in writing that insurance should not be considered.
>
> It is clear, under all the circumstances, that the verdict is inadequate.

The district court also noted in its order that the parties stipulated prior to the first trial in this case that Springer's medical expenses were fair and reasonable, necessary, and a result of the accident. However, for some reason not apparent from the record, that stipulation was not communicated to the jury via jury instructions or in any other manner. Nonetheless, there was no evidence presented at the second trial to contest Springer's testimony regarding her damages or to suggest that Springer's medical expenses were in any way unreasonable, unnecessary, or not a result of the October 15, 1996, accident.

[12] The trial court accurately noted that the admission of medical bills into evidence without objection does not mean the opposing party has conceded that these costs were necessitated by the accident. See *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). However, in *Jones*, the trial court stated that there was conflicting evidence as to whether all of the plaintiff's medical bills were occasioned by the accident. In addition, in *Jones*, there were several significant breaks in the treatment by a chiropractor, whose bill was approximately 93 percent of the total medical expenses; there was also evidence concerning a preexisting

condition. This court observed in *Jones, supra*, that the medical bills incurred immediately following the accident, mainly the emergency room and radiology expenses, were less than the verdict. Therefore, we determined that the jury could have reasonably concluded the evidence did not support the finding that all of Jones' chiropractic expenses were a result of the accident. *Id.*

In the instant case, however, the trial court noted, and we agree, that the undisputed medical bills incurred *directly after* the accident to repair Springer's fractured ankle exceeded the verdict by nearly $2,000. The court went on to state:

> In addition, it was stipulated by the parties that the plaintiff suffered a nine percent partial disability as a result of the accident. Further, the plaintiff testified without contradiction as to her employment, her rate of pay, and her inability to work from the date of the accident to January 8, 1997, when the medical records shows [sic] she was released to return to work. . . . Clearly the verdict is inadequate and bears no reasonable relationship to the damages that are uncontradicted and those proved.

(Emphasis in original.)

[13,14] In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995). Generally, a jury is entitled to determine what portion of a claimed injury was proximately caused by the incident and what portion of the medical bills was reasonably required. See *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000).

[15,16] However, if it appears that the jury has committed a gross error, or has rendered a verdict that is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake, it is as much the duty of the trial court to interfere, to prevent the wrong, as in any other case. See, *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001); *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). Where the amount of damages allowed by a jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set the verdict aside. *Reiser, supra*; *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982).

[17] In the present case, there was no evidence to suggest that Springer's medical bills were in any way unfair or unreasonable and the evidence clearly establishes that a minimum of $4,805.82 of medical expenses were a direct result of the emergency care and surgery required immediately after the October 15, 1996, accident. This undisputed sum of special damages is irrespective of any damages for followup medical care (totaling an additional $1,309.90), disability, pain and suffering, and loss of income. 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. *Holmes, supra*. The record establishes substantial grounds for the district court's determination; the district court did not abuse its discretion in granting Springer a new trial. Bohling's assignment of error is without merit.

[18] Finally, we note that the district court's order granting Springer's motion for new trial was not explicit regarding whether the new trial was to be limited to the issue of 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. *Id.*

In *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), we addressed a situation similar to the instant case, in which the jury returned a verdict on the plaintiff's second cause of action but awarded $0 in damages. This court affirmed the district court's action in granting the plaintiff's motion for new trial, but modified the order by limiting the new trial to the issue of damages. See *id.* Similarly, in the instant case, the issue of liability has been determined but a new trial is warranted on the issue of damages. Since the district court did not explicitly so provide, we modify the district court's order to limit the new trial of this cause to the issue of Springer's damages.

CONCLUSION

The district court did not err in refusing Bohling's proposed instruction on contributory negligence and did not abuse its discretion in determining that the damages awarded were inadequate. The district court's order granting Springer's motion for

new trial, but denying Bohling's motion for new trial, is affirmed. The district court's order is modified to reflect that the new trial shall be limited to the issue of damages.

AFFIRMED AS MODIFIED.

HENDRY, C.J., and STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RUSSELL W. HARMS, APPELLANT.

643 N.W.2d 359

Filed May 3, 2002. No. S-00-1157.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **Judgments: Trial: Evidence: Proof: Convictions: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed.
4. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.
5. **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.
6. **Constitutional Law: Miranda Rights: Appeal and Error.** Requests for counsel, as well as actual silence, constitute silence for purposes of analyzing potential *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), violations.
7. **Criminal Law: Confessions.** Refusal to give a statement constitutes silence.
8. **Criminal Law: Confessions: Miranda Rights: Impeachment: Mental Competency.** It is not a violation of fundamental fairness for the State to use a defendant's pre-*Miranda* silence as impeachment or as substantive evidence of sanity.

9. **Trial: Testimony: Appeal and Error.** Where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to preserve alleged error in the admission of the testimony to which the objection was made.
10. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
11. **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.
12. **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.
13. **Criminal Law: Miranda Rights: Appeal and Error.** Because the nature of a *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.
14. ____: ____: ____. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), violations constitute trial error and are subject to a harmless error analysis.
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. **Criminal Law: Insanity: Time.** Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.
17. **Insanity: Proof.** A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence.
18. **Mental Competency: Proof.** The fact that a defendant has some form of mental illness or defect does not by itself establish insanity.
19. **Homicide: Intent.** The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Reissue 1995), which states that a person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice.
20. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
21. **Homicide: Intent: Words and Phrases.** One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
22. **Homicide: Intent: Time.** The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
23. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
24. **Homicide: Statutes.** Nothing in Neb. Rev. Stat. § 28-303 (Reissue 1995) or in the Nebraska Supreme Court's interpretation of § 28-303 requires that a defendant must

rationally consider the probable consequences of his or her actions or rationally determine to kill the victim without legal justification.

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., 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.

HENDRY, C.J.

I. INTRODUCTION

Russell W. Harms was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with the December 10, 1999, death of Tennyson Kelsay. Harms was sentenced to life in prison on the murder charge and not less than nor more than 20 years' imprisonment for use of a weapon. Harms appeals.

II. FACTUAL BACKGROUND

At approximately 12:10 p.m. on December 10, 1999, Harms shot 84-year-old Kelsay 15 times with a .22-caliber semiautomatic rifle in the parking lot of a shopping center in Auburn, Nebraska. Harms was alone in his white pickup truck when he saw Kelsay, a stranger to him, in the parking lot. Harms picked up his rifle, pointed it out the window of his truck, and fired one shot at Kelsay, who was standing 5 to 8 feet away. There was a brief pause in the shooting as Kelsay "recoiled" and then started to fall backward to the ground. As Kelsay was falling, Harms resumed firing his rifle in a rapid succession of shots that continued after Kelsay was on the ground. Kelsay died as a result of the multiple gunshot wounds.

After the shooting, Harms slowly drove a half block to his trailer home, which was located in a trailer park across the highway from the shopping center and visible from the scene of the shooting. At approximately 12:14 p.m. Holly Plager, a dispatcher for the Nemaha County Sheriff's Department, received a 911

emergency dispatch service (911) call from a cellular telephone. The caller identified himself as Russell Harms. Harms asked Plager for his lawyer's telephone number. Plager attempted to keep Harms on the telephone line, but for an unknown reason, the call was soon lost. Plager called Harms back and resumed speaking with him.

Auburn police officers Daniel White and Eric Adams had been called to the shopping center parking lot within minutes of the shooting. Witnesses at the scene described a white pickup truck and provided a license plate number. After Adams radioed in the license plate number, Harms' ownership of the truck was confirmed. The officers could see Harms' trailer from where they stood in the parking lot, so they immediately went to the trailer.

While the officers were in front of Harms' trailer, Plager called White on the radio and notified him that Harms had called 911 and was on the telephone requesting his attorney. White then advised Plager to tell Harms that "Officer Adams and [White] were out front, that we wouldn't hurt him and we would take him up to [the police station] and have contact with his attorney." Plager did so, and Harms again requested to speak with his attorney. White then spoke to Harms utilizing his cruiser's "public address system" in an attempt to get Harms to come out from the trailer. White repeated the assurances to Harms that he would not be hurt and would be taken to see his attorney. At that point, Harms told Plager he would step outside.

Harms stepped outside of the trailer without any weapons, closed the door, and stood on the stairs. White spoke to Harms, reassuring him as he had previously. Adams then told Harms to step away from the trailer and lie down on the asphalt. When Harms did so, White handcuffed him and verbally informed him of his *Miranda* rights. Harms again requested an attorney.

Harms was transferred to the police station. He sat in a chair next to White while the police attempted to contact his attorney. During this time, White advised Harms again of his *Miranda* rights through a written *Miranda* advisement form, which Harms signed. After approximately 1 hour had elapsed, Harms' attorney arrived and spoke to Harms. Harms was then placed in jail.

On February 2, 2000, Harms was charged with first degree murder and use of a deadly weapon to commit a felony. On May

11, Harms gave notice pursuant to Neb. Rev. Stat. § 29-2203 (Reissue 1995) of his intention to rely upon the insanity defense and to plead not responsible by reason of insanity at the time of the offense.

A bench trial was held on August 15 and 16, 2000. At trial, Harms presented the expert testimony of Dr. William Logan, together with Dr. Logan's written psychiatric evaluation of Harms. Dr. Logan discussed Harms' lengthy history of mental illness and, specifically, Harms' condition as a paranoid schizophrenic. Dr. Logan testified that Harms often went to his attorney to discuss his delusional thoughts about "people bothering him" and had previously felt urges to "kill somebody at random." Dr. Logan stated that in the weeks prior to the shooting, Harms had experienced "command voices" telling him to shoot someone. Dr. Logan defined a "command voice" as a "voice that is experienced and instructs you to do something or [is] harassing you to do something." Dr. Logan also described Harms' numerous hospitalizations and difficulties with antipsychotic medication since 1987.

Dr. Logan further testified that Harms was having a psychotic episode at the time of the shooting. According to Dr. Logan, Harms told him during their meeting after Harms was arrested that he "remembered hearing the words 'not a baby' going on in his head" prior to shooting Kelsay. Specifically, Dr. Logan testified:

> And [Harms] said he heard voices that said, "looks like that older fella had enough years under his belt." He said he perceived them— they came from outside of himself. He then grabbed the rifle and shot. And that's what he described having happened right at that period of time.

Dr. Logan stated that he did not know whether Harms was also experiencing command voices on the morning of the shooting in addition to hearing these other voices.

Finally, Dr. Logan testified that Harms had not previously had a specific delusion about Kelsay, but he was "sure that Mr. Kelsay intersected Mr. Harms' delusional system at some point either by the fact that he was at the shopping center and there was some delusion about the shopping center or something about Mr. Kelsay himself intersected his delusion." In Dr.

Logan's opinion, Harms' delusional thinking at the time of the shooting prevented Harms from rationally considering whether the act of shooting Kelsay was right or wrong. On this basis, Dr. Logan concluded that Harms was insane at the time of the shooting.

The State responded by offering the expert testimony of Dr. Sanat Roy, together with Dr. Roy's written evaluation of Harms. Dr. Roy testified that Harms was legally sane at the time of the shooting because he understood the nature of the act he had committed and was able to distinguish right from wrong with respect to the shooting. Dr. Roy stated, "Based on my evaluation with him, certainty [sic] he was responsible for his behavior at the time of his alleged act." Dr. Roy disputed any contention that Harms' thought of " 'this old guy looks like he had a lot of good years' " was a command voice or command hallucination. Dr. Roy stated, "Command hallucination tells you, Roy, go out, kill that man. Kill that man. Kill that man. Roy, this person is holding your soul. If you don't kill him, you'll be dead. Kill him, kill him. That is command hallucination." Dr. Roy testified that individuals experiencing a command hallucination are "so disturbed they cannot function." He concluded that based on his personal meetings with Harms, as well as others' accounts of Harms' actions before, during, and after the shooting, Harms did not behave like a person who was hallucinating or experiencing command voices at the time of the shooting.

The State also presented the testimony of two eyewitnesses who described the shooting and Harms' actions afterward. One witness, Shawn Clark, testified that Harms left the parking lot in his truck at a normal rate of speed and was "[n]ot [in] a real big hurry." The other witness, Kenneth Hatten, testified that Harms did not appear to be in a hurry to leave the area, since he drove away "[s]low, deliberate, like watching."

Plager, the dispatcher, also testified at trial. She described the details of her conversation with Harms after the shooting, including Harms' requests for his attorney. Plager testified that Harms was not excited or agitated when she spoke with him on the telephone and that he was "just kind of okay." She noted that Harms did talk "kind of choppy" and that he sounded as if he were "confused," "distracted," "disoriented," and not focused.

Harms never told Plager during their conversation that he was experiencing command voices or hallucinating.

White and Adams testified at trial. Both officers described their involvement in arresting Harms on the day of the shooting. They discussed Harms' behavior at the time of arrest, including Harms' request for his attorney and the fact that during and after the arrest, Harms did not tell the officers that he was hallucinating or experiencing command voices.

The district court found Harms guilty on both counts and sentenced Harms to life in prison for the murder charge and not less than nor more than 20 years' imprisonment for use of a weapon. Both sentences were to be served consecutively. Harms filed a notice of appeal and a poverty affidavit and was granted leave to proceed in forma pauperis on appeal.

III. ASSIGNMENTS OF ERROR

Harms assigns, rephrased, that the district court erred in (1) admitting and considering evidence of Harms' silence and requests for counsel in violation of the U.S. Supreme Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986); (2) finding that Harms was not insane at the time of the shooting; and (3) improperly interpreting and applying the elements of first degree murder.

IV. STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *State v. VanAckeren, ante* p. 222, 639 N.W.2d 112 (2002).

[2] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Campbell, supra*; *Beyer, supra.*

[3] In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000). The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. *Id.* If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. *Id.*

[4] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

V. ANALYSIS

1. Jurisdiction

[5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). The State contends that this court lacks jurisdiction because the district court's order granting Harms' request to proceed in forma pauperis does not comply with Neb. Rev. Stat. § 29-2306 (Cum. Supp. 2000). Section 29-2306 states:

> If a defendant in a criminal case files, within thirty days after the entry of the judgment, order, or sentence, an application to proceed in forma pauperis in accordance with sections 25-2301 to 25-2310 with the clerk of the district court, then no payment of the docket fee shall be required of him or her unless the defendant's application to proceed in forma pauperis is denied. . . . If an application to proceed in forma pauperis is filed and granted, the Court of Appeals or Supreme Court shall acquire jurisdiction of

> the case when the notice of appeal is filed with the clerk of the district court.

The State argues that jurisdiction is lacking because the district court judge did not sign the order granting Harms' application to proceed in forma pauperis within 30 days after the entry of Harms' sentence. This argument is without merit. The relevant date under § 29-2306 is the date the defendant files the application to proceed in forma pauperis, not the date on which the court grants the application. The record shows, and the State acknowledges, that Harms timely filed his notice of appeal, application to proceed in forma pauperis, and poverty affidavit within 30 days after the entry of his sentence. Since the district court granted Harms' application to proceed in forma pauperis, the "Supreme Court shall acquire jurisdiction of the case when the notice of appeal is filed with the clerk of the district court." See § 29-2306. We determine that the requirements of § 29-2306 have been satisfied. Accordingly, we determine that we have jurisdiction over Harms' appeal.

2. Constitutional Right to Silence and Counsel

In his first assignment of error, Harms argues that the district court erred in allowing and considering evidence of Harms' silence and his requests for counsel as substantive evidence of his guilt and sanity. He asserts that the State violated the U.S. Supreme Court's rulings in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), by introducing evidence of Harms' silence and requests for counsel as a means to contest his insanity defense. We note that while this court has addressed alleged violations of *Doyle* on several occasions, this case presents the first opportunity for us to consider the *Wainwright* decision, which applied the *Doyle* rule in a case involving an insanity defense.

In *Doyle, supra*, the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." 426 U.S. at 611. The Supreme Court found that a defendant's postarrest, post-*Miranda* silence is "insolubly

ambiguous" as to whether the defendant is guilty or merely exercising his rights in accordance with the implicit assurance in the *Miranda* warnings that "silence will carry no penalty." 426 U.S. at 617-18. The Supreme Court thus determined that the State's use of a defendant's postarrest, post-*Miranda* silence to impeach the defendant would be "fundamentally unfair" and a violation of the Due Process Clause of the 14th Amendment. 426 U.S. at 618.

The Supreme Court extended the due process rationale of *Doyle* in *Wainwright, supra*, a case in which the State introduced a defendant's postarrest, post-*Miranda* silence as substantive evidence of his sanity. At the defendant's jury trial in *Wainwright*, the defendant did not testify; however, police officers involved with the defendant's arrest did testify, at the State's request, about how the defendant "had exercised his right to remain silent and had expressed a desire to consult counsel before answering any questions." 474 U.S. at 287. The State referred to the officers' testimony again in closing arguments to the jury, arguing that the defendant's refusal to answer and his requests for an attorney showed that the defendant was sane.

In analyzing *Wainwright*, the Supreme Court declined to distinguish the case from *Doyle*:

> We find no warrant for the claimed distinction in the reasoning of *Doyle* and of subsequent cases. The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Wainwright v. Greenfield, 474 U.S. 284, 292, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). The Court found in *Wainwright*, as it did in *Doyle*, "the problem of fundamental unfairness that flows from the State's breach of its implied assurances." 474 U.S. at 294. In

so finding, the Court confirmed and reiterated its prior holdings in *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), and *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), which determined that the State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or postarrest, does not violate the 14th Amendment. See *Wainwright, supra*.

[6,7] We also note that requests for counsel, as well as actual silence, constitute "silence" for purposes of analyzing potential *Wainwright* violations. In *Wainwright*, the U.S. Supreme Court stated that "[w]ith respect to post-*Miranda* warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." 474 U.S. at 295 n.13. The Eighth Circuit Court of Appeals has similarly stated that "we must treat a defendant's invocation of his *Miranda* rights not as a statement, but as post-*Miranda* warnings silence." *Fields v. Leapley*, 30 F.3d 986, 990 (8th Cir. 1994). Additionally, this court has found that refusal to give a statement constitutes silence. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996). Accordingly, we will consider Harms' requests for counsel, as well as his actual silence, as "silence" for purposes of determining whether a *Wainwright* violation has occurred.

[8] As an initial matter, Harms invites this court to expand the *Doyle* and *Wainwright* protections to bar any use by the State of a defendant's prearrest, pre-*Miranda* silence. We decline to do so. In *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986), this court adopted *Doyle*'s prohibition against use of a defendant's silence during the postarrest, post-*Miranda* time period. Since that time, this court has had additional occasions to consider *Doyle*, and it has not precluded the admissibility of pre-*Miranda* silence. See, e.g., *Woods, supra*; *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988); *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). See, also, *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). We agree with the U.S. Supreme Court that it is not a violation of fundamental fairness for the State to use a defendant's pre-*Miranda* silence as

impeachment or as substantive evidence of sanity. See, *Wainwright, supra*; *Fletcher, supra*; *Jenkins, supra*; *Thomas v. State of Ind.*, 910 F.2d 1413, 1414 (7th Cir. 1990) (admission of pre-*Miranda* silence and request for counsel as evidence of sanity "raises no problems"). Prior to a defendant's receipt of *Miranda* warnings, there is "no governmental action induc[ing] [the defendant] to remain silent before arrest." *Jenkins*, 447 U.S. at 240. We therefore limit our analysis to evidence elicited by the State at trial referring to Harms' post-*Miranda* silence.

Harms challenges portions of the testimony given by five witnesses at trial: Plager, Dr. Logan, Dr. Roy, White, and Adams. Harms contends that the district court, in admitting this testimony, considered Harms' silence as evidence of *both* his guilt and sanity. The district court's responses to Harms' objections based on *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), however, do not support Harms' contention that such evidence was considered by the court as evidence of his guilt. In response to Harms' first *Doyle* objection, the district court stated:

> Well, I'm going to overrule the objection and enter a finding that I feel that he's waived that particular right based on his affirmative defense presented to the Court at this time period and this is basically now being brought in for a limited purpose. And the limited purpose of the State is bringing this particular point in for the question of his sanity, so overruled on the objection.

Later, in response to another objection by Harms, the district court stated, "[A]s the Court indicated, I'm receiving it for a limited purpose and that's to determine insanity and not to prove his guilt or innocence as regarding that particular right that he has." The record clearly demonstrates that the district court's sole purpose in receiving testimony regarding Harms' silence and requests for counsel was to aid the court in determining whether Harms was sane at the time of the shooting. It was not used as substantive evidence of Harms' guilt. Therefore, the allegation that the district court used Harms' silence as evidence of his guilt is without merit. We thus analyze the testimony of each witness solely to determine whether the district court improperly considered Harms' silence as substantive evidence of his sanity.

(a) Plager

Plager's telephone conversation with Harms took place before Harms was arrested and had received *Miranda* warnings. Therefore, pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), Plager's testimony regarding her conversation with Harms, including Plager's references to Harms' requests for his attorney, was admissible.

(b) Dr. Logan

During recross-examination, defense counsel objected on the basis of *Doyle* to the State's attempt to elicit Dr. Logan's opinion regarding Harms' mental state at the time Harms called the dispatcher and requested his attorney. The district court overruled the objection and allowed Dr. Logan to testify as follows:

> [Prosecution:] When Russell Harms called 911 after the shooting and he returned to his mobile home and asked for his attorney, have you expressed an opinion as to whether he was sane or insane at this time?
>
> . . . .
>
> [Dr. Logan:] In terms of making an opinion determination on his sanity, I don't know how the criteria of nature and quality and lawfulness of his actions would be to call an attorney. I don't know how to answer this. But whether this was a product of his mental illness or not, I did not ask him specifically the reasons for him calling the attorney afterwards, but noted that he often went to his attorney with some of his ideas that people were harassing him and stealing things from his trailer and ideas about the t.v. or they were making comments about his behavior.
>
> Q Doctor, thank you. So the fact that he drives over to his trailer, calls 911 and makes the comment that he makes, is that significant to you or is it not?
>
> A It's significant to me.
>
> Q Does it indicate a period then that he knows what he is doing?
>
> A He certainly knows in the same way that he knew he was shooting a gun at Mr. Kelsay. He knew what he was doing. He certainly knew the number he was dialing. It doesn't tell me that he was thinking rationally about it at

that time or that it was done with any kind of clear recognition of the situation.

Q It doesn't tell you that if he was acting rationally or not because you didn't inquire of that with him, did you?

A I didn't inquire of him about the 911 conversation, but I inquired about the events of that morning. I asked him about—

Q You have said that several times. Please just answer the question. You didn't inquire of him concerning his dialing 911?

A Right. I did not inquire about that call.

The record shows that the subject matter of the State's questions and Dr. Logan's comments did not extend beyond Dr. Logan's interpretation of Harms' telephone call to the dispatcher and Harms' requests for his attorney during the telephone call. Since Harms' requests for his attorney while speaking with the dispatcher clearly occurred in the prearrest, pre-*Miranda* time period, Dr. Logan's statements were admissible. See *Wainwright, supra.*

(c) Dr. Roy

As the State was preparing to call Dr. Roy to testify at trial, defense counsel objected to any questioning of Dr. Roy that would violate *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The court overruled the objection and permitted Dr. Roy's testimony. Dr. Roy testified regarding Harms' prearrest, pre-*Miranda* call to the dispatcher and his requests for counsel at that time. As previously noted, such testimony was properly admitted under *Wainwright*.

However, Dr. Roy also testified regarding Harms' refusal to speak with police officers after receiving *Miranda* warnings. Dr. Roy stated, "[W]hen he was explained his Miranda rights, he said, 'I'm not going to talk without my lawyer.' " This statement by Dr. Roy commented on Harms' post-*Miranda* silence and was thus inadmissible as evidence of Harms' sanity pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

In addition, Dr. Roy's written psychiatric evaluation was admitted as an exhibit at trial. The written evaluation stated in part:

> Mr. Harms refused to talk to the police officer without the present [sic] of his lawyer. This also was suggestive that he knew the role of his lawyer and the consequences of the alleged offense. Mr. Harms did understand the nature of what he was doing and he did know the difference between right and wrong with respect to what he was doing.

While these portions of Dr. Roy's evaluation utilized Harms' post-*Miranda* silence as evidence of sanity, counsel did not object to their admission. When the State offered the evaluation as an exhibit, defense counsel stated, "No objection, Judge." As a result, Harms has waived his "right on appeal to assert prejudicial error concerning the evidence received without objection." *State v. Harris, ante* p. 331, 339, 640 N.W.2d 24, 33 (2002).

(d) White

White testified at trial regarding his communications with the dispatcher as he was stationed in front of Harms' trailer. White testified that the dispatcher had advised him that Harms was on the telephone requesting an attorney. As discussed *supra*, these conversations and events occurred pre-*Miranda* and were properly admitted under *Wainwright*.

The State, however, also asked White how Harms had reacted after being arrested and receiving the *Miranda* warnings. The following dialog occurred at trial:

> [Prosecution:] Did [Harms] say anything to you at that time?
>
> [White:] Officer Adams— we did what they call a— like a felony arrest situation. He gave the commands, had him walk out towards him and go down to the asphalt. I came around and handcuffed him and verbally gave him his Miranda rights. And at that time he asked for an attorney.
>
> [Defense counsel]: Your Honor, I'm going to renew my objection again regarding commenting about his right to remain silent and Miranda warnings and him invoking his right to remain silent.
>
> [Court]: All right. Overruled. You may proceed.
>
> [White:] I advised him, verbally advised him of his Miranda rights. He asked for Mr. Cain. I told him we would get Mr. Cain and put him in the cruiser and took him to the law enforcement building.

> Q . . . . Now, Mr. Cain, who do you understand that to be?
> A That's his attorney or was his attorney. . . .
> . . . .
> Q So what period of time were you with Russell Harms on the date in question, December 10?
> A From the time the arrest was made until he was locked in the jail.
> . . . .
> Q At any time that you were with him on that date, did Mr. Harms indicate to you that he was hearing any command voices?
> A No, sir.
> Q Did he indicate to you that he was having any hallucinations of any kind?
> A No, sir.

The State's questions to White elicited testimony about Harms' post-*Miranda* requests for his attorney and his failure to speak with police officers regarding his mental state. When the police officers gave Harms his *Miranda* warnings, they gave him an "implicit promise" that his decision to remain silent or request his attorney would not be used to penalize him. See *Wainwright v. Greenfield*, 474 U.S. 284, 292, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). However, by commenting on this silence at trial, the State "breach[ed] that promise by using silence to overcome [Harm's] plea of insanity." See 474 U.S. at 292. We determine, therefore, that the above portions of White's testimony which discussed Harms' post-*Miranda* silence were inadmissible and error pursuant to *Wainwright*.

(e) Adams

(i) Testimony Regarding 1999 Arrest

Adams' testimony at trial was very similar to White's description of Harms' post-*Miranda* behavior. In its examination of Adams, the State elicited from Adams the fact that Harms, after receiving *Miranda* warnings, requested his attorney and did not mention anything about hearing voices or having hallucinations. However, Harms did not object to Adams' testimony. Although all *Wainwright* errors were properly preserved by Harms in similar testimony by White, such objection

made during White's testimony does not preserve the objection as to Adams' testimony.

[9,10] Where an objection has once been made to the admission of testimony and overruled by the court, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to preserve alleged error in the admission of the testimony to which the objection was made. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Adams' testimony at trial was of the "same nature" as White's testimony, but Adams was not the "same witness." Thus, it was necessary for Harms to object to any alleged error in Adams' testimony in order to properly preserve it for appeal. See *id.* "A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection." *State v. Harris, ante* p. 331, 339, 640 N.W.2d 24, 33 (2002). Since Harms did not object to Adams' testimony, we determine that Harms has waived the right to assert prejudicial error regarding Adams' testimony on appeal.

(ii) Testimony Regarding 1994 Arrest

Harms also argues that it was a violation of *Wainwright* for the court to admit evidence at trial of Harms' silence following a prior arrest by Adams in 1994. The challenged testimony, which was initiated by Harms' counsel, is as follows:

> [Defense counsel:] When you contacted [Harms] in 1994 regarding the assault, did Mr. Harms indicate to you that he thought he was being falsely arrested?
>
> [Adams:] No, because— can I go on? Our policy is contact, interview, if you believe there's an arrest. He was read his rights and he was not willing to talk to me without the services of an attorney.
>
> Q All right, thank you. No further questions.

Harms' allegation is without merit because defense counsel elicited the response from Adams. While the State, in its direct examination of Adams, initiated the questioning regarding the 1994 arrest of Harms, the State did not inquire into Harms' post-*Miranda* silence at the time of that arrest. The State asked Adams whether Harms' "behavior was different at that time than other times that you have seen him." Adams responded that Harms was

"somewhat upset" and "angry" during the 1994 arrest. Such questioning is permissible under *Wainwright* because it "avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." *Wainwright v. Greenfield*, 474 U.S. 284, 295, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

[11,12] 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. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). Also, one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001). For the foregoing reasons, we determine that Adams' testimony describing Harms' silence during a 1994 arrest was properly admitted.

3. Harmless Error

[13,14] Having determined that portions of the testimony of Dr. Roy and White were improperly admitted pursuant to *Wainwright*, the issue becomes whether the erroneously admitted evidence is harmless. In this court's prior cases analyzing *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), we have stated that " '[b]ecause the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception.' " *State v. Lofquest*, 227 Neb. 567, 571, 418 N.W.2d 595, 597 (1988), quoting *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980). However, *Doyle* and *Wainwright* violations constitute "trial error" and are subject to a harmless error analysis. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). See, also, *Lofquest*, 227 Neb. at 570-71, 418 N.W.2d at 597 (applying " ' "harmless beyond a reasonable doubt" standard to *Doyle* violations' ").

[15] Generally, " 'erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.' " *State v. Ildefonso*, 262 Neb. 672, 686, 634 N.W.2d 252, 265 (2001). At Harms' trial, the trier of fact was the district court. In such a context, this court has stated:

> In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not

> reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. . . . The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. . . . If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed.

State v. Lara, 258 Neb. 996, 1002, 607 N.W.2d 487, 491-92 (2000). We examine the evidence and the district court's findings in accordance with these standards. Therefore, the issue is whether the district court resolved the question of Harms' sanity exclusively through the use of the impermissible testimony of Dr. Roy and White. If the record contains other sufficient evidence to support the district court's finding that Harms was sane beyond a reasonable doubt, the conviction will not be reversed. In Nebraska, the test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999). For an insanity defense, the insanity must be in existence at the time of the alleged criminal act. *Id.*

We begin our analysis by examining those portions of the testimony of Dr. Roy and White that were inadmissible pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). 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. *Ildefonso, supra*. Dr. Roy's testimony that "when [Harms] was explained his Miranda rights, he said, 'I'm not going to talk without my lawyer,' " is essentially identical to the statement in Dr. Roy's written evaluation, admitted without objection, that "Mr. Harms refused to talk to the police officer without the present [sic] of his lawyer." Accordingly, we find Dr. Roy's testimony cumulative. Similarly, White's testimony

regarding Harms' post-*Miranda* requests for counsel and failure to mention anything about hearing voices or having hallucinations is repeated without objection in Adams' testimony, which provides virtually the same answers to the same questions posed by the State. Because of this repetition, we also find White's testimony cumulative.

Since the inadmissible portions of the testimony of Dr. Roy and White are cumulative, we must determine next whether " 'other relevant evidence, properly admitted, supports the finding by the trier of fact.' " See *State v. Ildefonso*, 262 Neb. 672, 686, 634 N.W.2d 252, 265 (2001). At trial, the State offered a substantial amount of evidence regarding Harms' sanity. Several individuals testified to Harms' calm demeanor immediately after the shooting. Clark, an eyewitness to the shooting, stated that Harms drove away after the shooting at a normal rate of speed and was "[n]ot [in] a real big hurry." Hatten, another eyewitness, also testified that Harms did not hurry to leave the area after shooting Kelsay, but, rather, drove away "[s]low, deliberate, like watching." Both White and Adams, the police officers, described how Harms behaved calmly, normally, and without agitation at the time of his arrest. Adams specifically noted that Harms' "normal" demeanor on the day of the shooting differed significantly from an angry encounter Adams had had with Harms in 1994. Plager, the dispatcher, discussed how Harms was not excited or agitated when she spoke with him after the shooting, and how he had asked for his attorney without any mention of hallucinations or command voices.

Dr. Roy's statements at trial and in his written evaluation of Harms, excluding inadmissible portions in violation of *Wainwright*, also provided the court with evidence of Harms' sanity at the time of the shooting. Dr. Roy found that Harms' thoughts prior to the shooting, such as " 'this old guy looks like he had a lot of good years,' " were distinguishable from command voices ordering Harms to kill someone. He testified that when he interviewed Harms, Harms denied "any auditory hallucination, delusional thinking, or any paranoia related to" Kelsay because "he has no connection with that man."

Dr. Roy also compared the behavior of someone who was actively hallucinating with Harms' behavior on the day of the

shooting. Dr. Roy testified that an individual in Harms' circumstance who was actively hallucinating or experiencing delusions would have exhibited "bizarre" behavior, such as engaging in a random shooting spree with multiple victims or driving at an extremely high rate of speed, and would have been incapable of acting rationally. Dr. Roy contrasted this scenario with Harms' actions, specifically, Harms' ability to slowly drive to his trailer, pick up the telephone, dial 911, speak with the dispatcher, and ask the dispatcher for his attorney. In sum, Dr. Roy testified that a person who was actively hallucinating could not have behaved the way Harms did after the shooting. Dr. Roy further testified that Harms' call to the dispatcher with a request for his attorney demonstrated that Harms knew that shooting Kelsay was wrong and would subject him to legal proceedings.

In addition, portions of the testimony offered by Dr. Logan, Harms' expert witness, support a finding of sanity. Dr. Logan stated that Harms, in shooting Kelsay, "knew he was firing a gun," "knew he was shooting an elderly gentleman," and was acting with deliberation and premeditation "[t]o the extent that he had to take out a rifle and shoot him numerous times." Dr. Logan also concluded that Harms "knew what he was doing" and "certainly knew the number he was dialing" when he called 911 with a request for his attorney.

The district court in its findings does not refer to Harms' post-*Miranda* silence, either as a basis for its finding of sanity or for any other purpose. The court stated:

> There's two elements in the insanity defense, and one being that defendant had a mental disease, defect, disorder at the time that the act is charged. Again, the State concedes that, at least as to this part of the defense, the defendant has that particular disorder. That would be the schizophrenia of paranoid type.
>
> We get into the next part of that and that is that— and which means not only do you have to prove that the person has that particular disease, but the defense must also show that the mental disease, the paranoid schizophrenia impaired his mental capacity to such an extent that either (1) he did not understand the nature or consequences of what he was doing or (2) that he did not know that— he did not know the

difference between right or wrong with respect to what he was doing.

Now, either one of those has to be proved by the greater weight of the evidence. And if that's the case, the defense has met their burden of proving by preponderance of the evidence that he was insane. Like most of these cases, you have two experts with credentials coming into this room and they both give opposite opinions. And, of course, it has to be confusing to the lay witnesses from the standpoint that how two professionals can come up with two different types of opinion. On the other hand, I think it's pointed out by [defense counsel], his expert relied heavily— remember there was actually— well, they talked about four particular phases which didn't include the interview but they talked about his history prior to the actual incident and then the actions thereafter as part of the mix in making their determination regarding his— the issue of his knowing the nature and consequences of what he was doing or the difference between right and wrong.

Again, I know that Dr. Logan emphasized strongly the historical pattern up to the shooting which would leave a basis for his opinion as to the actual, you know, state of mind of the defendant at the time of the shooting. Now, we know the actions of the defendant at the time based on the evidence that's been submitted. And we don't know what was going on in his mind and that's the problem the Court has. Okay, we've got— somebody's got to make a decision as to what was going on in his mind at the time. We know his actions thereafter and, of course we know the cliches are brought about because they're generally there for all of us to hear, like the cliche actions speak louder than words. What he did do at the time, what he did do thereafter and, of course, [defense counsel] is saying what have we also got in the beginning of this, also to look from the standpoint of his actions, Judge, also to consider it.

There's no question that he did have a history of some delusions. And it seems like the historical pattern— now [defense counsel]'s explaining the reason and maybe given the facts and reason, he didn't— Well, let me go back here.

> The historical pattern seems to suggest that when Mr. Harms had a problem and felt a— whatever he called that, anxiety coming on, he usually was able to control it to some extent and maybe it was his own feeling that the mental professionals had let him down, to not help himself any further, I don't know.
>
> But it seems like from the history that was given, that throughout that history he was constantly telling them that he had these hallucinations or delusions and yet what I note in this particular case is, is that even Dr. Logan testified that there were no command voices that he was given at the time of the incident. And yet he, for whatever reason, he said he didn't know whether— said he believed he was— he said he was guarded. One's left to speculate as to what was going on in his mind. It's odd to me that the person that's been able to talk about all these voices all of a sudden, you know, does not— clams up when it comes to a particular factual pattern that's now very serious now confronting him.
>
> Even after time passes he's not communicating that at least to the satisfaction of the doctor. I know that Dr. Roy on the other hand disregarded the historical context and didn't put as much weight on it and put more weight on the actual incident and he weighed also, I'm sure, his actions thereafter.
>
> To be quite honest with both parties, it's the Court's opinion that both these professionals have left me with a lot more questions than I have answers for. And I guess what I'm saying to the defendant is that I do not believe you met your burden you have of proving yourself insane even by the greater weight of the evidence.

Given the court's findings and the admissible evidence as evaluated in this opinion, we determine that the district court did not resolve the issue of Harms' sanity "based exclusively on the erroneously admitted evidence." See *State v. Lara*, 258 Neb. 996, 1002, 607 N.W.2d 487, 492 (2000). We find that the erroneously admitted testimony of Dr. Roy and White in violation of *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), is cumulative to other relevant and properly

admitted evidence regarding Harms' sanity. Furthermore, we find that the properly admitted evidence contained in the record is sufficient to support the district court's finding that Harms was not insane at the time of the shooting. For these reasons, we determine that the *Wainwright* errors which occurred at trial were harmless beyond a reasonable doubt.

4. Insanity Defense

[16,17] In his second assignment of error, Harms argues that the district court erroneously concluded that he was not insane at the time of the shooting.

> Nebraska follows the *M'Naghten* rule as to the defense of insanity. The test of responsibility for crime is a defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act. . . . For an insanity defense, the insanity must be in existence at the time of the alleged criminal act.

(Citation omitted.) *State v. Smith*, 256 Neb. 705, 710, 592 N.W.2d 143, 147 (1999). A defendant who pleads that he or she is not responsible by reason of insanity has the burden to prove the defense by a preponderance of the evidence. See § 29-2203.

[18] It is undisputed that Harms is a paranoid schizophrenic with a long history of mental illness, failed medications, and hospitalizations. However, the fact that a defendant has some form of mental illness or defect does not by itself establish insanity. See, *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

As discussed previously, two eyewitnesses, two police officers, and a dispatcher testified at trial regarding their encounters with Harms' calm and normal demeanor after the shooting. Dr. Logan, Harms' expert, and Dr. Roy, the State's expert, presented opposing opinions as to Harms' sanity. Both experts submitted detailed written evaluations of Harms based on their examination of his medical records and their individual meetings with him.

The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Also, an appellate court does not resolve conflicts in evidence,

pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001). This court will not reevaluate the testimony of Dr. Roy or Dr. Logan, or reweigh such testimony against the testimony of others at trial. We conclude that the issue of sanity was fairly presented to the district court and that the record contains sufficient admissible evidence for the finder of fact to conclude that Harms was not insane at the time of the shooting. See *Ryan, supra.* Harms' second assignment of error is without merit.

5. First Degree Murder

In his final assignment of error, Harms argues that the district court erred in interpreting and applying the elements of first degree murder. In enumerating its findings of fact, the district court stated:

> The Court has reviewed the evidence. And pursuant to the fact-finder's deliberations, normally the first course would be to go through each one of these elements and make sure that the State has presented evidence regarding that. And the first count being that on December 10, 1999, Russell W. Harms in the County of Nemaha and State of Nebraska, did then and there kill Tennyson E. Kelsay purposely and with deliberate and premeditated malice. Those are the separate elements. There's been no dispute regarding those facts except in the case of Dr. Logan's testimony earlier that, well, deliberation, premeditation, he may have had; but it was not rational.
>
> Deliberation is defined under our law and that is not suddenly or rationally [sic] but after first considering the probable consequences. . . .
>
> . . . I don't think that Nebraska law says that your deliberate premeditation has to be rational. I'm not quite sure that's a relative term. If there's any way you're going to define it, that's probably back in the affirmative defense of insanity.

[19] The elements of first degree murder are listed in Neb. Rev. Stat. § 28-303 (Reissue 1995), which states, "A person commits murder in the first degree if he kills another person (1)

purposely and with deliberate and premeditated malice . . . ." Accord *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). Relying on *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), Harms argues that Nebraska law requires the trier of fact to find that a defendant's deliberation and premeditation were rational. He asserts:

> The lesson of *Reynolds* is that the State bears the burden of proving first degree murder and its essential elements of rational, intentional consideration of the probable consequences. The trial court never considered the possibility that the State had not proven these elements beyond a reasonable doubt. The evidence at trial is to the effect that Mr. Harms lacked the rational, intentional consideration of the probable consequences to meet the elements of first degree murder.

Brief for appellant at 48.

Based on this argument that "rational" intent is a required element of first degree murder, Harms argues that the district court erred in impermissibly placing the burden of proving "rational" premeditation and deliberation on him as part of his insanity defense. He further maintains that since the State did not prove that his premeditation and deliberation were rational, there was insufficient evidence to convict him of first degree murder and use of a deadly weapon to commit a felony.

[20-22] This court has determined that "deliberate" means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). We have also determined that one kills with "premeditated malice" if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *Id*. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *Id*.

[23,24] A fundamental principle of statutory construction requires that penal statutes be strictly construed. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). We find nothing in

§ 28-303 or in this court's interpretation of § 28-303 which requires that a defendant must *rationally* consider the probable consequences of his or her actions or *rationally* determine to kill the victim without legal justification. See, e.g., *McLemore, supra*; *McBride, supra*; *Reynolds, supra*. Therefore, in stating its findings, the district court did not err in determining that "rational" was not a required element of "premeditation" or "deliberation." As a result, we also find that the district court did not impermissibly shift the burden of proof to Harms or err in finding that there was sufficient evidence to convict Harms of first degree murder and use of a deadly weapon to commit a felony. We determine that this assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, Harms' convictions are affirmed.

AFFIRMED.

GREG HENRIKSEN, APPELLEE, V. JIM GLEASON, DOING BUSINESS AS JIM'S BODY SHOP, APPELLANT.

643 N.W.2d 652

Filed May 10, 2002. No. S-00-1233.

1. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. ____: ____. 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.
4. **Collateral Estoppel: Jurisdiction.** Collateral estoppel should not apply when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them.
5. **Judgments.** It is inappropriate to give any issue preclusive effect to any small claims court judgment in a later proceeding brought in county or district court.
6. **Parties: Standing: Appeal and Error.** Only a person aggrieved or injured by a judgment may take an appeal from it.

7. **Actions: Contracts: Torts: Pleadings.** To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading.
8. **Actions: Breach of Contract: Torts: Words and Phrases.** Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property.
9. **Breach of Contract: Pleadings: Proof.** In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.
10. **Breach of Contract: Proof.** In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.
11. **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.

Appeal from the District Court for Nance County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Nance County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

John Morgan, of Morgan & Morgan, for appellant.

Steffi A. Swanson, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this breach of contract action, Jim Gleason, doing business as Jim's Body Shop (Gleason), appeals from a decision of the district court for Nance County affirming the decision of the county court for Nance County. The county court found Gleason "negligent" and awarded damages to Greg Henriksen. Gleason contends that because of a prior action between Gleason and Henriksen in Nance County Small Claims Court, the instant action is barred by the doctrine of res judicata.

BACKGROUND

Henriksen is the sole proprietor of a construction business in Eagle, Nebraska. As part of his business, Henriksen constructs buildings for a business known as Battery Patrol and its franchises and also installs fascia panel systems on Battery Patrol's stores.

In the fall of 1998, Henriksen contracted to install fascia panel systems on two of Battery Patrol's stores: one located in Ames, Iowa, and the other in Des Moines, Iowa. Henriksen contacted Gleason about painting 22 panels, and Gleason agreed to paint the panels. Henriksen delivered the panels to Gleason in early November, as well as primer, cleaner, paint, and other materials needed to complete the task.

Sometime in mid-November, Gleason completed the 8 panels to be used for the Ames store. Henriksen notified Gleason that he would pick up the panels on a Friday. On that Friday, Gleason waited for Henriksen to arrive for some time after closing hours. When Henriksen did not appear, Gleason left the panels outside his shop to allow Henriksen to pick them up. Henriksen arrived the following morning, at which time he noticed that leaves were stuck to some of the panels, leaving an imprint on the panels. Henriksen loaded the panels on his trailer for transport, separating them with cardboard and cloth. As they loaded the panels, Gleason advised Henriksen that his method of transport was not appropriate. The painting had only been completed in the last 24 hours, and the paint had not had a sufficient amount of time to cure.

When unloading the panels in Ames, Henriksen noticed that the cardboard used as a divider between the panels had stuck to the paint. The effects of the cardboard and the leaves left the panels with indentations, a dull finish, and a "fish scale look." Henriksen incurred expenses of $632 to repair the damage caused by the leaves and the cardboard.

One week later, the remaining panels for the Des Moines store were completed. After the panels were installed, Henriksen noticed that some of the panels were discolored and varied in darkness. The manager of the Des Moines Battery Patrol store complained to Henriksen about the inconsistency, and the manager agreed to accept a 25-percent discount off Henriksen's total bid price of $12,420.

On January 20, 1999, Gleason filed a claim against Henriksen in the small claims court for Nance County. Gleason's claim alleged that on November 28, 1998, at "[p]laintiff's place of business, work was completed for the Defendant and payment was never received by the Plaintiff." Gleason sought damages in the amount of $867.70. Henriksen was properly served with notice of Gleason's claim. Henriksen failed to appear in the small claims court, and a default judgment was entered against Henriksen on March 19, 1999. Henriksen subsequently satisfied the judgment.

On June 7, 1999, Henriksen initiated the present action in Nance County Court. Henriksen alleged in his petition, inter alia, that the parties entered into a verbal agreement in which Gleason agreed to paint numerous panels for Henriksen. Henriksen further alleged that as a result of Gleason's "negligence" and failure to properly paint the panels, Henriksen suffered damages. A bench trial was held, and the county court entered its findings on March 14, 2000.

Regarding the panels for the Ames store, the county court found that Gleason was negligent in leaving the panels outside overnight and allowing the leaves to attach to the panels. The court also found that Henriksen was negligent in improperly transporting the panels. The court was unable to apportion damages to the parties' respective acts of negligence and therefore awarded no damages for those panels.

Regarding the panels for the Des Moines store, the county court found that Gleason was negligent in failing to match different batches of paint provided by Henriksen and also in applying the paint in an uneven manner. The court awarded damages to Henriksen in the amount of $3,486, the difference between Henriksen's bid price of $12,420 and the amount he was actually paid by Battery Patrol, $8,934.

The county court also overruled Gleason's motion to dismiss, finding that Henriksen's action was not barred by res judicata. Gleason had argued at trial that res judicata barred the action because of the prior action in small claims court.

After the county court entered its order in this action, Gleason appealed to the district court for Nance County. The district court affirmed the judgment of the county court. The court found that

Neb. Rev. Stat. § 25-814 (Reissue 1995) did not require Henriksen to plead a counterclaim in the small claims court and that Henriksen was not precluded from filing a subsequent action against Gleason based on any possible counterclaim. Gleason appealed from the district court's order, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Gleason assigns six errors which can be consolidated into the following four: (1) The district court erred in finding that res judicata did not bar Henriksen's action, (2) the district court erred in affirming the county court's finding that Gleason was "negligent" in leaving the panels for the Ames store outside overnight and allowing the leaves to imprint on the panels, (3) the district court erred in affirming the county court's findings that Gleason was "negligent" in painting the panels for the Des Moines store, and (4) the district court erred in affirming the county court's finding that Henriksen offered sufficient proof of damages.

STANDARD OF REVIEW

[1,2] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

[3] In 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. *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001); *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000).

ANALYSIS

Res Judicata and Collateral Estoppel

[4] We have previously recognized that collateral estoppel should not apply when a new determination of the issue is warranted by differences in the quality or extensiveness of the

procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. *Flobert Industries v. Stuhr*, 216 Neb. 389, 343 N.W.2d 917 (1984), citing Restatement (Second) of Judgments § 28(3) (1982).

As the Restatement further explained:

> [T]here may be compelling reasons why preclusion should not apply. For example, the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim.

Restatement, *supra*, comment *d*. at 279.

[5] Small claims courts in Nebraska are governed by Neb. Rev. Stat. ch. 25, art. 28 (Reissue 1995, Cum. Supp. 2000 & Supp. 2001). Proceedings in small claims courts are conducted on a very informal basis, with a minimum of procedural requirements. *Harris v. Eberhardt*, 215 Neb. 240, 338 N.W.2d 53 (1983). For example, the jurisdiction of small claims court is currently limited to those cases where the amount in controversy does not exceed $2,400, § 25-2802(4); parties are not represented by counsel, § 25-2803; matters are tried without a jury, § 25-2805; few formal pleadings are required, § 25-2806; and the formal rules of evidence do not apply, *id*. The setting in small claims court affords parties the opportunity to obtain a prompt and just determination in an action involving small amounts while expending a minimum amount of resources. This setting is vastly different from the relatively more complex and time-consuming litigation that occurs in county or district courts. Given these procedural differences, we believe it is inappropriate to give any issue preclusive effect to any small claims court judgment in a later proceeding brought in county or district court. For that reason, the county court was not barred from litigating the issue of Gleason's performance under the contract.

GLEASON'S "NEGLIGENCE"

[6] In his second assignment of error, Gleason asserts that the district court erred in affirming the county court's finding that he was "negligent." The negligence consisted of Gleason's leaving the panels for the Ames store outside overnight and allowing the

leaves to imprint on the panels. However, the county court also found that Henriksen was "negligent" in transporting the panels. Being unable to apportion the respective acts of negligence by each party, the county court did not award damages for those panels. Thus, Gleason was not aggrieved by this portion of the county court's findings. Only a person aggrieved or injured by a judgment may take an appeal from it. *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). This assignment of error is without merit.

In his third assignment of error, Gleason argues that the district court erred in affirming the county court's finding that he was "negligent" in painting the panels for the Des Moines store. Henriksen's petition had alleged that the parties entered into a verbal agreement, but also alleged that Henriksen suffered damages because of Gleason's "negligence." The county court's order also referred to various acts of Gleason as acts of "negligence." Now on appeal, Gleason has repeatedly and inaccurately characterized the present action as a negligence action grounded in tort law.

[7] Although the dividing line between breaches of contracts and torts is often dim and uncertain, it has been said that the character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action. *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988). To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading. *Id.*

[8] Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property. *Id.*

No duty was imposed upon Gleason by law, but, rather, was imposed upon him by an agreement he made with Henriksen

whereby Gleason agreed to paint a number of panels for Henriksen. The nature of Henriksen's grievance by which he requests relief is clearly one based on a contract. Thus, we interpret the county court's decision as one finding that Gleason breached the contact, and we consider whether the county court erred in doing so.

[9,10] In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. See, *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000); *Doupnik v. Usher Pest Control Co.*, 217 Neb. 1, 346 N.W.2d 699 (1984).

Henriksen offered the testimony of his brother Brian Henriksen, an employee at a paint store whose job duties included mixing paint. Brian had 15 years of experience in painting cars and motorcycles. Brian testified regarding the recommended procedures to paint panels such as the ones Gleason painted. He testified as to the recommended mill thickness of paint, the method of measuring the thickness on panels such as these, and the recommended drying time and environment for each coat of paint. Brian further testified that the discoloration of the panels for the Des Moines store could have been caused by incomplete coverage or inconsistencies in the method of spraying the paint.

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.

Given Brian's testimony, we agree with the district court and conclude that the county court was not clearly erroneous in entering judgment for Henriksen. This assignment of error is without merit.

Proof of Damages

[11] Gleason also assigns that the district court erred in awarding Henriksen damages because there was not sufficient proof to allow such an award. However, Gleason fails to argue this assignment of error in his brief. 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. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

CONCLUSION

We conclude that given the differences in the procedures followed by small claims courts and county courts, no issue preclusive effect should be given to the small claims court's judgment in Gleason's favor. The district court did not err in finding that the county court could litigate the issue of Gleason's performance under the contract. For the reasons stated above, Gleason's remaining assignments of error are likewise without merit. Accordingly, we affirm.

Affirmed.

Hongning Fu, appellant and cross-appellee, v. State of Nebraska, State of Nebraska Board of Regents, University of Nebraska, doing business as University of Nebraska Medical Center, appellee and cross-appellant.

643 N.W.2d 659

Filed May 17, 2002. No. S-01-037.

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. **Tort Claims Act: Appeal and Error.** In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. 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.

3. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. If there is no legal duty, there is no actionable negligence.
4. ____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. ____. In determining whether a legal duty exists, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
6. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, the plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
7. **Negligence.** Foreseeability, in the context of a legal duty, is a question of law.
8. **Negligence: Proximate Cause.** Foreseeability in the context of proximate cause is a question of fact.
9. **Negligence: Proximate Cause: Words and Phrases.** Proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
10. **Negligence: Proximate Cause.** Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.
11. **Judgments: Appeal and Error.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. An appellate court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong.
12. **Negligence.** The standard of care generally requires one to act as a reasonable person of ordinary prudence would have done in the same or similar circumstances.
13. ____. Determining the standard of care to be applied in a particular case is a question of law, and the duty of care does not exist in the abstract, but must be measured against a particular set of facts and circumstances.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellant.

David D. Ernst and Lisa M. Meyer, of Gaines, Pansing & Hogan, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Hongning Fu, a former graduate student at the University of Nebraska Medical Center College of Pharmacy (UNMC), brought suit against UNMC pursuant to the State Tort Claims Act seeking to recover for injuries he sustained in a laboratory explosion. The court found in favor of UNMC. In its order, the court concluded that although Fu's dissertation chairperson, Jonathan Vennerstrom, Ph.D., was negligent in failing to monitor Fu more closely, Vennerstrom's negligence was not a proximate cause of the explosion which injured Fu. Fu appealed, and UNMC cross-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).

FACTUAL BACKGROUND

In 1981, Fu received a bachelor's degree in pharmaceutical studies from the West China University of Medical Sciences. In 1984, Fu was awarded a master's degree in medical pharmaceutical sciences from Shandong Medical University in China and thereafter worked as an organic chemistry instructor at the Shandong University Department of Pharmacy from 1984 to 1990. In 1990, Fu was admitted as a graduate student at UNMC.

Vennerstrom, an associate professor at UNMC since 1987, was Fu's advisor and the chairperson of Fu's doctoral dissertation committee. Vennerstrom's main area of research was focused upon the creation of a synthetic antimalarial drug and involved experiments with chemical compounds known as tetraoxanes. While serving as Fu's chairperson, Vennerstrom prepared a grant proposal for the World Health Organization (WHO) involving his antimalarial research. Fu was identified in the WHO grant proposal as a student researcher working under Vennerstrom.

In order to be admitted as a doctoral student in the College of Pharmacy, one must prepare a dissertation proposal which sets out the intended area of research he or she will pursue. Fu's dissertation topic was related to the WHO grant and dealt with the "Activity Relationship of 1,2,4,5-Tetraoxanes." Fu's written dissertation proposal set out intended experiments with both "bridged" and "unbridged" tetraoxanes. Bridged tetraoxanes are

unstable and more likely to explode than unbridged tetraoxanes. Vennerstrom's tetraoxane research, in association with the WHO grant, and Fu's dissertation proposal both involved the use of concentrated hydrogen peroxide (peroxide). Concentrated peroxide can explode if not handled properly.

Fu studied at UNMC from 1990 to 1993. His studies included both classwork and laboratory work related to his dissertation and the WHO grant. As part of his laboratory work, Fu kept notebooks in which he recorded the experiments performed, the procedures utilized, and the experiment results. Fu completed three notebooks and was working in a fourth when the explosion occurred. All of the experiments undertaken by Fu related to creating unbridged tetraoxanes, except for four experiments recorded in the fourth notebook between May 28 and June 11, 1993. These four experiments were labeled "HF-4-13," "HF-4-18," "HF-4-20," and "HF-4-21." Fu began HF-4-13 on May 28. The experiment which caused the explosion was HF-4-21. Fu began HF-4-21 on June 11, and it exploded that same day.

According to Fu, HF-4-13, HF-4-18, HF-4-20, and HF-4-21 were attempts to create bridged tetraoxanes and were a component of Fu's area of research. Fu asserted that Vennerstrom designed all the experiments contained in the four notebooks and directed Fu to perform them.

At trial, Fu contended that Vennerstrom directed Fu to perform HF-4-21 as part of the WHO grant, without providing Fu with adequate supervision, protective safety gear, or information or warning that HF-4-21 could result in an explosive compound. Fu also asserted that he had no knowledge that HF-4-21 had been previously attempted by other researchers or that HF-4-21 could result in an explosive substance. Fu further claimed that he was not wearing gloves when the explosion occurred on June 11, 1993, because there were no gloves in the laboratory.

Fu testified that while in China, he had never worked with high concentrations of peroxide or conducted experiments involving tetraoxanes. Fu explained that his dissertation proposal was undertaken in conjunction with the WHO grant and that HF-4-21 was part of Vennerstrom's research for the WHO grant. Fu testified that no one besides himself wrote in his four laboratory notebooks or performed the experiments recorded.

Fu stated that when he began his studies with Vennerstrom, Vennerstrom gave him a large quantity of articles and other information to read regarding Vennerstrom's tetraoxane research. However, Fu asserted that Vennerstrom had never given him exhibit 17, a German article specifically describing HF-4-21. This article states that HF-4-21 produces an explosive triperoxide. Fu stated he had never seen exhibit 17 until he brought suit against UNMC, when Vennerstrom produced the article in response to a discovery request. Fu also stated he could not read German. Fu explained that if he had read the German article, he would have asked Vennerstrom why he was directing him to do such a dangerous experiment. Fu also testified that two previous experiments in the course of his work for Vennerstrom, involving unbridged tetraoxanes and recorded in laboratory notebooks one and three, had resulted in explosions.

On cross-examination, Fu agreed that he was able to translate German with the help of a dictionary and did some German translation work for Vennerstrom. However, Fu maintained that Vennerstrom never gave him the German article. He agreed that HF-4-21 was "probably" what caused the explosion, but stated that he did not know himself which experiment exploded. Fu explained that his intention in performing HF-4-21 was to synthesize a bridged tetraoxane in conjunction with the WHO grant and that he did not know that HF-4-21 would produce an explosive compound. Fu also agreed that Vennerstrom gave him information on the type of protective gear to wear when working with concentrated peroxide. He further testified, however, that such gear was not always available in the laboratory.

Vennerstrom's testimony, for the most part, presents a completely different version of the facts. Vennerstrom testified that he gave Fu a large amount of written material concerning Vennerstrom's work with tetraoxanes when Fu began his studies and that he expected Fu to read all this material. Included in this material was the German article on HF-4-21 (exhibit 17). Vennerstrom further testified that although experiments involving bridged tetraoxanes were included in Fu's dissertation proposal, it was later agreed that Fu's experiments would involve only unbridged tetraoxanes.

Vennerstrom went on to explain that the decision to exclude bridged tetraoxanes from Fu's work was based on the fact that Vennerstrom had already completed sufficient experiments on bridged tetraoxanes for purposes of his research for the WHO grant proposal. Vennerstrom testified he discussed this with Fu and that they agreed that Fu's dissertation would therefore involve only unbridged tetraoxanes.

Notwithstanding this agreement, Vennerstrom testified that in mid-May 1993, Fu requested permission from Vennerstrom to attempt some bridged tetraoxane experiments. Vennerstrom explained he instructed Fu not to undertake any such experiments. During the 2-week period preceding the explosion on June 11, Fu continued to seek authorization from Vennerstrom to conduct such experiments, and Vennerstrom continued to direct him not to attempt them.

Vennerstrom's office was located across the hall from the laboratory where Fu performed his experiments. Vennerstrom testified that he typically spoke with Fu two to three times a week about his work and periodically checked the experiments and results recorded in Fu's notebooks. Vennerstrom did not check Fu's notebooks between May 28, 1993, and the time of the explosion. Vennerstrom testified he had no knowledge that Fu began doing experiments on May 28 in which he attempted to create bridged tetraoxanes. Vennerstrom acknowledged that he knew Fu was working in the laboratory during this time period, but stated that he had no knowledge of Fu's specific experiments other than the fact that Fu was "generally working in the area of chemistry."

According to Vennerstrom, HF-4-21 was an unauthorized experiment which Fu undertook without Vennerstrom's knowledge. Vennerstrom stated that he believed and trusted that Fu would accept his directions and not conduct experiments related to bridged tetraoxanes and that he had no reason to believe Fu would attempt HF-4-21.

Regarding the circumstances surrounding the accident, the evidence showed that Fu began working on HF-4-21 on June 11, 1993. This reaction involved mixing 70 percent peroxide with dichloromethane, methanesulfonic acid, and acetonylacetone.

There was further evidence that after combining the above ingredients, Fu carried HF-4-21 in a glass beaker to an adjoining laboratory to use the "roto-vapper." Another student working in the adjoining laboratory, Sudha Vippagunta, testified that Fu used the "roto-vapper" to evaporate the liquid in the beaker, resulting in a substance that was thick and looked somewhat like a "cotton ball." According to Vippagunta, Fu seemed surprised by the result, showing the beaker to Vippagunta while stirring it with a glass rod. Vippagunta testified that the only protective gear Fu was wearing at the time was a pair of gloves.

Shortly thereafter, Fu returned to his laboratory with the beaker, and within 2 or 3 minutes, the explosion occurred. At the time of the explosion, Fu was wearing glasses and a face shield, but no gloves.

Several people arrived soon after the explosion. First was William Elmquist, Ph.D., who was on the same floor and heard a loud bang. He wrapped Fu's left hand, which was bleeding, in a laboratory coat. Vennerstrom arrived next. Shortly thereafter, John Hauser, who was the director of safety for UNMC, and James Rhone, who was the director of the hazardous materials program for the University of Nebraska, also arrived. Emergency personnel were called, and Fu was taken to the hospital. As a result of the injuries sustained in the explosion, Fu's left ring finger and half of his left middle finger were amputated. The tip of his left little finger was also damaged.

After Fu was taken to the hospital, Hauser, Rhone, and Vennerstrom examined the laboratory and discovered Fu's notebook, opened to HF-4-21. Vennerstrom looked at the notebook and, according to the testimony of Rhone and Hauser, expressed surprise that Fu was working on this experiment.

Two expert witnesses testified on behalf of Fu: Kevin Woller, Ph.D., and Jeffrey Aube, Ph.D. Woller testified that although a portion of his graduate studies in chemistry involved working with peroxides, he had never himself worked with tetraoxanes. He agreed that it was "lore" among chemistry students, professors, and researchers that peroxides can be dangerous, stating that "[w]henever I had mentioned I was doing peroxide chemistry, they've asked if I had all ten fingers."

Woller testified that in his opinion, HF-4-13, HF-4-18, HF-4-20, and HF-4-21 were all experiments within the scope of Fu's dissertation proposal and the WHO grant. He based this opinion upon his belief that all four experiments were intended to produce a bridged tetraoxane. However, Woller also testified that there were differences between HF-4-21 and the three previous experiments. He testified that the "first three [experiments] are the same reaction. The last one [HF-4-21] is different." In comparing the chemical composition of the experiments, Woller stated, "HF-4-21 is just a straight chain aliphatic diketone, whereas the previous three, all being the same, involve a cyclic diketone." Woller also testified that while the reaction involved in HF-4-13, HF-4-18, and HF-4-20 was listed in Fu's dissertation proposal and the WHO grant, the reaction involved in HF-4-21 was "not specifically described" in either Fu's dissertation proposal or the WHO grant proposal.

Finally, Woller acknowledged that the literature regarding the reaction involved in HF-4-21 showed that the resulting compound was either a "triperoxide" or "polymeric peroxide" and that HF-4-21 had never produced a bridged tetraoxane. Woller stated during cross-examination:

> [Defense counsel:] You think HF-4-21 in theory could make a bridged tetraoxane, instead of one of these [other two compounds]?
>
> [Woller:] That's right.
>
> Q. It's never been done, has it?
>
> A. It has never been done.
>
> Q. You've never tried it?
>
> A. I certainly haven't tried it.
>
> Q. You wouldn't try it, would you?
>
> A. I don't have any plans to try it, no.
>
> Q. It would be a dangerous experiment, wouldn't it?
>
> A. It would be, but a lot of experiments are dangerous.

Woller further stated that during his research regarding HF-4-21, he found exhibit 17 (the German article) within a half hour to an hour. Woller also testified that had Fu researched HF-4-21, Woller would have expected Fu to realize that HF-4-21 would produce a "shock-sensitive compound." Finally, Woller agreed that it was a "bad idea" for Fu to walk around with a

compound containing acetonylacetone and peroxide and that graduate students generally are expected to do their own independent research on the experiments they perform.

Aube, Fu's other expert, was a professor of medicinal chemistry. Aube had never worked directly with peroxides or tetraoxanes. He testified that in his opinion, most of the experiments conducted by Fu for Vennerstrom throughout Fu's studies were inherently unsafe because of the "scale" or amount of material being used. Aube testified that when working with inherently dangerous compounds, the smallest amount of material necessary should be used because the amount of material affects the severity of any possible explosion. He opined that 20 grams of peroxide, as was used in HF-4-21, was an unsafe quantity of material. He also opined that HF-4-21 was "within the scope" of Fu's dissertation and the WHO grant because he believed HF-4-21 was intended to produce a bridged tetraoxane.

On cross-examination, Aube agreed that it was "lore" in the chemistry field that peroxides are dangerous. He testified that he would expect someone in Fu's position to know that HF-4-21 could be unstable and that a good chemist would find the relevant articles dealing with the experiments being attempted. He also agreed with Woller that the reaction involved in HF-4-21 was not listed in either Fu's dissertation proposal or in the WHO grant proposal, in that neither document contained a "recipe or formula or specific description of [HF-]4-21." Finally, he described Fu's actions in walking around with the HF-4-21 compound and stirring it with a glass rod as "dangerous" and "possibly" reckless.

In its defense, UNMC presented testimony from various witnesses, including, inter alia, Edward Clennan, Ph.D.; Rhone; James Wood, Ph.D.; and Hauser. Clennan, a chemist and "worldwide" lecturer on peroxides, opined that there was no relationship between Fu's dissertation proposal, the WHO grant, and HF-4-21 for two reasons. First, Clennan testified that the German article made it clear that HF-4-21 would not produce a bridged tetraoxane, but a triperoxide. Second, the ratio of the chemical ingredients in HF-4-21 could not possibly result in the formation of a bridged tetraoxane. Therefore, Clennan opined that HF-4-21 was clearly outside the scope of Fu's dissertation and the WHO grant.

Clennan also opined that the scale of Fu's experiments throughout the four notebooks was safe. He testified that although the scale of some of the experiments was "fairly large," the scale was "quite" appropriate in the context of the methodology employed. Clennan explained that the general pattern followed by Fu was to initially run the experiment on a small scale and then run it again on a larger scale. He agreed that HF-4-21 was not initially attempted on a small scale, but stated this was a mistake on Fu's part. He also agreed that the more concentrated the peroxide, the more likely it is to explode, and that it was "lore" in the chemistry field that concentrated peroxide was dangerous to work with without proper safety precautions. Finally, Clennan testified that Fu should not have picked up the beaker containing HF-4-21.

Rhone testified that he held a bachelor's degree in chemistry and a master's degree in organic chemistry. Rhone opined that HF-4-21 was outside the scope of Vennerstrom's research and that Vennerstrom would never authorize a student to undertake HF-4-21 because it was dangerous. Rhone stated that when Vennerstrom saw the notebook, Vennerstrom seemed surprised that Fu was conducting this type of experiment. Rhone also testified regarding the manner in which graduate students are expected to conduct themselves, stating "the student should leave no stones unturned to read up on the chemicals that he's mixing, that he's working with."

Wood, a member of Fu's dissertation committee, testified that concentrated peroxide, whether at 50 percent strength or higher, was a dangerous substance. He further testified that graduate students do not typically run all of the experiments set out in a dissertation proposal, as the proposals often evolve and change over the course of a student's studies.

Finally, Hauser testified that there had been no safety violations or reported explosions in Vennerstrom's laboratory prior to the explosion in this case. He also testified that when he, Vennerstrom, and Rhone found the notebook opened to HF-4-21 on June 11, 1993, Vennerstrom indicated that Fu was not supposed to be working on this type of experiment.

On November 30, 2000, the trial court issued a written order finding in favor of UNMC. In its order, the trial court made

findings that generally adopted Vennerstrom's version of the facts surrounding the explosion and rejected Fu's. The court found that although Vennerstrom was negligent in "failing to monitor Plaintiff's activities more closely," such negligence was not a proximate cause of Fu's injuries. The court specifically found in its order that although "[t]he experiment was part of Plaintiff's dissertation . . . Dr. Vennerstrom would not have been able to foresee Plaintiff conducting this experiment in the manner in which it was performed, and, therefore, could not foresee the risk of injury." (Emphasis in original.) The court went on to find:

> Did Dr. Vennerstrom direct the Plaintiff to perform the experiment? The Court believes not. . . .
>
> . . . .
>
> . . . [E]ven if Dr. Vennerstrom had done a better job of monitoring Plaintiff, Dr. Vennerstrom would not have known what experiment Plaintiff was performing on June 13 [sic], 1993 unless Dr. Vennerstrom's monitoring schedule happened to have coincided with the date of the explosion, or unless he checked on Plaintiff everyday [sic], which is clearly not the norm for students of Plaintiff's knowledge and history.
>
> . . . .
>
> . . . Would the explosion have occurred had Dr. Vennerstrom done a better job of monitoring his student? Plaintiff did not advise his supervisor he was conducting this experiment and even had Dr. Vennerstrom checked Plaintiff's workbook 2 days prior to the explosion, rather than 2 weeks, Dr. Vennerstrom would not have been able to foresee Plaintiff conducting this experiment in the manner in which it was performed, and, therefore, could not foresee the risk of injury.

The court made additional findings concluding that Fu should have known HF-4-21 was dangerous, that Vennerstrom had given Fu the German article stating that HF-4-21 produced an explosive triperoxide, and that Fu had been told by Vennerstrom not to do the experiment.

Finally, the court found that Fu's actions in walking around with HF-4-21 and stirring it with a glass rod were "hazardous and reckless," noting:

> Plaintiff was clearly not a freshman chemistry student, but a [graduate student] working towards his doctorate, and, at this point in time, had over 10 years of research experience. Plaintiff's supervisor did not have a duty to watch every move Plaintiff made in the lab. . . . Plaintiff made a mistake in judgment and this Court finds that this mistake in judgment was not limited to Plaintiff's failure to wear the proper gloves, but to the entire span of Plaintiff's activities on June 13 [sic], 1993. . . .
>
> The Court, therefore, finds that that [sic] the risk was not foreseeable by the Defendants and that the proximate cause of Plaintiff's damage was Plaintiff's negligence.

ASSIGNMENTS OF ERROR

Fu asserts, rephrased, summarized, and renumbered, that the trial court erred in (1) finding that Vennerstrom's negligent supervision of Fu was not a proximate cause of the explosion, (2) finding that Vennerstrom did not instruct Fu to conduct HF-4-21, (3) making other factual determinations which are clearly wrong, (4) finding that Fu was aware of the dangers associated with the experiments he conducted, (5) holding Fu to the same standard of care as Vennerstrom in finding Fu negligent, and (6) finding that Fu assumed the risk involved in conducting HF-4-21.

CROSS-APPEAL

UNMC asserts in its cross-appeal, rephrased, that the trial court erred in finding (1) Vennerstrom had a legal duty toward Fu with regard to the explosion caused by HF-4-21 and (2) Vennerstrom breached a legal duty in failing to monitor Fu's activities more closely.

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. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001); *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

[2] In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when

determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. 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. See, *Cerny, supra*; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

ANALYSIS

Legal Duty

[3,4] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Claypool, supra.* If there is no legal duty, there is no actionable negligence. *Id.* We therefore determine at the outset to address UNMC's first assignment of error in its cross-appeal, in which UNMC contends the trial court erred in finding that UNMC owed a legal duty to Fu regarding the explosion, for if there is no legal duty, there can be no actionable negligence. See *id.* Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.*

[5] In determining whether a legal duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). We have further stated:

> " 'Foreseeability as it impacts duty determinations refers to " 'the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.' " . . .' "
>
> . . . .
>
> . . . "[T]he law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen."

Id. at 179, 181, 615 N.W.2d at 900-01 (quoting *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999)).

The evidence in this case shows that explosions are a foreseeable risk in the context of a chemistry student's graduate research involving concentrated peroxide. Regarding the relationship of the parties, instructors generally have a legal duty to supervise students in a nonnegligent manner. See, *Norman, supra*; *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998); *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979). This duty is illustrated in the present case from the evidence that when Fu began his work, Vennerstrom gave Fu materials about tetraoxane research and the safety precautions Fu should take when conducting experiments. Vennerstrom also monitored Fu's work regularly. We determine that UNMC owed a legal duty to Fu and, accordingly, turn to the errors raised on appeal by Fu.

Proximate Cause

[6,7] In his first assignment of error, Fu asserts the trial court erred in finding that Vennerstrom's negligent supervision of Fu was not a proximate cause of the explosion. In order to recover in a negligence action brought pursuant to the State Tort Claims Act, the plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). Foreseeability, in the context of a legal duty, is a question of law. *Sharkey, supra*. See, also, *Cerny, supra*. Fu, however, raises no error with regard to the trial court's finding that Vennerstrom owed a legal duty to Fu or that Vennerstrom breached that legal duty. Instead, Fu challenges the trial court's factual finding that there was no causation in that Vennerstrom's negligence was not a proximate cause of the explosion.

[8] Foreseeability in the context of proximate cause is a question of fact. *Sharkey, supra*. In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. 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. See, *Cerny, supra*; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[9] The question at issue in evaluating Fu's first assignment of error is whether the trial court was clearly wrong in finding that Vennerstrom's negligent supervision was not a proximate cause of Fu's injuries. See *Johnson, supra*. Proximate cause is a cause that (1) produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Norman, supra*. The general test of causation is whether, after the occurrence, the injury appears to be the reasonable and probable consequence of the defendant's negligent acts or omissions. *Brown v. Social Settlement Assn.*, 259 Neb. 390, 610 N.W.2d 9 (2000). Fu argues in his brief that the trial court's finding that the explosion was not foreseeable is clearly wrong because "Dr. Vennerstrom knew or should have known it was possible (even likely) that Mr. Fu was performing experiments he had supposedly been told not to conduct." Brief for appellant at 26.

[10] Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty. *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

The trial court in its order stated:

> [E]ven if Dr. Vennerstrom had done a better job of monitoring Plaintiff, Dr. Vennerstrom would not have known what experiment Plaintiff was performing on June 13 [sic], 1993 unless Dr. Vennerstrom's monitoring schedule happened to have coincided with the date of the explosion, or unless he checked on Plaintiff everyday [sic], which is clearly not the norm for students of Plaintiff's knowledge and history.
>
> . . . .
>
> . . . [T]here must be a legal duty on the part of the Defendant to protect the Plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. As Plaintiff has argued, the

> Defendant had a duty to protect the [Plaintiff] from injury. Was the risk of injury foreseeable and did the Defendant fail to see the risk, thereby failing to discharge its duty?
>
> . . . [E]ven had Dr. Vennerstrom checked Plaintiff's workbook 2 days prior to the explosion, rather than 2 weeks, Dr. Vennerstrom would not have been able to foresee Plaintiff conducting <u>this</u> experiment in the manner in which it was performed . . . .
>
> . . . .
>
> . . . by carrying this unstable solution in a hazardous and reckless manner [and] disregarding all safety procedures, precautionary measures and warnings.

The trial court's conclusion that the explosion was not foreseeable was based on two factual findings. The first was its finding that Vennerstrom "would not have known what experiment Plaintiff was performing on June 13 [sic], 1993 unless Dr. Vennerstrom's monitoring schedule happened to have coincided with the date of the explosion, or unless he checked on Plaintiff everyday [sic], which is clearly not the norm for students of Plaintiff's knowledge and history."

The record is undisputed that Vennerstrom had not checked Fu's notebook from May 28 to June 10, 1993. The issue presented is whether the record supports the trial court's finding that even had Vennerstrom checked Fu's notebook at any time between May 28 and June 10 and observed that Fu was performing HF-4-13, HF-4-18, or HF-4-20, Vennerstrom would not have foreseen Fu attempting HF-4-21 on June 11.

We find that the record supports such finding, given the dissimilarities between the experiments. Woller, one of Fu's experts, acknowledged that HF-4-21 was "different" from the prior three experiments. He testified that the three earlier experiments all involved the same reaction, essentially mixing concentrated peroxide and ketone. In contrast, HF-4-21 involved mixing concentrated peroxide with a different ingredient, acetonylacetone. Woller also testified that the reaction involved in the three earlier experiments was listed in the WHO grant. However, as Woller acknowledged, the WHO grant, in conjunction with which Fu was supposedly conducting HF-4-21, contained no reaction involving concentrated peroxide and acetonylacetone. Furthermore, Woller

acknowledged that while the reaction involved in the three earlier experiments was intended to produce a bridged tetraoxane, HF-4-21 had never produced a bridged tetraoxane. Aube agreed with Woller that HF-4-21 involved the mixture of concentrated peroxide with acetonylacetone, a reaction not described in the WHO grant. Clennan, UNMC's expert, testified that while the reaction involved in HF-4-13, HF-4-18, and HF-4-20 was an attempt to create a bridged tetraoxane, HF-4-21 was not. According to Clennan, HF-4-21 would produce a triperoxide, not a bridged tetraoxane.

The second factual finding made by the trial court was that Vennerstrom could not have foreseen Fu's "conducting this experiment in the manner in which it was performed . . . by carrying this unstable solution in a hazardous and reckless manner, disregarding all safety procedures, precautionary measures and warnings." Again, we find the record supports such finding.

With respect to the manner in which Fu conducted HF-4-21, Woller, Aube, and Rhone testified that a graduate student should research an experiment before attempting it. Woller also testified that proper research would have informed Fu that HF-4-21 would produce an explosive compound. Woller, Aube, and Clennan all agreed that it was a mistake for Fu to carry the mixture and stir it. Aube, Fu's own expert, agreed that Fu's actions in conducting HF-4-21 could be considered dangerous and possibly reckless.

The trial court found that Vennerstrom's negligence was not a proximate cause of the explosion. In considering the evidence in the light most favorable to UNMC and giving to UNMC the benefit of every reasonable inference that can be deduced from the evidence, we cannot conclude that the trial court's factual finding on the issue of proximate cause was clearly wrong. See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). Fu's first assignment of error is without merit.

Remaining Assignments of Error

[11] In his second assignment of error, Fu argues the court erred in finding that Vennerstrom did not direct Fu to conduct HF-4-21.

> In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. . . . This court will not reweigh the testimony or reevaluate the credibility of the witnesses, but it will review the evidence to determine whether the trial court made findings which are clearly wrong.

Johnson v. School Dist. of Millard, 253 Neb. 634, 637, 573 N.W.2d 116, 119 (1998).

At trial, Vennerstrom testified that he did not direct Fu to conduct HF-4-21. Rhone and Hauser testified that when they discovered Fu's notebook after the explosion, Vennerstrom expressed surprise that Fu was attempting HF-4-21. While Fu's testimony on this issue directly contradicted Vennerstrom's, questions regarding credibility are solely the province of the trier of fact. See *Johnson, supra*. Based on our review of the record, the trial court's finding that Vennerstrom did not instruct Fu to do HF-4-21 is not clearly wrong.

In his third assignment of error, Fu asserts the trial court "made several factual determinations regarding Mr. Fu's past training and experience that are clearly wrong." Brief for appellant at 35. Fu first asserts that the court erroneously found Fu had been a medical doctor in China. Although the order does state that "[i]n his Application to Graduate College (Exhibit #117), Plaintiff stated he had a medical degree," the trial court's order does not contain a finding that Fu was a medical doctor in China, nor does the order refer to Fu as a medical doctor or physician. Also, as noted in the factual background, Fu does have a medical degree in pharmaceutical sciences. This contention by Fu is without merit.

Fu also contends that the trial court erred in finding Fu had extensive experience with peroxides. Fu cites in his brief to pages 16 and 17 of the trial court's order for this alleged error, but the court makes no such finding on those pages or elsewhere in the order. On page 17 of the order, the court noted, "[Fu] also stated that he never worked with high concentrations of peroxide in China, nor did he ever do unbridged or bridged tetraoxides [sic] in China." Fu's assertion that the court found Fu had extensive experience with peroxides is without merit.

Fu also asserts that the trial court erred in finding Fu's experiment was flawed because of the concentration of the peroxide when, according to Fu, the flaw was the scale or quantity of the chemicals used. The trial court's order reads:

> Dr. Woller stated that if Plaintiff had done the experiment correctly rather than adjusting the variables, the experiment would have been safe, even with a higher percent peroxide. . . .
>
> Professor Aube believed that Plaintiff was conducting his experiments on too large a scale. Dr. Wood stated that 50% peroxide was very high and dangerous, and Dr. Clennon [sic] testified that the chance of a bigger explosion was greater the higher the peroxide used.

The trial court's order lists several factors which contributed to the dangerousness of HF-4-21. The trial court's order shows that the court considered the variables in the experiment, the scale of the experiment, and the concentration of the peroxide in assessing the dangerousness of the experiment. The court's basis for finding that HF-4-21 was a flawed experiment was not clearly wrong.

In his fourth assignment of error, Fu contends the trial court erred in finding that Fu was aware of the dangers associated with the experiments he conducted. The trial court's order states, "[Fu] claims to have had other explosions . . . . The Plaintiff, therefore, knew of the danger involved in his work, yet paraded around the lab with a shock sensitive substance." As indicated in the above-quoted language from the trial court's order, the court found that Fu was aware of the risks of his work based on Fu's testimony that he had run two previous experiments which resulted in explosions prior to June 11, 1993. There is also evidence from Woller, Aube, and Clennan that experiments involving peroxides are, as a matter of "lore," known to be dangerous in the field of chemistry. Finally, the trial court found that Fu had been given the German article discussing the explosive triperoxide produced by HF-4-21. Based on the record, we cannot say that the trial court's finding that Fu was aware of the dangers associated with the experiments he conducted was clearly wrong.

[12] In his fifth assignment of error, Fu asserts that the trial court erred by holding Fu to the same standard of care as Vennerstrom in finding Fu negligent. The standard of care generally requires one to act as a reasonable person of ordinary prudence would have done in the same or similar circumstances. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001). In *Cerny*, we noted:

> 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.

(Citations omitted.) 262 Neb. at 73, 628 N.W.2d at 704.

[13] Determining the standard of care to be applied in a particular case is a question of law, and the duty of care does "not exist in the abstract, but must be measured against a particular set of facts and circumstances." *Id.* at 74, 628 N.W.2d at 704. Therefore, the standard of care applicable to Fu is that of a reasonably prudent graduate student with Fu's level of education and experience. The trial court in its order evaluated Fu's conduct based on the standard of care expected of a graduate student "working toward his doctorate . . . [with] over 10 years of research experience." Accordingly, we determine the trial court applied the proper standard of care to Fu. This assignment of error is without merit.

In his final assignment of error, Fu asserts the court erred in finding Fu assumed the risk involved in conducting HF-4-21. However, a review of the trial court's order does not reveal any finding that Fu assumed the risk of conducting HF-4-21. Instead, the order finds that Vennerstrom's negligence was not a proximate cause of the explosion, and as a result, UNMC was not liable for Fu's injuries. Any finding on the issue of assumption of risk would have been unnecessary in light of the trial court's determination that Fu had failed to show that his injuries

were proximately caused by UNMC. This assignment of error is similarly without merit.

Because this court determines that Fu's assignments of error are without merit, it is not necessary to reach UNMC's second assignment of error in its cross-appeal.

CONCLUSION

The decision of the trial court finding in favor of UNMC is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

KELLY MACKE, APPELLEE, V.
EDDIE PIERCE, APPELLANT.

643 N.W.2d 673

Filed May 17, 2002. No. S-01-207.

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.
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. **Motions for New Trial.** A motion for new trial pursuant to Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000) must be filed within 10 days after an entry of judgment, as defined in Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000).
5. **Motions for New Trial: Final Orders.** A motion for new trial directed to a nonfinal order is a nullity, as is any ruling on such a motion.
6. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a valid final order entered by the court from which the appeal is taken.
7. ____: ____: ____. In the absence of a judgment or a valid 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 Box Butte County: BRIAN SILVERMAN, Judge. Order vacated, appeal dismissed, and cause remanded for further proceedings.

William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellant.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

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

GERRARD, J.

NATURE OF CASE

Kelly Macke sued Dr. Eddie Pierce, alleging that Pierce tortiously interfered with a business expectancy when Pierce informed Macke's prospective employer, Burlington Northern Railroad Company, of findings Pierce made during a physical examination of Macke. After a jury verdict in favor of Pierce, Macke filed a motion for new trial, which was sustained by the district court. Pierce appealed. Because Macke's motion for new trial was premature, we dismiss this appeal for lack of jurisdiction.

PROCEDURAL BACKGROUND

DISTRICT COURT PROCEEDINGS

Macke filed the petition in the instant case on February 25, 1999, alleging that Pierce tortiously interfered with a business expectancy, because Pierce's communication with Burlington Northern Railroad Company resulted in the disapproval of Macke's application for employment. The matter proceeded to jury trial, and the jury returned a verdict in favor of Pierce. Macke filed a motion for new trial, which the district court granted on the basis that the evidence was insufficient to sustain the verdict.

Both the bill of exceptions and the district court docket sheet, present in the transcript, show that the jury reached a verdict in favor of Pierce on August 9, 2000. The district court accepted the verdict and entered a "finding" for Pierce in open court on that date, as reflected in the bill of exceptions and on the court's docket sheet. The docket sheet is not file stamped, and no file-stamped judgment of dismissal, pursuant to the jury verdict, appears in the record.

On August 11, 2000, Macke filed a motion for new trial. The matter came on for hearing on September 26, and on January 26, 2001, the district court sustained the motion for new trial. Pierce filed a notice of appeal on February 16.

Appellate Court Proceedings

On March 16, 2001, before this appeal was moved to our docket, the Nebraska Court of Appeals issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction, based on the absence from the record of a file-stamped judgment of dismissal pursuant to the jury verdict. In response, Pierce filed a praecipe for a supplemental transcript. On March 28, Pierce also filed a written response to the show cause order, in which he stated that he had contacted the clerk of the district court and had been informed that no district court order entering judgment on the jury's verdict existed. The supplemental transcript was filed on March 29; the filings contained in the supplemental transcript, however, all relate to Macke's motion for new trial.

On June 14, 2001, the Court of Appeals determined that cause had been shown and ordered that the case proceed. On August 29, we moved the case to our docket by granting Macke's petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

As relevant to the jurisdictional issue that is the basis of our disposition of this appeal, Pierce assigns that the district court erred in sustaining Macke's motion for new trial.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm., ante* p. 544, 641 N.W.2d 55 (2002).

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. *Waite v. City of Omaha, ante* p. 589, 641 N.W.2d 351 (2002). 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. *Id.* The questions presented by the record in this case are whether a judgment was entered in the manner provided by statute prior to the filing of Macke's motion for new trial, and thus whether Macke's motion for new trial was filed prematurely.

Entry of a judgment "occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order." Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2000). Although the district court's order sustaining Macke's motion for new trial was properly entered pursuant to § 25-1301, the transcript does not contain an entry of judgment on the jury verdict prior to the filing of Macke's motion for new trial.

The order to show cause entered by the Court of Appeals, as relevant, stated the following:

> The contents of the transcript causes the Court concern as to whether it has jurisdiction by reason of the failure of the judge to render a judgment of dismissal pursuant to the jury's verdict in accordance with Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000). Because an order of dismissal was not entered, it appears that the motion for new trial which was purportedly granted by the court was prematurely filed under Neb. Rev. Stat. § 25-1144.01 [Cum. Supp. 2000], thus making the granting of that motion premature.

In Pierce's response to the order to show cause, Pierce conceded that no judgment of dismissal, pursuant to the jury's verdict, was present in the district court file. The supplemental transcript filed pursuant to Pierce's praecipe bears out this concession, as it contains only filings relating to Macke's motion for new trial. In short, the record, even after the filing of the supplemental transcript, contains no entry of judgment pursuant to the jury verdict, and Pierce concedes that none exists.

Pierce argued, however, that an application for new trial, pursuant to Neb. Rev. Stat. § 25-1143 (Reissue 1995), need only be filed "within ten days, either within or without the term, after the verdict, report or decision was rendered." Pierce contended that pursuant to § 25-1143, an entry of judgment was not necessary in order for a motion for new trial to be filed. Since Macke's motion for new trial was filed within 10 days after the

verdict, Pierce argued that the motion was timely and that appellate jurisdiction had been conferred. But see *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

However, 2000 Neb. Laws, L.B. 921, repealed § 25-1143 and replaced it with Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000), which provides that "[a] motion for a new trial shall be filed no later than ten days after the *entry of the judgment*." (Emphasis supplied.) The effective date of § 25-1144.01 and the repeal of § 25-1143 was July 13, 2000—27 days before the jury's verdict in this case. It is § 25-1144.01, and not the repealed § 25-1143, that is controlling in the instant case.

[4,5] A motion for new trial pursuant to § 25-1144.01 must be filed within 10 days after an entry of judgment, as defined in § 25-1301, and the record reflects that such an entry of judgment has not occurred. Because the jury's verdict, standing alone (i.e., in the absence of a file-stamped order entered pursuant to the verdict), did not constitute a final judgment, Macke's premature motion for new trial filed on August 11, 2000, was a nullity, as was the district court's ruling on the motion for new trial. See *Wicker v. Vogel, supra* (motion for new trial directed to nonfinal order is nullity, as is any ruling on such motion).

[6,7] For an appellate court to acquire jurisdiction of an appeal, there must be a valid final order entered by the court from which the appeal is taken. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). While generally a district court's order ruling on a party's motion for new trial constitutes a final order, a district court's ruling on a motion for new trial is not a valid final order where, as here, both the premature motion and the ruling thereon are nullities. In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. See *Waite v. City of Omaha, ante* p. 589, 641 N.W.2d 351 (2002).

CONCLUSION

Because the district court order granting Macke a new trial was a nullity, we vacate the January 26, 2001, order of the court, dismiss this appeal, and remand the cause to the district court for entry of judgment pursuant to the jury verdict. At that time, Macke can file a timely motion for new trial, and the district

court's disposition of that motion may form the basis for an appropriately perfected appeal. We also note that after remand and subsequent perfection of an appeal, either party may file, pursuant to Neb. Ct. R. of Prac. 11B(3) (rev. 2000), a motion with the appellate court, and showing in support of said motion, requesting that the case be advanced for argument.

ORDER VACATED, APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and STEPHAN, JJ., not participating.

RICHARD F. TYMA, APPELLANT, V.
JUDITH ANN TYMA, APPELLEE.

644 N.W.2d 139

Filed May 17, 2002. No. S-01-267.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **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.
5. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
6. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 1998) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
7. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. ____. The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
9. ____. The date upon which the marital estate is valued should be rationally related to the property composing the marital estate.

10. **Property Division: Alimony.** How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.
11. **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.
12. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
13. **Divorce: Property Division: Pensions.** Although Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such included assets be valued at the time of dissolution. The expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. The pension-type property may be valued as of another date that is rationally related to the property.
14. ____: ____: ____. In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties.

Appeal from the District Court for Sherman County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

John O. Sennett and Julianna S. Jenkins, of Sennett, Duncan & Borders, for appellant.

Larry W. Beucke and Marc J. Odgaard, of Parker, Grossart, Bahensky & Beucke, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Richard F. Tyma appeals from the decree of dissolution entered by the district court for Sherman County which dissolved his marriage to Judith Ann Tyma and divided the marital estate. Richard asserts that the district court erred in its valuation and division of marital property. We reverse, and remand for further proceedings.

STATEMENT OF FACTS

Richard and Judith were married on April 4, 1970. Richard filed for dissolution of the marriage on June 8, 2000. None of the parties' children were minors at the time of the dissolution. Trial was held December 15, 2000, to determine, inter alia, the extent and amount of the marital estate and the division of marital property. In view of our reversal and remand, we do not repeat the evidence in detail. Reference to the evidence is incorporated in the analysis as needed.

At the time of trial, Richard worked as a self-employed general repairman who also bought and sold equipment. Judith had been employed by Litchfield Public Schools since 1983. During the marriage, in 1992 and 1993, Richard inherited money from an uncle and from an aunt. Richard testified that he had used approximately $3,000 of the inheritance from his uncle to build an addition to the family home and approximately $2,000 to $3,000 of the inheritance from his aunt to build a carport onto the family home.

In November 1997, Judith moved out of the family home in Litchfield. At trial, Judith testified that Richard "threw [her] out" of the home and that her departure was not voluntary. Judith moved in with a daughter in Kearney and was living there at the time of the trial.

Richard continued to live in the family home. In interrogatories and at trial, Richard estimated the value of the home to be $17,000. Judith testified that the value of the family home was from $15,000 to $20,000. The documentary evidence of the value of the home was limited to a statement from the Sherman County assessor dated December 15, 2000, which showed a current assessed value of $18,525 for the home.

Judith inherited a half-interest in a house in Silver Creek after her mother died in August 1999. Judith continued to own her portion of the inherited house as a rental property at the time of trial. In addition, Judith had a retirement account through her employment with Litchfield Public Schools. She presented evidence that the value of the account was $17,000.09 when she moved out of the family home in November 1997 and $24,383.91 at the time of the trial.

On January 18, 2001, the district court entered a decree of dissolution in which it found that the marriage was irretrievably broken and should be dissolved. Regarding property division, the district court found that the parties had been separated since November 1997 and determined that because of the "lengthy separation," it would divide the assets and debts as of the date of separation.

The district court found that each party should retain the property currently in his or her possession, except that Judith should receive certain pieces of personal property in Richard's possession which were brought by her into the marriage. The district court assigned values to the marital property possessed by each party according to a chart in the order not repeated here. To equitably divide the property, the district court ordered Richard to pay $2,403 to Judith.

On January 25, 2001, Richard moved for a new trial on the basis, inter alia, that the district court had erred and abused its discretion in the division of property. On February 22, the district court denied the motion for new trial. Richard appeals.

ASSIGNMENTS OF ERROR

Richard generally asserts that the district court abused its discretion in its division of property. Richard asserts, restated, that the district court abused its discretion by (1) valuing the marital estate as of the date of separation rather than the date of dissolution, using inconsistent valuation dates for different properties, and failing to properly "credit" Richard for money he inherited and used to make improvements to the family home and (2) failing to value Judith's pension as of the date of dissolution in contravention of Neb. Rev. Stat. § 42-366(8) (Reissue 1998).

STANDARDS OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[2] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its

own independent conclusions with respect to the matters at issue. *Id.*

[3] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[4] 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. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm., ante* p. 544, 641 N.W.2d 55 (2002).

ANALYSIS

Valuation of Marital Estate.

Richard argues that the district court abused its discretion by using the date the parties separated, rather than the date of trial, to value the marital estate. Richard also argues that it was error for the district court to use inconsistent dates in valuing assets. Finally, he claims that the district court abused its discretion by failing to "credit" him for moneys he inherited and used to make improvements to the family home.

[5-7] In a divorce action, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties." Neb. Rev. Stat. § 42-365 (Reissue 1998). Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gibilisco v. Gibilisco, ante* p. 27, 637 N.W.2d 898 (2002). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[8,9] The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). The date upon which the marital estate is valued should be rationally related to the property composing the marital estate. *Id.*

In the present case, the district court found that the parties "kept separate finances throughout the marriage" and that they separated in November 1997. The record supports this finding. Under the facts of this case, it was reasonable for the district court to conclude that no property was "accumulated and acquired . . . through the joint efforts of the parties," see *id.* at 665, 619 N.W.2d at 461, after the date of their separation, and the district court did not err in using the date of the separation in November 1997, as opposed to the date of dissolution, as the date upon which to identify the composition of the marital estate. The November 1997 date used for valuation was "rationally related to the property composing the marital estate." See *id.* at 667, 619 N.W.2d at 462. We conclude that the district court did not abuse its discretion by choosing the date of separation to identify and value the property composing the marital estate.

Richard argues that even if November 1997 was an appropriate date upon which to value the marital estate, the district court erred by using inconsistent dates in valuing items of property. By way of example, he notes that the district court valued Judith's pension as of November 1997, whereas it valued the family home as of the date of trial.

A review of the record shows that during discovery, the parties focused on current valuations rather than valuations as of the date of separation. There is no pretrial order advising the parties that the district court would base its order regarding property division on valuations as of the date of the separation of the parties. At trial, with minor exception, the parties presented evidence regarding the values of assets and debts as of the date of dissolution. Other than the documentary evidence of the value of Judith's pension as of November 1997, there appears to be no direct evidence of values of any assets or debts at the date of separation. The record does not contain evidence supporting the district court's determination of November 1997 values.

We conclude that the valuation of assets and debts of the marital estate by the district court was untenable, unfairly depriving the parties of a substantial right and denying just results in the matter submitted for disposition. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001). It was an abuse of discretion for the district court to assign date-of-separation values to marital

assets and debts where such valuations were not supported by the record. The order valuing and dividing the marital property must be reversed, and the cause remanded to the district court for further proceedings to allow the parties to present evidence of values of assets and debts as of the date of separation.

[10] As part of his challenge to the district court's valuation of the marital estate, Richard argues that the district court abused its discretion by failing to "credit" him for moneys he inherited and used to make improvements to the family home. How property, inherited by a party before or during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). See *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000) (stating that with some exceptions, property acquired by one party through gift or inheritance is not to be included in marital estate).

In view of our ruling reversing the district court's order and remanding the cause regarding the identification, valuation, and division of the marital estate, we need not resolve this claim. On remand, Richard may present evidence in support of this claim. The district court may then rule, based on the facts before it, on Richard's claim involving his inheritances.

Judith's Pension.

[11] Although we have concluded that the district court's division of property must be reversed and the cause remanded for further proceedings, we will address Richard's remaining assignment of error to the extent it involves an issue likely to recur on remand. 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. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000).

Richard claims that the district court abused its discretion by failing to include in the marital estate the entire value of Judith's pension at the date of the dissolution trial. Although, as we concluded above, the date of separation was rationally related to the

property composing the marital estate and may be used as the date upon which to value marital assets, Richard argues that § 42-366(8) requires that a pension invariably be valued at the date of dissolution. We do not agree.

Section 42-366(8) states in part, "The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." Richard claims that this language requires that any pension owned by a party at the time of dissolution must not only be included in the marital estate but must also be valued as of the dissolution trial.

[12,13] We reject Richard's interpretation of § 42-366(8). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture, ante* p. 529, 641 N.W.2d 31 (2002). Although § 42-366(8) requires that "any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party" be included as part of the marital estate, the plain language of the statute does not require that such included assets be valued at the time of dissolution. The expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. The pension-type property may be valued as of another date that is rationally related to the property. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000).

[14] Richard refers to our decision in *Brunges v. Brunges, supra*, in which we concluded, based in part on § 42-366(8), that one party was entitled to one-half of the value of the other party's 401K plan computed as of the date of the decree of dissolution. Although under the facts of *Brunges*, we concluded that the plan should be valued as of the date of dissolution, we did not hold that the date of dissolution must invariably be used to value pension-type property. Instead, we have stated that in dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

In the present case, the district court complied with § 42-366(8) by including Judith's pension "as part of the marital estate, for

purposes of the division of property at the time of dissolution." As discussed in the previous section of this opinion, the date of separation was rationally related to the property composing the marital estate and the district court would not abuse its discretion on remand by valuing the marital estate including Judith's pension as of the date of the separation. There is no merit to this assignment of error.

CONCLUSION

We conclude there was no abuse of discretion in the district court's use of the date of separation to value marital property including Judith's pension. However, we conclude that the district court abused its discretion by assigning date-of-separation values to the parties' assets and debts when such values were not supported by evidence in the record. We therefore reverse the district court's order dividing the marital estate and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

JEANINE M. BAUERLE, APPELLEE, V.
DIRK A. BAUERLE, APPELLANT.

644 N.W.2d 128

Filed May 17, 2002. No. S-01-318.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

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 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.
5. **Alimony.** In considering the specific criteria of Neb. Rev. Stat. § 42-365 (Reissue 1998) concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case.
6. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is reasonableness.
7. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
8. ____. Alimony may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment.
9. ____. In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1998), the income and earning capacity of each party as well as the general equities of each situation.
10. ____. Disparity in income or potential income may partially justify an award of alimony.
11. **Divorce: Alimony.** In entering a decree awarding alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.
12. **Alimony: Appeal and Error.** An appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record.
13. **Alimony.** Serious health problems experienced by either party may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).
14. ____. An alimony recipient's inability to work or improve his or her earning capacity is a circumstance which may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).
15. ____. An obligor spouse's tenuous financial condition or unique economic circumstances may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).
16. ____. The specific criteria in Neb. Rev. Stat. § 42-365 (Reissue 1998), such as duration of the marriage, contributions to the marriage, and contributions to the care and education of the children are also circumstances which may support an award of alimony which does not terminate according to the default provisions of Neb. Rev. Stat. § 42-365 (Reissue 1998).

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed as modified.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellant.

George M. Zeilinger for appellee.

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

HENDRY, C.J.

INTRODUCTION

Jeanine M. Bauerle and Dirk A. Bauerle were divorced pursuant to a decree of dissolution entered by the Chase County District Court on February 23, 2001. In its decree, the district court approved the Bauerles' property settlement agreement and awarded alimony to Jeanine. The court ordered Dirk to pay alimony in the sum of $1,500 per month for 120 months. The court further ordered that Dirk's alimony obligation would not terminate upon Dirk's death or Jeanine's remarriage. Dirk 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

Jeanine filed for divorce on June 23, 1999. At the trial on January 8, 2001, Dirk and Jeanine presented a property settlement agreement covering all issues regarding marital property and debt. The district court then resolved the three remaining issues: (1) alimony, (2) delinquent temporary support payments, and (3) attorney fees. The only issue raised by Dirk on appeal is the district court's award of alimony.

Dirk and Jeanine were married on October 18, 1980, in Longmont, Colorado. Shortly after their marriage, they moved from Colorado to Chase County, Nebraska, where they lived on a farm owned by Dirk's family, and in which Dirk had received an ownership interest from his parents. Although Dirk and Jeanine lived on the farm for only 3 to 4 months, they continued to farm this property after moving into town.

Prior to the marriage, Jeanine had obtained a 2-year associate of applied science secretarial degree from a junior college in Colorado. However, Jeanine did not pursue outside employment when the couple relocated to Nebraska. Instead, she worked on the farm with her husband, driving tractors and trucks. She also cleaned her in-laws' home and tended to their yardwork. In

addition, she generally bore sole responsibility for maintaining the family home, which involved cleaning, washing, cooking, and managing the couple's farm and personal bookkeeping.

After approximately 2 years, Jeanine stopped cleaning her in-laws' home, but she did not cease her work on the farm. Jeanine continued to drive a truck and a grain cart for the farm's corn and wheat harvests. She also operated tractors, pulled anhydrous ammonia tanks, helped irrigate fields, and ran farm errands. Jeanine received some payment for this work, but such payment was not made every year. When Jeanine was paid, she usually received $8 per hour. It was Jeanine's understanding that she was paid for her work because her compensation could be deducted from the farm's tax returns.

In 1988 or 1989, Jeanine enrolled in a quilting class. Soon after, she and her mother-in-law began to teach quilting. For approximately 10 years, Jeanine taught classes in quilting during the winter months when she had fewer farm and household duties.

In 1998, approximately 4 years prior to the divorce, Jeanine began part-time employment at a liquor store where she worked as a clerk and stocked shelves. She worked 10 to 20 hours per week and received the minimum wage, approximately $5.50 per hour. Jeanine's time at the liquor store was in addition to the hours she spent working on the farm and maintaining the family home. Jeanine managed this dual employment until filing for divorce in 1999, at which time she ceased working on the farm.

After filing for divorce in June 1999, Jeanine secured temporary employment with the Farm Service Agency (FSA) office in Imperial, Nebraska. Her initial position with FSA involved filing and labeling map slides for $10 per hour. Although Jeanine had an opportunity "to stay on a little longer" with FSA, such extended employment would have necessitated "knowledge in computer work," which Jeanine felt she did not possess. Jeanine's employment with FSA ended in September 1999.

Near the time Jeanine left FSA, she also ceased her employment at the liquor store in order to assist area farmers with the fall harvest. She helped the farmers defoliate beets by operating farm trucks and tractors.

In March 2000, Jeanine returned to her part-time position at the liquor store. In addition, she secured a temporary seasonal

job with a golf course, which paid $6 per hour. At the golf course, Jeanine mowed the lawn and worked in the clubhouse assisting customers. Between these two part-time jobs, Jeanine worked a combined total of 40 to 42 hours per week.

In January 2001, Jeanine was no longer working at the golf course because her position had ended with the arrival of winter weather. However, she was still working at the liquor store and had resumed teaching quilting classes. Jeanine charged approximately $30 per student for a 3-week course. Although the income from these classes varied depending upon the number of students, her class just prior to the divorce hearing consisted of 16 students, which netted approximately $350. Jeanine planned to continue teaching quilting on a monthly basis.

At the time of trial, Jeanine had not received any formal education since earning her 2-year secretarial degree almost 20 years earlier. Her secretarial experience was also limited to the time she had spent maintaining the couple's farm and personal records.

After filing for divorce, Jeanine considered pursuing employment possibilities at an insurance agency and a local school. However, the position with the insurance agency required "computer skills and computer knowledge" and would have resulted in less income than what she could earn at the golf course. The opportunity with the local school was not pursued after learning that the job description indicated that applicants with computer experience would be given preference.

Jeanine testified she desired business and computer training so she could secure a better job and start her own quilting business. She also testified she had limited financial resources and was waiting for funds from the divorce before enrolling in computer classes. She estimated the cost of these computer classes to be approximately $40 per credit hour at a local community college. Another option Jeanine testified she was considering was computer classes through the Internet which could result in a 4-year degree. She estimated this cost at $3,000 to $4,000.

Jeanine further testified that she had been living in a low-rent housing unit in Imperial since January 2000. The apartment rent was $225 per month, but Jeanine anticipated that the rent would probably change once she obtained her share of the property settlement agreement. She estimated that her income was $700 per

month and that her expenses were $1,742.66, resulting in a shortfall of $1,042.66.

At the time of trial, Dirk was still working on the family farm with his brother and his parents. The family farming operation included livestock, together with crops consisting of corn, pinto beans, and wheat. Several farming entities, referred to as "D & D Bauerle, JV," "3-D Farms, JV," "Champion Valley Enterprises, LLC," and "B Barr Farms, Inc.," contained the various family members' interests in the farming operation. Many of Dirk's interests in these entities were given to him by his parents. In addition to these entities, Dirk and Jeanine also maintained their own personal farm account.

According to Dirk's balance sheet, his net worth at the time of trial, which included his interests in the farming entities, was $422,177. Dirk estimated that his living expenses were $1,936.60 per month. He also offered an amortization schedule for payments he is obligated to make on a $110,000 loan at 9 percent interest. Dirk stated that he must pay $1,393.43 per month for 10 years to retire the loan he incurred as a result of agreeing to provide Jeanine $110,000 as part of the parties' property settlement. Dirk also testified that his personal finances would be impacted due to the overall rising costs of fuel, fertilizer, pesticides, irrigation, repairs, and harvesting between 1999 and 2000.

Robert McChesney, a certified public accountant, testified on behalf of Jeanine regarding the Bauerles' tax returns from previous years. He testified that the Bauerles' 1998 and 1999 tax returns showed a significant decrease in adjusted gross income due to losses passing through the farming entities in which the Bauerles held interests. McChesney further explained that the cause of a reflected loss in Champion Valley Enterprises, one of the entities, was due to counting prepayments for feed and pigs as expenses without reflecting the market values on the entity's inventories. McChesney found that such prepaying of expenses distorted the Bauerles' recent tax returns because the losses were reflected but the income had not yet been included. Excluding the Champion Valley Enterprises loss, McChesney stated that the Bauerles' farm income was "fairly consistent with ranges" between $45,000 and $60,000 per year. McChesney also testified that the Bauerles would receive approximately

$17,500 in refunds from prior tax returns due to "carry back loss" that resulted from their decisions in 1998 and 1999 not to claim "outright" the depreciation on purchases of new equipment, which differed from previous years in which they had claimed the depreciation "outright."

The district court entered the decree of dissolution on February 23, 2001. In it, the court approved the Bauerles' property settlement agreement. The agreement stated that Jeanine brought $1,500 in assets into the marriage, while Dirk brought approximately $41,000 in assets into the marriage. The agreement awarded Jeanine a 1996 Ford Explorer, household goods valued at approximately $12,000, a $2,700 debt owed to her, and a bank account, for a total award of approximately $32,500. Dirk received the remaining property and liabilities in the marriage, which taken together, were valued at over $350,000. As part of the agreement, Dirk also agreed to pay Jeanine $110,000.

In the decree, the court further found that alimony should be awarded to Jeanine based on its findings that (1) the marriage was one of long duration, (2) most of the Bauerles' assets were accumulated after the marriage, (3) most of the Bauerles' income was used to purchase assets Dirk uses in the farming operation, and (4) Dirk's net monthly income was approximately $4,632. The court ordered that an award of alimony in the sum of $1,500 per month for 120 months would be paid to Jeanine and would not terminate upon the death of Dirk or the remarriage of Jeanine. Dirk appealed.

ASSIGNMENTS OF ERROR

Dirk assigns, rephrased, that the district court erred in (1) determining the amount and duration of Dirk's alimony obligation and (2) ordering that Dirk's obligation to pay alimony would not terminate upon Dirk's death or Jeanine's remarriage.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[2] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[3] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

[4] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002).

ANALYSIS

Grant of Alimony

In his first assignment of error, Dirk argues that the district court abused its discretion by awarding Jeanine alimony in the sum of $1,500 per month for 120 months. He contends that an award of such an amount and duration "cannot possibly be considered reasonable or fair" under the specific criteria for alimony awards in Neb. Rev. Stat. § 42-365 (Reissue 1998). Brief for appellant at 13. Section 42-365 states:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .

> . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

[5,6] In considering the specific criteria of § 42-365 concerning an award of alimony, a court's "polestar" must be "fairness and reasonableness as determined by the facts of each case." See *Meints v. Meints*, 258 Neb. 1017, 1022, 608 N.W.2d 564, 568 (2000). Stated another way, in determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is reasonableness. *Kalkowski, supra*.

As the district court noted, Dirk and Jeanine's marriage was one of long duration. The record reflects that they were married and worked together on the family farm for almost 20 years. Dirk and Jeanine are each 42 years old. They did not have children during their marriage, so they will be able to engage in gainful employment without interfering with the interests of any minor children. While Dirk is able to continue working on the farm with machinery and other resources purchased during the marriage, Jeanine must find a new career. She desires to start a quilting business and work with computers. However, the skills she attained two decades ago while earning her secretarial degree are of minimal use to her at the present time. Jeanine has had little opportunity to utilize these secretarial skills, having spent the past 20 years primarily working with Dirk on the family farm.

Jeanine's contributions to the marriage were significant. She maintained the family household by cleaning, washing, cooking, and doing the couple's farm and personal bookkeeping. On the farm, she operated tractors, pulled anhydrous ammonia tanks, helped irrigate fields, ran farm errands, and drove a truck and a grain cart for the family's various harvests. Dirk brought approximately $41,000 in assets into the marriage in 1980, but he leaves the marriage with over $240,000. Jeanine's efforts played a significant role in that increase. As Jeanine stated at trial, "I feel like I've sacrificed a lot of years of my life helping him, working on the farm."

[7,8] Any award of alimony to Jeanine should not be used to equalize the incomes of the parties or to punish Dirk. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

However, it may be used to assist Jeanine during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment. See, *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989); *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988). Jeanine desires to secure employment beyond her minimum-wage, part-time jobs which will allow her to achieve a standard of living that resembles the one she helped maintain in her marriage to Dirk. In order to do this, she will need time and money to receive additional education.

[9] Dirk argues that the district court's alimony award was excessive when considering the incomes of the parties and Jeanine's ability to work. This court has previously noted that "in awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation." *Kelly v. Kelly*, 246 Neb. 55, 64, 516 N.W.2d 612, 617-18 (1994).

The district court found that Dirk's net income was $4,632 per month, or $55,584 per year. This is consistent with the testimony of McChesney, the certified public accountant, who testified that the Bauerles' farm income ranged between $45,000 and $60,000 per year. According to the budget Dirk offered at trial, Dirk's monthly expenses are $1,936.60. Thus, Dirk's income without any alimony obligation would exceed his expenses by $2,695.40 per month. Dirk argues, however, that this court should also include in its calculations Dirk's monthly payment of $1,393.43 on the $110,000 loan he incurred to satisfy his obligations to Jeanine pursuant to the property settlement agreement. The record shows that Dirk voluntarily chose to borrow the $110,000 and incur this expense rather than liquidate $110,000 of the assets he received under the property settlement agreement. Having voluntarily determined to utilize a portion of his assets in this manner, we determine that under this record, Dirk's argument is without merit.

According to Jeanine's budget, her net income was $700 per month, or $8,400 per year. Her estimated monthly expenses were $1,742.66. Thus, Jeanine's expenses exceed her income by $1,042.66 per month. Dirk argues that Jeanine's budget is inaccurate because it contained "guesses" of certain expenses, inter

alia, apartment rent and utilities, and included an automobile loan obligation she did not have. Dirk testified that Jeanine's budget should have included interest income at a "safe return" of "six and a half" percent on the $110,000 Jeanine received under the property settlement agreement.

[10] Even if one were to eliminate the car payment and further "adjust" Jeanine's budget by the difference between her claimed and actual expenses for apartment rent and utilities, and add $596 of interest income using Dirk's "safe return" of "six and a half" percent, we find that Jeanine's "adjusted" income exceeds her expenses by only $148 per month. This sum does not include any consideration of costs for Jeanine's computer classes. Even with this "adjustment" of Jeanine's budget, there is a significant disparity between Dirk's monthly income after expenses of $2,695.40 and Jeanine's monthly income after expenses of $148. " 'Disparity in income or potential income may partially justify an award of alimony.' " *Ainslie v. Ainslie*, 249 Neb. 656, 660-61, 545 N.W.2d 90, 94 (1996) (quoting *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995)).

[11] In *Ainslie*, 249 Neb. at 661, 545 N.W.2d at 94, the court stated:

> " 'In entering a decree for alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.' "

(Quoting *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958).) As a result of the property settlement agreement, Dirk received property valued in excess of $240,000, whereas Jeanine received property valued at approximately $142,500. Dirk's property allocation contained significant income producing assets such as savings bonds, interests in farming entities, and farm machinery, including 21 antique tractors that Dirk uses in his farmwork. This disparity in potential income may also partially justify the award of alimony. See *Ainslie, supra.*

[12] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's

award is untenable such as to deprive a party of a substantial right or just result. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997). Furthermore, an appellate court is not inclined to disturb the trial court's award of alimony unless it is patently unfair on the record. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). Considering Dirk and Jeanine's circumstances under the "ultimate criterion . . . of reasonableness," see *Kalkowski*, 258 Neb. at 1044, 607 N.W.2d at 525, we determine the award of alimony by the district court was not an abuse of discretion, as it neither deprived Dirk of a substantial right or just result, nor was it patently unfair. Dirk's first assignment of error is without merit.

Termination of Alimony

In his second assignment of error, Dirk argues that the district court abused its discretion in ordering that Dirk's obligation to pay alimony would not terminate upon Dirk's death or Jeanine's remarriage. Dirk asserts there is nothing in his or Jeanine's circumstances that would support a departure from the default provisions of § 42-365, and he maintains that the district court's provisions are "unreasonably harsh and burdensome." Brief for appellant at 20.

Section 42-365 states in part, "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." The statute specifically allows a court to determine "by order of the court" that an alimony award will *not* "terminate upon the death of either party or the remarriage of the recipient." Although § 42-365 lists specific circumstances which are to be considered in making any alimony award, it does not provide specific guidance for determining when it is appropriate for a court to determine that such award will not terminate on the parties' deaths or the recipient's remarriage. However, this court and other courts have found certain circumstances significant in cases with similar termination provisions. While it is impossible to provide an exhaustive list of such circumstances, we discuss some of them below.

[13] Serious health problems experienced by either party may support an award of alimony which does not terminate according to the default provisions of § 42-365. For example, in *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981), this court modified an alimony award to provide $800 per month for 25 years and ordered that the award would not terminate on the obligor spouse's death. In that case, the recipient spouse had been seriously injured while riding as a passenger on a motorcycle. She was paralyzed from the chest down and had only partial use of her arms and hands. Similarly, in *Hafer v. Hafer*, 3 Neb. App. 129, 524 N.W.2d 65 (1994), the recipient spouse contracted multiple sclerosis during the marriage and, as a result, was completely unemployable. The Court of Appeals determined that the recipient spouse should receive an alimony award of $300 per month until the death of either party. The court specifically found that "[t]his award of alimony is not to terminate automatically upon the remarriage of the [recipient spouse]." *Id.* at 137, 524 N.W.2d at 71.

[14] Another circumstance which may support a trial court's decision to vary the termination provisions of § 42-365 is the recipient spouse's inability to work or improve his or her earning capacity. See, e.g., *Hafer, supra* (recipient spouse unemployable because of multiple sclerosis); *Sommer v. Sommer*, 636 N.W.2d 423, 429 (N.D. 2001) (permanent spousal support appropriate where disadvantaged spouse is at such an age where it is impossible to restore him or her " 'to independent economic status or to equalize the burden of divorce by increasing the disadvantaged spouse's earning capacity' ").

[15] An obligor spouse's tenuous financial condition or unique economic circumstances have also been considered in evaluating an alimony award that will not terminate on the obligor's death or the recipient spouse's remarriage. For example, in *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991), this court increased an alimony award to $400 per month for the recipient spouse's life, even if she remarried. The court found that since the parties had been married to each other previously, a lifetime award of alimony was an appropriate method of dealing with the obligor spouse's pension funds,

which were not considered as marital property in the first divorce proceeding.

In *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982), the obligor husband was a lieutenant colonel in the U.S. Air Force who planned to retire from the service in 2 years. The district court awarded the wife $850 per month until the death of either party " 'or until further order of the court.' " *Id.* at 117, 321 N.W.2d at 909. The district court also ordered that the alimony award would not terminate on the remarriage of the wife, "but that such remarriage could be considered as a change of circumstance to be considered by the court at some future time, together with any other relevant circumstances in regard to the earning capacity of either of the parties." *Id.* In reviewing the district court's award, this court noted the husband's anticipated retirement in 2 years and stated:

> It would appear that where, as here, the court is now mindful that a significant event is to occur in the near future which may alter the earning abilities of either of the parties, but the court is unable to determine what that amount is, an order such as that entered by the court in this case is appropriate.

Id. at 120, 321 N.W.2d at 910. See, also, *Vandal v. Vandal*, 31 Conn. App. 561, 626 A.2d 784 (1993) (upholding award of alimony which did not terminate on wife's remarriage based on finding that husband, due to significant personal debt, was financially unable at time of dissolution to pay alimony in amount to which wife was rightfully entitled).

[16] The specific criteria in § 42-365, such as duration of the marriage, contributions to the marriage, and contributions to the care and education of the children, are also appropriate circumstances for consideration in determining that alimony not terminate on the obligor's death or the recipient spouse's remarriage. In *Erickson v. Erickson*, 202 Neb. 345, 275 N.W.2d 287 (1979), we found each of the statutory factors listed in § 42-365 significant in granting a nonmodifiable and nonterminable award of alimony. This court stated:

> [T]he trial court did not adequately consider the fact that respondent interrupted her nursing education by her marriage to petitioner and her subsequent raising of the

> children; and that she has now had to leave the family home, establish a new home for herself and the children, and undertake a 3-year program of education before she will be able to provide sufficient earnings to make up the difference between the actual cost of supporting the two small children and the meager amount petitioner is able to pay. She will have a difficult and expensive period of readjustment and no assets with which to pay for it. In addition, petitioner paid no temporary child support or temporary alimony after the December 1976 separation, and he has had the use and possession of the farm home and the 80 acres since that time.

Id. at 350-51, 275 N.W.2d at 291.

In the present case, the district court made no specific findings in support of its determination that the alimony award not terminate on Dirk's death or Jeanine's remarriage. Furthermore, in our de novo review of the record, we do not find facts to support the imposition of such conditions. We recognize that Dirk and Jeanine's marriage was of long duration and that Jeanine contributed significantly to the marriage. However, there were no children as a result of this marriage, nor is there any evidence in the record that Jeanine or Dirk have health problems or economic circumstances which would justify departing from the default termination provisions of § 42-365. For these reasons, we determine the district court abused its discretion. The court's determination that Dirk's alimony obligation would not terminate upon Dirk's death or Jeanine's remarriage was untenable and unfairly deprived Dirk of a substantial right and a just result. See *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002). Accordingly, we modify the decree of dissolution to provide that Dirk's alimony obligation "shall terminate upon the death of either party or the remarriage of the recipient." See § 42-365.

CONCLUSION

For the foregoing reasons, the district court's decree of dissolution is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JIM R. TURNER, APPELLANT.

644 N.W.2d 147

Filed May 17, 2002. No. S-01-707.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Blood, Breath, and Urine Tests: Implied Consent: Due Process.** The giving of a sample under Neb. Rev. Stat. § 60-6,197 (Reissue 1998) does not involve a question of involuntariness, want of due process, or self-incrimination.
3. **Drunk Driving: Blood, Breath, and Urine Tests.** The right of a person suspected of driving under the influence to refuse a chemical test is a matter governed purely by statute.
4. ____: ____. Under Neb. Rev. Stat. § 60-6,197(10) (Reissue 1998), a person arrested for driving under the influence must be advised that refusal to submit to a chemical test is a separate crime for which the person may be charged, but he or she need not be advised of any additional consequences of a refusal to submit to a chemical test.
5. **Constitutional Law: Appeal and Error.** A constitutional issue that has not been presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Johnson County, DANIEL BRYAN, JR., Judge, on appeal thereto from the County Court for Johnson County, STEVEN BRUCE TIMM, Judge. Judgment of District Court affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

CONNOLLY, J.

The appellant, Jim R. Turner, was convicted in county court for driving under the influence of alcohol, refusing to submit to a chemical test, and refusing to submit to a preliminary breath test for alcohol. The district court affirmed. On appeal, he argues that Neb. Rev. Stat. § 60-6,197(10) (Reissue 1998) is unconstitutional because the advisement by the arresting officer was inadequate and violated his right to due process. Under § 60-6,197(10), the arresting officer was required to advise Turner that a refusal to

submit to a chemical test is a separate crime for which he could be charged. Turner was so advised. We affirm.

BACKGROUND

On March 7, 1999, Stanley Osterhoudt, the Johnson County sheriff, received a dispatch about an incident which occurred in Cook, Nebraska. Osterhoudt was told that a man was lying in the street and that two people involved in the incident had left in a 1980 blue Chevrolet pickup truck with county plates numbered 64. As Osterhoudt drove toward Cook, he observed a truck matching that description.

Osterhoudt stopped the truck and identified the driver as Turner, observing that Turner's eyes were bloodshot and watery. He also detected an odor of alcohol coming from the truck.

Osterhoudt asked Turner to exit the truck and observed him stagger and sway as he got out of the truck. He handcuffed Turner and placed him in his patrol vehicle. He asked Turner about the incident in Cook, and Turner replied that he did not know about the incident. Osterhoudt observed that Turner's speech was slurred and delayed. He also noticed a strong odor of alcohol emanating from Turner.

Turner refused to submit to field sobriety tests and a preliminary breath test. Osterhoudt testified that he believed Turner was under the influence of alcohol. He testified that he then placed Turner under arrest and read him a postarrest chemical test advisement form. The advisement form stated that refusal to submit to a chemical test is a separate crime for which the suspect may be charged. Turner refused to submit to a chemical test.

Turner was charged with driving under the influence of alcohol, refusing to submit to a chemical test, and refusing to submit to a preliminary breath test for alcohol. Before trial, he filed a plea in abatement alleging that he was arrested and then refused a chemical test. Without being specific, he contended that the postarrest advisement was constitutionally infirm. Turner then filed a motion to quash, alleging that the advisement was a misrepresentation. He also filed a demurrer and a motion to suppress the chemical test.

Regarding the advisement, the county court addressed only due process considerations and overruled the plea in abatement,

motion to quash, demurrer, and motion to suppress the chemical test results. The county court concluded that there was no constitutional right to refuse to submit to a chemical test or to be warned that a refusal could be used against the driver at trial. The court determined that any right to be warned of the consequences of a refusal was purely statutory. The court further concluded that an amendment to § 60-6,197(10) removed the need to advise a driver of the consequences for refusing to submit to a chemical test.

Turner next filed a second motion to suppress, alleging that the sheriff unconstitutionally stopped him. The motion was overruled. At the start of trial, Turner objected to the proceedings based on those asserted in his previous motions. The county court overruled the objection. During trial, Turner moved for a directed verdict at the end of the State's case. Turner then testified and did not renew his motion for a directed verdict. The county court found Turner guilty on all counts.

The district court affirmed. The district court addressed only due process concerns regarding the advisement and agreed with the conclusions of the county court. Additionally, the district court factually found that Turner had been arrested before he was read the advisement. The court concluded that the sheriff had reasonable suspicion to stop Turner and request a preliminary breath test. The court also determined that there was sufficient evidence to convict him. Turner appeals.

ASSIGNMENTS OF ERROR

Turner assigns, rephrased, that the county court erred in (1) determining that the advisement was constitutional and overruling his plea in abatement, motion to quash, demurrer, motion to suppress chemical test results, and objection at the start of trial; (2) overruling his second motion to suppress; (3) finding that he had been arrested before being read the postarrest advisement; (4) determining that the sheriff lawfully requested a preliminary breath test; and (5) determining there was sufficient evidence to convict him and overruling his motion for a directed verdict.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach

a conclusion independent of the decision reached by the trial court. *State v. Hynek, ante* p. 310, 640 N.W.2d 1 (2002).

ANALYSIS

Turner contends that the postarrest advisement he was given was inadequate and violated his right to due process. Turner argues that the advisement fails to specifically state whether the suspect will actually be charged. He also argues that the advisement fails to advise of any civil penalties that may occur as a result of the refusal to submit to a chemical test.

Section 60-6,197(1) provides:

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

Under § 60-6,197(2), an officer may require a chemical test when he or she has reasonable grounds to believe that a defendant was driving under the influence of alcohol. Section 60-6,197(10) provides: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged."

[2,3] We have held that the giving of a sample under § 60-6,197 does not involve a question of involuntariness, want of due process, or self-incrimination. See *State v. Williams*, 189 Neb. 127, 201 N.W.2d 241 (1972). Thus, a suspect's right to refuse a chemical test is a matter governed purely by statute. See *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983). Accordingly, we address the question whether the advisement was adequate under § 60-6,197(10).

[4] An earlier version of § 60-6,197(10) required that a suspect be advised of the "consequences" of refusing to submit to a chemical test. See § 60-6,197(10) (Reissue 1993). Applying the 1993 version of § 60-6,197(10), we held that a suspect must be advised of the civil penalties that could apply if he or she refused to submit to a chemical test. See *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). The current version, however, requires only

that a suspect be advised that "refusal to submit to such test or tests is a separate crime for which the person may be charged." We recently held that under the current version of § 60-6,197(10), a defendant need not be advised of any additional consequences of a refusal to submit to a chemical test. *Davis v. Wimes, ante* p. 504, 641 N.W.2d 37 (2002).

Under § 60-6,197(10), Osterhoudt was required to advise Turner only that a refusal to submit to a chemical test was a separate crime for which Turner could be charged. That is exactly what Turner was advised of. The advisement was adequate, and Turner was not denied due process.

Turner next argues that § 60-6,197(10) is vague and overbroad. Turner, however, did not specifically present this issue in his pleading to the county or district courts. Additionally, both courts considered only issues of due process raised by Turner.

[5] A constitutional issue that has not been presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). Because the trial court did not pass on the issue of the facial validity of § 60-6,197, we do not address the issue on appeal.

Finally, Turner raises several additional assignments of error. We have reviewed the remaining assignments of error and determine that they are without merit. Accordingly, we affirm.

AFFIRMED.

RANDY L. SMEAL, APPELLANT, V.
RICKARD W. OLSON, APPELLEE.

644 N.W.2d 550

Filed May 24, 2002. No. S-00-834.

1. **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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Limitations of Actions: Notice.** The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed long after the time he or she could have had to prepare a defense against a claim.
5. **Limitations of Actions: Pleadings: Notice.** For the purpose of applying the relation-back doctrine to a defendant named for the first time in an amended petition, the period during which the new defendant must be shown to have had the requisite knowledge of the suit includes the statutory period prescribed for the filing of the original petition plus the additional 6-month period in which summons could be served pursuant to Neb. Rev. Stat. § 25-217 (Reissue 1995).
6. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
7. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled.
8. **Summary Judgment: Proof.** Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
9. ____: ____. In the absence of a prima facie showing that the movant is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in the petition.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals reversed with directions.

Terry M. Anderson and Timothy J. O'Brien, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Jeffrey H. Jacobsen and Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

STEPHAN, J.

In this appeal, we examine the rules governing when an amended petition naming a new defendant in a civil action relates

back to the date on which the original petition was filed for purposes of determining whether the statute of limitations bars the claim against the new defendant. Based upon its determination that the relation-back doctrine did not apply, the Nebraska Court of Appeals affirmed an order of the district court for Buffalo County entering summary judgment in favor of appellee, Rickard W. Olson, the defendant below. *Smeal v. Olson*, 10 Neb. App. 702, 636 N.W.2d 636 (2001). We granted the petition for further review filed by appellant, Randy L. Smeal, the plaintiff below.

BACKGROUND

On December 15, 1998, Smeal filed a petition alleging that Rickard K. Olson negligently caused a December 15, 1994, motor vehicle accident. The petition was filed 1 day prior to the expiration of the 4-year statute of limitations. See Neb. Rev. Stat. § 25-207 (Reissue 1995). Rickard K. was served with summons on June 11, 1999, after the period of limitations had run and 4 days before the expiration of the 6-month period for service of process allowed by Neb. Rev. Stat. § 25-217 (Reissue 1995). He filed an answer on June 28, in which he admitted that a vehicle operated by him collided with a vehicle operated by Smeal on December 15, 1994, but denied the remaining allegations in the petition.

On October 14, 1999, Rickard K. moved for leave to file an amended answer in order to "clearly reflect the fact that he was not the operator of a vehicle involved in a collision with the plaintiff as alleged in the plaintiff's Petition, said vehicle having been operated by Rickard W. Olson, Rickard K. Olson's son." Smeal was granted leave to file an amended petition naming Rickard W. as defendant and did so on November 17. Rickard W. was served with a summons on February 1, 2000.

Rickard W. filed a demurrer to the amended petition, averring that the claim against him was barred by the statute of limitations. The district court sustained the demurrer but granted leave to file a second amended petition. Smeal did so on March 6, 2000, naming Rickard W. as defendant and specifically alleging that the second amended petition related back to the filing of the original petition, "since Rickard W. Olson, Defendant, had notice of Plaintiff's original Petition prior to the time bar." Rickard W. filed another demurrer, which was overruled.

Rickard W. then filed an answer in which he admitted that he was the driver of the vehicle at the time of the accident but generally denied Smeal's remaining allegations. He affirmatively alleged that the statute of limitations barred the claim against him. On the same day he filed his answer, Rickard W. filed a motion for summary judgment.

The evidence offered at the hearing on the motion for summary judgment consisted of copies of the pleadings which had been filed in the action and the proof of service of process on both Rickard K. and Rickard W. On July 18, 2000, the district court granted Rickard W.'s motion for summary judgment, reasoning on the basis of *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), that the second amended petition could not relate back to the original petition as a matter of law because Rickard W. did not have notice of the original action until after the statute of limitations had run.

Smeal appealed, arguing that an amended petition naming a new defendant can relate back to the filing date of the original petition under Nebraska law if the new defendant had notice of the original action within the prescribed limitations period plus the 6-month period permitted under § 25-217 for obtaining service following the filing of the original action. Assuming without deciding that this proposition was correct, the Court of Appeals determined that Smeal had failed to prove that Rickard W. had notice by means other than service within this time period and, therefore, affirmed the judgment of the district court. *Smeal v. Olson*, 10 Neb. App. 702, 636 N.W.2d 636 (2001).

ASSIGNMENTS OF ERROR

On further review, Smeal assigns that the Court of Appeals erred in allocating the burden of proof on the summary judgment motion.

STANDARD OF REVIEW

[1,2] 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. *McCarson v. McCarson, ante* p. 534, 641 N.W.2d 62 (2002);

Altaffer v. Majestic Roofing, ante p. 518, 641 N.W.2d 34 (2002). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Polinski v. Sky Harbor Air Serv., ante* p. 406, 640 N.W.2d 391 (2002).

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002).

ANALYSIS

Relation Back

At all times relevant to this action, Nebraska had no statute or court rule specifying when an amended petition relates back to the filing of a prior petition for purposes of determining whether a claim is time barred. This court has held that for limitations purposes, an amended pleading in the same cause of action ordinarily relates back to the original pleading. *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996)*; St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). A more complicated issue arises when the amendment seeks to add or substitute a new defendant. We addressed this issue in *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), upon which both the district court and the Court of Appeals relied in this case.

In *Zyburo*, a school guidance counselor who claimed he was unlawfully terminated from his employment filed a petition in error naming the school board as defendant. The petition was timely filed within the required 30 days of the board's order discharging the counselor. The district court, however, sustained the board's special appearance, finding that the proper party defendant was the school district, not the school board. After the limitations period had expired, the counselor filed an amended petition naming the school district as defendant. The district court found the petition untimely and dismissed the action. On appeal, we held that the school board was the alter ego of the school district and that it was thus proper in an error proceeding to name either or both as parties defendant. In addressing whether the

amended petition related back to the date of filing of the original petition, we cited and discussed *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986).

In *Schiavone*, the plaintiffs filed libel suits naming Fortune as the defendant prior to the expiration of the statute of limitations. Service was not attempted until after the limitations period had expired. The plaintiffs subsequently learned that Fortune was merely a division of Time, Inc., and amended their complaints to name Time as the proper defendant. The lower court found that the amended complaints were barred by the statute of limitations. On appeal to the U.S. Supreme Court, the plaintiffs argued (1) that institution of the action against Fortune was equivalent to institution of an action against Time due to the close relationship between the two and (2) that the amended petitions nevertheless related back under Fed. R. Civ. P. 15(c). In addressing the plaintiffs' first argument, the Court recognized that the "[t]imely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party." *Schiavone*, 477 U.S. at 29. However, the Court found that such a rule could not benefit the plaintiffs because "neither Fortune nor Time received notice of the filing until after the period of limitations had run [and t]hus, there was no proper notice to Fortune that could be imputed to Time." *Id.*

The Court then addressed the application of rule 15(c), summarizing the rule as follows:

> (1) [t]he basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled *within the prescribed limitations period.*

(Emphasis supplied.) *Schiavone*, 477 U.S. at 29. The language of rule 15(c) as it existed at the time of *Schiavone* did not actually contain the phrase "within the prescribed limitations period," but, rather, the language " 'within the period provided by law for commencing the action against' Time." 477 U.S. at 30. The Court

concluded that the plain meaning of this language required a substituted party to have notice within the statute of limitations only and made it impossible to extend the notice period to include the time for service of process. *Id.*

We stated in *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), that because of the similarity between rule 15(c) and our case law, we look to federal decisions for guidance in applying the relation-back doctrine. Relying primarily on *Schiavone*, we stated, "the keystone determining whether a change in party defendant relates back to the original pleading is whether the substituted party had notice of the suit within the period of limitations." *Zyburo*, 239 Neb. at 169, 474 N.W.2d at 676. We concluded that because the school board and the school district were "one and the same," service upon the board gave the district notice within the limitations period, and thus the amended petition related back. *Id.* at 169-70, 474 N.W.2d at 676.

It is unclear from the *Zyburo* opinion whether the requisite service upon the board and thus notice to the board occurred during the 30-day limitations period or whether it occurred during the additional period for service of process following the 30 days. *Zyburo* thus does not expressly address the specific issue presented in this case, i.e., whether the relation-back doctrine applies in the circumstance where the party added by amendment is alleged to have acquired notice of a timely filed original petition after the prescribed limitations period has expired but within the statutory period for obtaining service of process on a defendant named in the original petition. In this regard, § 25-217 provides that "[a]n action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed."

In addressing this issue, the Court of Appeals looked to current federal law for guidance, as we did in *Zyburo*. Subsequent to the Supreme Court's decision in *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), rule 15(c) was amended and currently provides:

> An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct,

> transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, *within the period provided by Rule 4(m) for service of the summons and complaint*, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(Emphasis supplied.) The Court of Appeals correctly noted that this rule as amended "does not require actual service upon a late-added defendant in order for the notice requirement to be satisfied, nor does the rule require that the notice issue directly from the plaintiff." *Smeal v. Olson*, 10 Neb. App. 702, 708, 636 N.W.2d 636, 642 (2001). Rather, "[i]nformal notice to the new party of commencement of the action is sufficient." *Id.* Accordingly, the Court of Appeals assumed without deciding that the period in which actual notice of the suit on the part of the substituted defendant would trigger the relation-back doctrine included the limitations period plus the 6-month period allowed for service of process under § 25-217, which is this state's equivalent of Fed. R. Civ. P. 4(m).

[4,5] We agree with this reasoning. The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed long after the time he or she could have had to prepare a defense against a claim. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999); *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996). Under our statutory scheme, a properly named defendant might not have actual knowledge of a suit filed on the last day of the prescribed limitations period until served with summons up to 6 months later as permitted by § 25-217. If it is shown that the original defendant was named in error and that the party who should have been named had actual knowledge of the suit within the same time period, we see no logical reason why that party

cannot be substituted as a defendant by an amended petition which relates back to the filing of the original petition for purposes of the statute of limitations. See, *West v. Buchanan*, 981 P.2d 1065 (Alaska 1999); *Ritchie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 799 P.2d 801 (1990). Accordingly, we hold that for the purpose of applying the relation-back doctrine to a defendant named for the first time in an amended petition, the period during which the new defendant must be shown to have had the requisite knowledge of the suit includes the statutory period prescribed for the filing of the original petition plus the additional 6-month period in which summons could be served pursuant to § 25-217.

We are aware that during the pendency of the petition for further review in this case, L.B. 876 was enacted which includes provisions dealing with relation back of amended pleadings. See 2002 Neb. Laws, L.B. 876. This new law does not apply to the present case, and we express no opinion as to how the issues now before us would be determined under its provisions.

Summary Judgment

The Court of Appeals determined that because Rickard W. was "sued outside the statute of limitations and served outside the grace period . . . the burden shifted to Smeal to prove by evidence that the factual predicates for application of the doctrine of relation back existed." *Smeal*, 10 Neb. App. at 712, 636 N.W.2d at 644. The court concluded that Rickard W. was entitled to summary judgment because Smeal offered no evidence that Rickard W. acquired notice of the suit within the limitations period. We disagree with this allocation of the burden of production.

[6-9] If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997); *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996). Smeal met this pleading requirement by alleging in his second amended petition that it arose out of the same conduct which was the subject of his original petition; that Rickard W. "had notice of Plaintiff's original Petition prior to the time bar" and "will not be prejudiced maintaining a defense"; and that Rickard W. "must or should have known that, but for a mistake concerning identity, the action was being brought against him."

The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000); *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985). Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Polinski v. Sky Harbor Air Serv., ante* p. 406, 640 N.W.2d 391 (2002); *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *City State Bank v. Holstine, supra.* In the absence of a prima facie showing that the movant is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in the petition. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999); *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996).

The evidence offered by Rickard W. in support of his motion for summary judgment consisted solely of copies of pleadings, motions, and orders which had been previously filed in this action. This evidence shows that Rickard W. was first served with summons on February 1, 2000, and thus had notice of the action on that date. However, there is no affidavit or other evidence demonstrating that contrary to Smeal's allegations, Rickard W. had no prior notice of the action by other means. Rickard W. thus did not make a prima facie showing to pierce the allegation in the second amended petition that he "had notice of Plaintiff's original Petition prior to the time bar." Therefore, Smeal had no burden at this stage in the proceedings to offer evidence on the issue of when Rickard W. first became aware of the action. The motion for summary judgment should have been overruled.

CONCLUSION

The Court of Appeals correctly determined that the relation-back doctrine would make Smeal's claim against Rickard W. timely if it were shown that Rickard W. had notice of the suit by

means other than service of process within a period which included the 4-year limitations period prescribed by § 25-207 plus the additional 6-month period for service of summons permitted by § 25-217. However, the court erred in concluding that the absence of any evidence to establish whether and when Rickard W. received such notice warranted the entry of summary judgment in his favor. Because Rickard W. failed to make a prima facie showing that he did not receive notice of suit within the applicable time period, the entry of summary judgment in his favor was error. We therefore reverse the judgment of the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED WITH DIRECTIONS.

LENORA RUSH, LEGAL GUARDIAN OF THEODORE BLAND, JR., AN INCAPACITATED PERSON, APPELLANT, V. WILLIAM D. WILDER, INDIVIDUALLY, AND DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

644 N.W.2d 151

Filed May 24, 2002. No. S-00-929.

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: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. **Pleadings.** The issues in a case are framed by the pleadings.
4. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings.
5. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (1994), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.
6. **Constitutional Law: Prisoners: Medical Assistance.** Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally

denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

7. **Constitutional Law: Public Officers and Employees: Prisoners: Medical Assistance: Liability.** A prison official cannot be found liable under the Eighth Amendment for failure to attend to a prisoner's medical needs unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and the official must also draw the inference.
8. **Constitutional Law: Prisoners: Medical Assistance: Due Process.** While a convicted prisoner's claim alleging inadequate medical care is brought under the Eighth Amendment to the U.S. Constitution, a pretrial detainee's claim alleging inadequate medical care is a due process claim.
9. **Summary Judgment: Proof.** Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
10. ____: ____. In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.
11. **Public Officers and Employees: Prisoners: Medical Assistance.** One type of deliberate indifference is evidenced when prison officials prevent an inmate from receiving treatment or deny the inmate access to medical personnel capable of evaluating the need for treatment.
12. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled.
13. **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.
14. **Negligence: Liability: Public Officers and Employees.** A local government cannot be held liable under 42 U.S.C. § 1983 (1994) solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.
15. **Supreme Court: Courts: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

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 Douglas County, W. MARK ASHFORD, Judge. Judgment of Court of Appeals affirmed.

D.C. Bradford and James R. Welsh, of Bradford, Coenen & Welsh, for appellant.

Joseph S. Daly, Kelly K. Brandon, and P. Shawn McCann, of Sodoro, Daly & Sodoro, for appellee Douglas County.

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

GERRARD, J.

NATURE OF CASE

Lenora Rush, legal guardian of Theodore Bland, Jr., sued Douglas County for injuries Bland suffered while incarcerated by Douglas County. The district court entered summary judgment for Douglas County, but the Nebraska Court of Appeals reversed the judgment of the district court. Because Douglas County's evidence did not establish a prima facie case for summary judgment, we affirm the judgment of the Court of Appeals.

BACKGROUND

Rush filed a petition alleging that on June 24, 1996, while Bland was an inmate at the Douglas County correctional facility, William D. Wilder, another inmate, assaulted Bland with a food tray and caused Bland to suffer a traumatic brain injury. Rush's petition alleged causes of action against Wilder for assault and against Douglas County for depriving Bland of his "right . . . to timely and appropriate medical care while in the custody of the defendant, Douglas County, under the Fourth and Fourteenth Amendments to the Constitution of the United States."

Douglas County filed a motion for summary judgment supported by the affidavit of Robert N. Brown, M.D., a physician employed by Douglas County who treated Bland during Bland's incarceration. Brown averred that he had reviewed the records of Douglas County's treatment of Bland, and based on that review of the record, as well as his own knowledge of the care given to Bland, Brown opined that all the employees of Douglas County met the relevant standard of medical care. The affidavit of Rush's expert witness, a professor of criminal justice, was rejected as a discovery sanction. The district court determined that without expert testimony for Rush, there was no issue of material fact, and entered summary judgment for Douglas County.

Rush appealed, arguing that the district court erred in requiring her to produce an expert witness and in striking the affidavit

of her expert witness. The Court of Appeals reversed the summary judgment, determining that Rush's petition was not intended to state a cause of action for medical malpractice, but instead stated a cause of action for simple negligence. See *Rush v. Wilder*, No. A-00-929, 2001 WL 1643585 (Neb. App. Dec. 26, 2001) (not designated for permanent publication). The Court of Appeals determined that the negligence of corrections officers did not require expert testimony to establish a case and, therefore, that the district court had erred in entering summary judgment. See *id.* The Court of Appeals reversed the decision and remanded the cause for a new trial, without reaching the question whether the district court erred in striking the affidavit of Rush's expert witness. See *id.* Douglas County filed a petition for further review, which we granted.

ASSIGNMENT OF ERROR

Douglas County assigns, as consolidated and restated, that the Court of Appeals erred in determining that Rush was not required to produce expert medical testimony to rebut Douglas County's prima facie showing for summary judgment.

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. *McCarson v. McCarson, ante* p. 534, 641 N.W.2d 62 (2002). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.*

ANALYSIS

Initially, we note that Rush's petition pleads two causes of action, the first of which is a cause of action against Wilder. The record on appeal does not reflect any proceedings with respect to Rush's claim against Wilder. At oral argument, Rush's counsel stated that the cause of action against Wilder had been dismissed for failure to serve process. Moreover, the district court's order of summary judgment dismisses Rush's petition in its entirety, and

Rush does not assign any error with respect to the apparent dismissal of the assault cause of action. Absent any other suggestion that the order appealed from is not a final order, we conclude that we have jurisdiction over the instant appeal.

Nature of Rush's Cause of Action

The primary dispute between the parties relates to the appropriate characterization of Rush's second cause of action. On appeal, Rush characterizes this claim as one of simple negligence on the part of Douglas County. Douglas County claims that the cause of action involves medical malpractice and constitutional claims, thus requiring Rush to produce expert testimony in response to Douglas County's motion for summary judgment. The Court of Appeals adopted Rush's position in reversing the district court judgment.

[3,4] The issues in a case are framed by the pleadings. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings. See, *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). Rush's petition, in relevant part, alleges the following:

> 11. This action arises under the United States Constitution, particularly under the provisions of the Fourth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly the Civil Rights Act, Title 42 of U.S.C. § 1983.
>
> 12. This Court has jurisdiction of this cause under and by virtue of 28 U.S.C. § 1343. Each and all of the acts of defendant, Douglas County, alleged herein, were done by defendant, Douglas County, under the color of the statutes, ordinances, regulations, customs and usages of the State of Nebraska, by and through its agents, employees and/or representations while acting in the course of their employment, agency and/or representation of defendant, Douglas County.
>
> 13. That the defendant, William D. Wilder, intentionally and forcibly struck Theodore Bland Jr., across the head with a food tray, without justification or cause, with the intent to inflict unnecessary harm upon the plaintiff. Such

use of force caused physical and mental injuries to Theodore Bland Jr., as described in more detail below.

14. That the defendant, Douglas County, by and through its agents, employees and/or representatives, failed and/or refused to make available to Theodore Bland Jr. medical treatment for injuries sustained as a result of the assault for a period from 11:30 A.M. until 7:30 P.M., at which time Theodore Bland Jr. was taken to St. Joseph Hospital wherein he underwent emergency medical treatment for traumatic brain injury.

15. That the conduct of the defendant, Douglas County, by and through its agents, employees and/or representatives, while acting in the scope of their employment with the defendant, deprived Theodore Bland Jr. of the following rights, privileges, and immunities given to him by the Constitution of the United States:

a. The right of Theodore Bland to timely and appropriate medical care while in the custody of the defendant, Douglas County, under the Fourth and Fourteenth Amendments to the Constitution of the United States;

b. The acts, conducts and behavior of the defendant, Douglas County, by and through its agents, employees and/or representatives, were performed knowingly, intentionally and maliciously, by reason of which plaintiff is entitled to punitive damages in the sum of $1,000,000.

[5] Based on our reading of Rush's petition, as set forth above, we agree with Douglas County insofar as it argues that the Court of Appeals erred in characterizing Rush's cause of action against Douglas County as simple negligence. Rush's petition clearly sets forth a single cause of action against Douglas County, brought under 42 U.S.C. § 1983 (1994): the failure to provide Bland with adequate medical care in violation of the Constitution of the United States. At oral argument, the parties agreed that the petition sets forth a cause of action under § 1983. In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

[6,7] Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. See *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983. *Estelle, supra*. A prison official cannot be found liable under the Eighth Amendment for failure to attend to a prisoner's medical needs unless the official knows of and disregards an excessive risk to inmate health or safety; the official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and the official must also draw the inference. See, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991).

[8] Allegations of deliberate indifference to a prisoner's medical needs are generally analyzed pursuant to the 8th Amendment, applied to the states through the Due Process Clause of the 14th Amendment. See, generally, *Wilson, supra*. While Rush's petition variously invokes the 4th, 6th, and 14th Amendments, Rush's complaint is more accurately characterized as a claim pursuant to *Estelle, supra*. See *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001). We also note that the record does not reflect the reason for Bland's incarceration. While a convicted prisoner's claim alleging inadequate medical care is brought under the Eighth Amendment, a pretrial detainee's claim alleging inadequate medical care is a due process claim. See *Chavez v. Cady*, 207 F.3d 901 (7th Cir. 2000), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). In general, however, the claims are analyzed in the same manner, guided by the propositions of law set forth above. See *id.* Thus, the analysis to be conducted would be the same regardless of whether Bland's claim is brought under the 8th or 14th Amendments. See *Chavez, supra*.

Need for Expert Testimony

Based on this understanding of Rush's cause of action, Douglas County argues that Rush is required to prove her claim with expert medical testimony. We need not, however, consider so expansive a rule in the context of the present case. The question presented to us is not whether all cases of deliberate indifference to a prisoner's medical needs require substantiation by expert medical testimony, but simply whether Rush was, in this case, required to present expert opinion testimony to respond to Brown's affidavit supporting Douglas County's motion for summary judgment.

[9,10] Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

The only exhibits received in evidence by the district court in support of Douglas County's motion for summary judgment were Brown's affidavit and Rush's responses to interrogatories. The responses to interrogatories contain no admissions that are relevant to this issue. Brown's affidavit, as relevant, states the following:

> [Y]our affiant has reviewed the Douglas County Department of Corrections' medical record concerning the care and treatment of Mr. Bland, and based upon his review of the record, his knowledge of the medical care given to Mr. Bland, and his training, education and experience as a medical doctor, he is of the opinion that he and all of the employees of Douglas County, Nebraska, met the standard of medical care applicable in Omaha, Douglas County, Nebraska, or similar communities under similar circumstances at all times material herein.

[11] If this case presented a medical malpractice cause of action, Brown's affidavit might suffice to establish a prima facie case for summary judgment. See, generally, *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). However, Rush's petition in this case does not allege that the quality of medical care eventually provided by Douglas County was inadequate; rather, Rush alleges that Douglas County did not make timely medical care available at all. One type of deliberate indifference is evidenced when prison officials prevent an inmate from receiving treatment or deny the inmate access to medical personnel capable of evaluating the need for treatment. *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001).

Brown's affidavit does not sufficiently controvert this allegation. Taken in the light most favorable to Douglas County, Brown's affidavit, as quoted above, could be read to infer that all of Douglas County's employees provided timely and appropriate medical care. However, in reviewing a summary judgment against Rush, we view the evidence in the light most favorable to Rush and give Rush the benefit of all reasonable inferences deducible from the evidence. See *McCarson v. McCarson, ante* p. 534, 641 N.W.2d 62 (2002). Brown's affidavit states that his opinion was based on his review of Bland's medical records and Brown's own knowledge of the medical care given to Bland. While this would establish that the medical care eventually provided to Bland was appropriate, taken in the light most favorable to Rush, Brown's affidavit does not establish that Douglas County made medical care available to Bland in a timely fashion.

[12] This is particularly so because the record does not contain any of Bland's medical records, nor does it contain any depositions, affidavits, or other testimony describing what happened to Bland on June 24, 1996, or how Douglas County responded to Wilder's assault of Bland. We conclude that a review of such records is required before a determination is made against Rush in this case. See *Smith v. Jenkins*, 919 F.2d 90 (8th Cir. 1990). Whether a prison official had the requisite knowledge of a substantial risk to an inmate's health is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. See *Oxendine, supra*. The record in this case sets forth none of the circumstances surrounding Bland's

injuries. The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled. See *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). The evidence presented by Douglas County, taken in the light most favorable to Rush, does not pierce the allegations made in Rush's pleadings and does not establish that Douglas County is entitled to summary judgment.

[13] Rush argued before the Court of Appeals that the district court erred in refusing to accept the affidavit of her expert witness, a professor of criminal justice. The Court of Appeals did not reach this assignment of error, nor do we, as we conclude, albeit for reasons different from those of the Court of Appeals, that Rush was not required to present expert testimony to rebut the evidence offered by Douglas County. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Crawford v. Crawford, ante* p. 37, 638 N.W.2d 505 (2002).

[14] We note, in passing, that Rush's second cause of action is directed solely at Douglas County, and not at any employees of Douglas County in their individual capacities. Rush, however, did not allege that Douglas County's treatment of Bland was pursuant to any policy or custom of Douglas County. A local government cannot be held liable under § 1983 solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001), citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Thus, Rush's petition in its current form may not state a cause of action against Douglas County, the only defendant in her second cause of action. However, since this defect could have been remedied, if raised, by amendment of the pleadings, it is not plain error and does not affect our disposition of the appeal.

CONCLUSION

[15] Douglas County did not establish a prima facie case for summary judgment; thus, Rush was not required to present

evidence to rebut Douglas County's evidence in support of its motion for summary judgment. Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals. See *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000). For reasons different from those stated by the Court of Appeals, we conclude that the summary judgment entered by the district court should be reversed, and we affirm the judgment of the Court of Appeals to that effect.

AFFIRMED.

ERNIE CHAMBERS, APPELLANT, V. SCOTT LAUTENBAUGH, DOUGLAS COUNTY ELECTION COMMISSIONER, APPELLEE.

644 N.W.2d 540

Filed May 24, 2002. No. S-01-110.

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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **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.
6. **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.
7. **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.

8. **Courts: Jurisdiction.** 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.
9. **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.
10. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
11. **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.
12. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
13. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
14. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
15. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
16. **Actions: Standing: Taxation: Municipal Corporations.** To assert standing, a resident taxpayer must allege that a demand was made upon the municipal or public corporation and that the demand was refused, or facts which show that such a demand would be useless.
17. **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.
18. **Political Subdivisions.** Neb. Rev. Stat. § 32-553 (Reissue 1998) does not limit redrawing of district boundaries to only once every 10 years.
19. **Demurrer: Pleadings.** If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Robert V. Broom and Vard R. Johnson, of Broom, Johnson & Clarkson, for appellant.

Thomas G. Incontro, of Raynor, Rensch & Pfeiffer, for appellee.

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

HENDRY, C.J.

INTRODUCTION

In August 2000, Ernie Chambers brought suit against Scott Lautenbaugh, Douglas County election commissioner, seeking declaratory judgment and injunctive relief relating to Lautenbaugh's act of redrawing the Omaha City Council district boundaries in August 2000 based on 1990 federal decennial census data. Lautenbaugh demurred, and on January 17, 2001, the Douglas County District Court sustained Lautenbaugh's demurrer. The court dismissed Chambers' petition with prejudice, finding that it could not be amended to allege sufficient facts to state a cause of action. Chambers appealed.

FACTUAL BACKGROUND

In his operative petition, Chambers alleged that on August 30, 2000, despite Chambers' demands that Lautenbaugh cease and desist from his announced plans to redraw the boundaries, Lautenbaugh proceeded to draw "new boundaries for the election of members of the City Council at the primary election to be held April 3, 2001 and the general election to be held May 15, 2001." Chambers further alleged that Lautenbaugh drew the new boundaries for the stated purpose of "maintain[ing] substantial equality of population among the districts." The petition asserted that Lautenbaugh exceeded his authority by drawing the new district boundaries based on 1990 federal decennial census data, rather than waiting to use the data from the 2000 federal decennial census.

Chambers also alleged in his petition that "[t]he Election Commissioner has no authority to draw district boundaries for the Omaha City Council for the purpose of maintaining substantial population equality among the districts except as set forth" in Neb. Const. art. III, § 5, and Neb. Rev. Stat. §§ 14-201.03 (Reissue 1997) and 32-553 (Reissue 1998). The petition contended that Neb. Const. art. III, § 5, requires the Legislature to

redistrict the state into legislative districts after each federal decennial census. According to the petition, the election commissioner, pursuant to § 32-553, must, if necessary to maintain substantial equality of population within the districts, redraw the boundaries within 6 months after passage and approval of the Legislature's bill which redistricts the state on the basis of the most recent federal decennial census.

Chambers' petition asked the district court to declare that Lautenbaugh's redrawing of the Omaha City Council district boundaries in August 2000 was unlawful, since it was done before the data from the 2000 federal decennial census was available and before the Legislature had passed legislation redistricting the state in 2001. The petition also asked the district court to declare unlawful any implementation of the new district boundaries and the consequent expenditures of employee time and public tax money. Finally, the petition requested that the court declare unlawful any Omaha City Council elections held under the new city council district boundaries.

On December 15, 2000, Lautenbaugh filed a demurrer alleging that (1) the district court had no jurisdiction over the subject matter of the action, (2) the district court had no jurisdiction over Lautenbaugh, (3) Chambers had no legal capacity to sue, (4) there was a defect of parties, and (5) the petition did not state facts sufficient to constitute a cause of action.

The district court held a hearing on the demurrer on January 8, 2001. On January 17, the court entered its order overruling allegations one through four of Lautenbaugh's demurrer, but sustaining allegation five on the basis that Chambers' petition failed to state a cause of action. In its order, the district court analyzed the arguments presented by Chambers and Lautenbaugh:

> [Chambers] alleges that the second portion of Section 32-553 of the Nebraska Revised Statutes not only requires redistricting if necessary but also limits redistricting to the six month period of time referred to therein. [Lautenbaugh] argues that Section 14-201.03 requires the election commissioner to redraw the boundaries of Omaha's city council districts whenever they are no longer substantially equal in population and, therefore, that the election commissioner has a statutory duty and obligation to redraw the boundaries

> of the districts when their population is no longer substantially equal. The commissioner further argues that the basis to use to determine a redrawing of the districts was the most recent decennial census which in this case is the census taken in 1990.
>
> The initial question is the meaning of the language in Neb. Rev. Stat. 14-201.03 which requires the commissioner to redraw the boundaries when the districts are no longer substantially equal in population **pursuant to Section 32-553** (emphasis added). Does the redrawing of the districts pursuant to Section 32-553 simply mean that the redistricting is to be determined by the most recent federal decennial census or does it mean that the redistricting is to be determined by the most recent federal decennial census but only within six months after the passage and approval of the legislative bill providing for reestablishing the states [sic] legislative districts?
>
> If the Court follows the logic and argument of [Chambers] then redistricting is to occur once every ten years, if necessary. If the Court follows the logic and argument of [Lautenbaugh] the redistricting is to occur whenever the districts are substantially unequal in population as determined by the most recent decennial census.

(Emphasis in original.)

The district court found it significant that the Legislature "in drafting Section 14-201.03 and Section 32-553 did not use limiting or restrictive terms such as 'only' when mandating the redrawing of districts by the election commissioner when they became substantially unequal in population." The district court stated:

> Since there is no language limiting the redrawing of districts by the election commissioner the Court further finds that the election commissioner can redraw, if necessary, districts more than the one time required in the year that the census figures are submitted to the State by the United States Department of Commerce.

On this basis, the district court found that Lautenbaugh's actions as election commissioner were lawful and that Chambers' petition could not be amended to state a cause of action against Lautenbaugh. The court sustained Lautenbaugh's

demurrer and dismissed Chambers' petition with prejudice. Chambers appealed.

ASSIGNMENTS OF ERROR

Chambers assigns, rephrased, that the district court erred in (1) determining that his petition did not state facts sufficient to constitute a cause of action and (2) determining that Lautenbaugh, as Douglas County election commissioner, had the authority to redraw the Omaha City Council district boundaries before the data from the 2000 federal decennial census was available.

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. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (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. *Id.* 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. *Id.*

[4] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Premium Farms v. County of Holt, ante* p. 415, 640 N.W.2d 633 (2002).

[5,6] 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. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

ANALYSIS

MOOTNESS

[7,8] 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. *Tri-Par Investments v. Sousa, ante* p. 209, 640 N.W.2d 371 (2002). 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. *Wilcox, supra*.

Lautenbaugh argues that Chambers' case is moot due to several events which have occurred since the district court sustained Lautenbaugh's demurrer in January 2001. On April 3, 2001, Omaha City Council primary elections were held pursuant to the new district boundaries Lautenbaugh drew in August 2000. On May 15, the general election for the Omaha City Council was held utilizing the same boundaries. On May 16, an amendment to § 14-201.03 became operative, which, inter alia, removed the election commissioner's authority to redraw city council district boundaries and placed the responsibility with the Omaha City Council. See 2001 Neb. Laws, L.B. 71. In November 2001, the Omaha City Council passed, and Omaha Mayor Mike Fahey approved, city ordinance No. 35781, redrawing the Omaha City Council district boundaries based on data from the 2000 federal decennial census. Lautenbaugh claims that "because of LB 71, the completion of the elections at issue, the second redrawing of the Omaha City Council Districts and the passage of time, [Chambers'] appeal is now inconsequential, unsubstantial and moot."

[9,10] " '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.' " *Wilcox*, 262 Neb. at 699, 634 N.W.2d at 489 (quoting *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000)). A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

[11] Assuming without deciding that all issues raised in Chambers' petition are moot, we determine that these issues

qualify for review under the public interest exception to the mootness doctrine. See *Wilcox, supra.* This 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. *Id.* 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. *Id.*

Chambers' petition raises the public issue of how often city council district boundaries may be redrawn pursuant to § 32-553. This issue, if adjudicated, would provide future guidance for public officials, including members of the Omaha City Council who, as a result of the amendment to § 14-201.03, are now responsible for redrawing city council district boundaries. Furthermore, the similar question of whether § 32-553 limits the Omaha City Council or other appropriate legal entities to redrawing district boundaries only once every 10 years will likely arise prior to the federal decennial census in 2010. For these reasons, we determine the public interest exception to the mootness doctrine applies to this case. However, before we may consider the issues Chambers raises on appeal, we must address another jurisdictional defect asserted by Lautenbaugh.

STANDING

[12-14] Lautenbaugh challenges Chambers' standing to bring this declaratory judgment action. Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *State ex rel. Steinke v. Lautenbaugh, ante* p. 652, 642 N.W.2d 132 (2002). In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* With regard to declaratory actions against public officials, we have specifically stated:

> " '[A] person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.' "

Id. at 657-58, 642 N.W.2d at 138. Accord, *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001); *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000); *Ritchhart, supra*.

[15] It is unnecessary for us to determine whether Chambers' petition shows "special injury" because the petition clearly alleges "an illegal expenditure of public funds." See *State ex rel. Steinke, supra.* A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998). In paragraph 2 of his petition, Chambers states that he is a resident of the city of Omaha. In paragraph 10, Chambers alleges, "Employees in the office of the Douglas County Election Commissioner have spent and will spend in the future public time and money to implement the new district boundary lines, when such new boundary lines are not authorized by law." Finally, in his prayer for relief, Chambers asks the district court to "declar[e] that the commitment of employee time and the expenditure of tax monies for such purposes is unlawful and not authorized by law . . . ."

[16] However, a mere allegation of illegal expenditures by public officials is not sufficient in itself to confer standing on a resident taxpayer. To assert standing, a resident taxpayer must also allege that a demand was made upon the municipal or public corporation and that the demand was refused, or facts which show that such a demand would be useless. See *Fitzke, supra*. " ' "Ordinarily a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity." ' " *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 899-900, 327 N.W.2d 595, 602 (1982). In paragraph 12 of his petition, Chambers asserts that he

has "on his own behalf" and "by and through legal counsel, made demand upon [Lautenbaugh] that [Lautenbaugh] cease and desist from his announced plans to redraw the boundaries of the city council districts in the year 2000." Chambers goes on to state, "Notwithstanding such demands, [Lautenbaugh] has drawn new district boundary lines for the seven City Council districts using 1990 census data." Thus, Chambers has alleged that a demand was made to Lautenbaugh and that such demand was refused.

We determine that Chambers has satisfied the conditions necessary to assert standing as a resident taxpayer in this action, and thus this court has jurisdiction to consider Chambers' assignments of error.

Statutory Interpretation

Having determined that Chambers has standing on the basis of his status as a resident taxpayer, we now examine whether the district court erred in sustaining Lautenbaugh's demurrer on the basis that Chambers' petition did not state facts sufficient to constitute a cause of action. In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Northwall v. State, ante* p. 1, 637 N.W.2d 890 (2002).

We begin with Chambers' request that the district court declare unlawful any implementation of the new district boundaries and the consequent expenditure of employee time and public tax money. In order to address this issue, we must first determine whether Lautenbaugh had the authority to redraw the district boundaries in August 2000.

Chambers asserts that § 32-553 permits the election commissioner to redraw district boundaries only once every 10 years. Section 32-553 states in part:

> (1) When any political subdivision except a public power district nominates or elects members of the governing board by districts, such districts shall be substantially equal in population as determined by the most recent federal decennial census. Any such political subdivision

> which has districts in place on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Department of Commerce, Bureau of the Census, shall, if necessary to maintain substantial population equality as required by this subsection, have new district boundaries drawn within six months after the passage and approval of the legislative bill providing for reestablishing legislative districts. Any such political subdivision in existence on the date the census figures used in drawing district boundaries for the Legislature are required to be submitted to the state by the United States Department of Commerce, Bureau of the Census, and which has not established any district boundaries shall establish district boundaries pursuant to this section within six months after such date. If the deadline for drawing or redrawing district boundary lines imposed by this section is not met, the procedures set forth in section 32-555 shall be followed.

We recognize that § 32-553 was amended during the pendency of this appeal by L.B. 71; however, the amendment does not change or affect the above-quoted language from § 32-553.

Chambers alleges that "[a]s a matter of law the Election Commissioner is without authority to redraw Omaha's City Council Districts 'to maintain substantial population equality' until a federal decennial census is effected and the Legislature has redistricted itself pursuant to the census figures." Brief for appellant at 10. Chambers further argues that the election commissioner "has been granted no power to periodically, on his own initiative, in less than the ten year framework, redraw the boundaries whether they may no longer be substantially equal in population or not." Brief for appellant at 7. Finally, Chambers contends that "[t]o use 1990 census data to justify redrawing in 2000 for a 2001 election is arbitrary. To claim in the 2000 redrawing that the districts now maintain substantial equality when the data is 10 years old is equally arbitrary." Brief for appellant at 11.

[17] Chambers' allegations raise an issue of statutory interpretation. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an

independent, correct conclusion irrespective of the determination made by the court below. *Premium Farms v. County of Holt, ante* p. 415, 640 N.W.2d 633 (2002). 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.*

[18] Section 32-553 requires the appropriate legal entity to draw districts which are "substantially equal in population as determined by the most recent federal decennial census." The only reference in § 32-553 to a specific time period for redrawing districts appears in the requirement that the appropriate entity must, if necessary to maintain substantial equality of population within the districts, redraw the districts within 6 months after passage and approval of the Legislature's bill which redistricts the state on the basis of the most recent federal decennial census. This decennial redistricting is mandatory if necessary to maintain substantial equality of population within the districts. However, there is no language in § 32-553 which prohibits the appropriate legal entity from redrawing district boundaries at other times to maintain substantial equality. We thus determine that § 32-553 does not limit redrawing of district boundaries to only once every 10 years.

In his petition, Chambers alleges that Lautenbaugh's stated purpose for redrawing the city council district boundaries was "to maintain substantial equality of population among the districts" and that Lautenbaugh "drew such new districts by using the 1990 decennial census data." "Accept[ing] as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom," we determine that Lautenbaugh's actions in redrawing the district boundaries complied with § 32-553. See *Northwall v. State, ante* p. 1, 5, 637 N.W.2d 890, 894 (2002). Therefore, Chambers' petition fails to state a cause of action in that the petition alleges actions by Lautenbaugh that we have determined were lawful. In addition, we conclude that Chambers' remaining allegations likewise do not state a cause of action against Lautenbaugh because they, too, are based solely on Lautenbaugh's authority to draw the district boundaries.

[19] Since Chambers' petition fails to state a cause of action against Lautenbaugh, the district court did not err in sustaining Lautenbaugh's demurrer. The district court also did not err in dismissing Chambers' petition with prejudice since there is no reasonable possibility that an amendment could state a cause of action against Lautenbaugh under the facts alleged in the petition. If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Northwall, supra.*

CONCLUSION

For the foregoing reasons, we conclude the district court did not err in sustaining Lautenbaugh's demurrer and dismissing the action with prejudice.

AFFIRMED.

TONIA FALES, PERSONAL REPRESENTATIVE OF THE ESTATE OF VIRGINIA NORINE, APPELLEE, V. IRWIN J. NORINE, APPELLANT.

644 N.W.2d 513

Filed May 24, 2002. No. S-01-349.

1. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
3. **Directed Verdict: Evidence: Appeal and Error.** Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
4. **Negotiable Instruments: Evidence: Proof.** In an action to recover upon lost, destroyed, or stolen instruments, a plaintiff must prove the elements of the claim by clear and convincing evidence.
5. ____: ____: ____. In addition to the elements stated in Neb. U.C.C. § 3-309 (Reissue 2001), a claimant must also prove by clear and convincing evidence the terms of the instrument.
6. **Decedents' Estates: Negotiable Instruments: Evidence: Proof.** Under Neb. Rev. Stat. § 30-2456 (Reissue 1995) and Neb. U.C.C. § 3-309 (Reissue 2001), a successor

personal representative may enforce a lost note made payable to his or her decedent if the successor proves by clear and convincing evidence that (1) the predecessor personal representative was in possession of the notes and entitled to enforce them when the loss of possession occurred; (2) the loss of possession was not the result of a voluntary transfer by predecessor or lawful seizure; and (3) possession of the notes cannot be obtained because they were either destroyed, their whereabouts cannot be determined, or they are in the wrongful possession of an unknown person or a person who cannot be found or is not amenable to service of process.

7. **Directed Verdict: Negotiable Instruments: Evidence: Proof: Appeal and Error.** When considering the denial of a defendant's motion for a directed verdict in an action to enforce a lost, stolen, or destroyed instrument, an appellate court must affirm the denial unless, as a matter of law, the claimant has failed to prove his or her case by clear and convincing evidence.
8. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
9. **Judgments: Negotiable Instruments.** Under Neb. U.C.C. § 3-309(b) (Reissue 2001), a "court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument."
10. **Decedents' Estates: Limitations of Actions: Judgments: Negotiable Instruments.** Where an estate has insufficient funds to provide for an indemnification bond, a court's withholding of judgment from the personal representative until the statute of limitations for enforcing negotiable instruments expires is a reasonable exercise of discretion in providing adequate protection for the defendant under Neb. U.C.C. § 3-309(b) (Reissue 2001).
11. **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.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

John P. Weis, of Sorensen, Zimmerman & Mickey, P.C., for appellant.

Brenda L. Bartels, of Douglas, Kelly, Meade, Ostdiek, Bartels & Neilan, P.C., for appellee.

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

CONNOLLY, J.

Following a jury verdict, the district court entered judgment for appellee, Tonia Fales, on two lost promissory notes. Fales is the successor personal representative of the estate of Virginia

Norine (Virginia). The notes were executed by appellant, Irvin J. Norine (Norine), Virginia's son, payable to Virginia.

The district court entered judgment after finding there was sufficient evidence to support the verdict under Neb. U.C.C. § 3-309 (Reissue 2001). That section allows a claimant to enforce a lost, stolen, or destroyed instrument if the person was in possession of the note when the loss occurred and the instrument was not voluntarily transferred or lawfully seized. Under § 3-309(b), the court must also find that the defendant is adequately protected against future claims on the instrument before entering judgment. Further, a court is permitted to provide adequate protection by any reasonable means. The district court restricted payment to Fales on the judgment until January 2003, after the statute of limitations for enforcing the notes had expired.

We affirm the court's judgment that under § 3-309, there was sufficient competent evidence that a jury could reasonably conclude that after Virginia's death, Norine had possession of the notes and had either lost or destroyed them. We modify, however, the court's provision for adequate protection.

ASSIGNMENTS OF ERROR

Norine assigns that the district court erred in (1) failing to sustain his motion for directed verdict made at the close of all the evidence, (2) finding that Virginia was in possession of the promissory notes at the time of her death and that she was entitled to enforce them, (3) finding that Fales had the right to enforce payment on the notes when she could not account for the loss of the originals, (4) overruling Norine's motion for new trial or judgment notwithstanding the verdict, (5) entering judgment when there is no reasonable means of protecting Norine from the enforcement of the lost promissory notes in question, and (6) entertaining Fales' motion to correct the calculation of interest when it was procedurally inaccurate and untimely filed.

BACKGROUND

Virginia died intestate on September 7, 1997. She was survived by Norine; another son; and two granddaughters, Fales and Mindy Medina, the daughters of Virginia's predeceased daughter. After Virginia died, Norine was appointed as personal representative of Virginia's estate.

In March 1999, while Norine was the personal representative, he prepared an inventory of Virginia's estate in which he listed as assets two promissory notes dated January 16, 1996, that he had executed payable to Virginia. The first note was in the amount of $67,615.48, plus 8.5 percent interest calculated at $8,877.08. The second note was in the amount of $115,000 plus 8.5 percent interest calculated at $16,042.50. Both notes were payable on January 16, 1998, 2 years from the date they were executed. According to Norine's inventory, the combined total value of the notes plus interest equaled $208,089.88 at the time of Virginia's death. In May 1999, he prepared a proposal for the distribution of Virginia's estate, which also included the notes as assets. Both documents were signed by Norine and filed with the county court.

Norine was removed as personal representative of Virginia's estate for mismanagement of the estate, and Fales was appointed to succeed him in June 2000. Fales then filed suit against Norine to enforce payment of the missing notes under § 3-309. Norine filed a general denial, and the case was tried to a jury.

At trial, during Fales' case in chief, copies of both promissory notes were shown to Norine. He admitted that each was a true and accurate copy of the respective promissory note he had executed on January 16, 1996, payable to Virginia. He admitted that he had signed the notes and had not made any payments on them, and he verified his signatures on the copies. He also admitted that he had testified during a deposition in October 1999 that he had the original notes.

He denied owing money on either note. He stated that the notes were executed to protect his assets from his ex-wife during his divorce, apparently by showing more debt than actually existed. He admitted, however, that Virginia had assisted him in paying a judgment to his ex-wife and that the first promissory note partially reflected the payment Virginia had made to him for the judgment. He was shown a copy of a real estate mortgage to secure both notes, and he admitted that he had executed the mortgage on January 16, 1996. Finally, he was shown a copy of a financing statement and security agreement, which he admitted to signing on February 16. The financing statement secured all of Norine's debts to Virginia with several items of personal

property. He admitted that Virginia had never told him that she was destroying the notes.

On cross-examination by his attorney, Norine stated that Virginia kept her important papers in a cardboard box in a locked room in the basement and that he last saw the box 4 to 5 months before Virginia's death. He stated that Virginia was hospitalized during the last 2 to 3 months of her life and that for 2 to 3 weeks of this time, Medina and Fales lived at the house. Photographs were received into evidence which showed that the lock had been removed from the room in which Virginia kept her papers. He stated that he did not look for the box again until after Virginia died and that he believed the box disappeared during the last 3 weeks Virginia was hospitalized. He stated that he did not know that the originals were missing when he prepared the inventory. Finally, he also stated that he had learned from his son about 3 weeks before trial that Virginia might have destroyed the notes.

Fales testified that she, Medina, and Medina's children had gone to see Virginia while she was in the hospital. They had stayed in a hotel all but one night because the house was not large enough for them all. She denied knowing about the cardboard box or missing lock, and she stated that Norine did not allow her back into the house after Virginia's death. After she was appointed personal representative, she went back to the house to search for the original promissory notes and make inquiries. There was a metal box in the house with titles and loan records, but the originals were not in the box. She obtained copies of the notes from Norine's attorney. She stated that Virginia had told her about making the loan to Norine but had never told her that she had destroyed the notes. Finally, Fales stated that no payments had been made on the notes.

At the close of Fales' testimony, photocopies of both of the promissory notes, the mortgage, and the financing statement were offered into evidence. Norine objected because Fales had failed to show that the documents were not destroyed by Virginia. The court found that Fales was required to show only that the originals could not be produced. The court noted that both Fales and Norine, the only authorized representatives of the estate, had testified that they could not locate the originals. The

court then received the exhibits as evidence of the terms of the promissory notes.

During Norine's case in chief, his son testified that in June 1996, Virginia had told him that the promissory notes were intended only to protect Norine during his divorce. He said that she intended to destroy them because she did not want Norine to have to repay them. He admitted that Virginia had never mentioned the notes again and that he had no confirmation that she had destroyed them.

At the close of the evidence, Norine moved for a directed verdict because the only evidence presented which would account for the disappearance of the notes was Norine's son's testimony that Virginia may have destroyed them. Norine further argued that the burden of proof was on Fales to show that Virginia had not destroyed the notes. He argued that she had failed to prove that the notes were still in existence and could have been enforced by Virginia during her lifetime. Fales also moved for directed verdict because all of the elements to enforce the missing promissory notes had been proved under § 3-309. The court stated that the governing provision of the law was § 3-309. It found that whether Virginia had destroyed the notes was an issue of fact and denied both motions.

The jury returned a verdict against Norine on both causes of action. It awarded the estate $79,598.64 on the first promissory note and $135,380.87 on the second note. On December 21, 2000, Fales filed two motions. The first motion asked the court under § 3-309(b) to postpone entering a judgment in the case until January 26, 2001, at which time—she mistakenly believed—the statute of limitations for enforcing a contract would expire. The second motion asked the court to correct the jury's calculation of interest. Norine filed a motion for new trial or judgment notwithstanding the verdict. He argued that the evidence was insufficient to support a reasonable basis for the jury's verdict. He also argued that using the statute of limitations was insufficient security for him because the notes could be enforced against him later than the time limitations if they were being held by a minor. The court found that there was sufficient evidence to support the verdict. The court also found that it had a duty to correct the interest calculated by the jury, and did so.

Concerning the issue of security, the court commented that the chance of a minor bringing a suit on the notes after the statute of limitations had expired "is just about as likely as the three of us getting knocked dead by lightning right now. And that didn't happen." Because the estate had insufficient funds to cover an indemnification bond, the court rendered judgment in the full amount of principal plus interest but restricted the payment to the estate until the statute of limitations had expired, in January 2003. The court ordered that the judgment be held by the court until that time. In a written order, the motion for new trial was overruled.

STANDARD OF REVIEW

[1,2] A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000). A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Id.*

[3] Concerning the overruling of a motion for a directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Id.*

ANALYSIS

This appeal presents two issues. The first is whether Fales presented sufficient evidence to satisfy the requirements of § 3-309. The second issue is whether the judgment adequately protected Norine against a future claim by a holder in due course of the lost promissory notes.

Norine contends that Fales failed to prove by clear and convincing evidence that (1) Virginia was in possession of the notes and entitled to enforce them when the loss of possession occurred; (2) Virginia did not transfer the notes before her death; and (3) the whereabouts of the notes cannot be reasonably obtained. Fales contends there was sufficient evidence for the jury to find that Virginia was in possession of the notes and had not destroyed them or transferred them before her death. Further, she contends

that the evidence showed that she could not determine the whereabouts of the notes.

[4] In an action to recover upon lost, destroyed, or stolen instruments, a plaintiff must prove the elements of the claim by clear and convincing evidence. *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). An instrument means a negotiable instrument under Neb. U.C.C. § 3-104(a) (Reissue 2001), which is an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, at a definite time or on demand. See § 3-104(a) (setting forth additional definitions and conditions). The notes were made payable to Virginia at the time they were executed, and Norine promised to pay them 2 years from the date they were executed. They were therefore due on January 16, 1998. There were no conditions placed on the payments, and the parties have not disputed that the instruments were negotiable. Thus, the enforcement of the notes is governed by § 3-309. Section 3-309(a) provides:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

[5] Although one of the stated excuses for the note's absence under § 3-309(a) is the destruction of the note, obviously, the destruction must not be a voluntary act of the payee or the obligation would be discharged. See Neb. U.C.C. § 3-604 (Reissue 2001) (discharge by cancellation or renunciation). In addition to the elements stated in § 3-309, under *Castellano, supra*, a claimant must also prove by clear and convincing evidence "the terms of the instrument." *Id*. at 810, 346 N.W.2d at 252.

Section 3-309 is part of the revised article 3 of the Uniform Commercial Code governing negotiable instruments and was adopted by Nebraska in 1991, operative January 1, 1992. See

Neb. U.C.C. § 3-102, comment 1 (Reissue 2001). It is a modification of the former Neb. U.C.C. § 3-804 (Reissue 1980), intended to clarify that the plaintiff need not satisfy the definition of "owner" to enforce an instrument. See § 3-309, comment.

Section 3-309 was designed to deal with the typical situation of a lost, destroyed, or stolen check or other type of instrument being enforced against the maker by the payee. See 2 James J. White & Robert S. Summers, Uniform Commercial Code § 18-2 (4th ed. 1995). Although § 3-309 does not deal specifically with lost instruments in the context of probate administration, its application in this context is not entirely without precedent. See *Good v. Good*, 72 N.C. App. 312, 324 S.E.2d 43 (1985) (applying article 3, § 804, of Uniform Commercial Code to enforce promissory note made to decedent).

Under Neb. Rev. Stat. § 30-2464(c) (Cum. Supp. 2000), "a personal representative of a decedent domiciled in this state at his or her death has the same standing to sue and be sued . . . as his or her decedent had immediately prior to death." Thus, if a personal representative comes into possession of an instrument made payable to the decedent after his or her death, the personal representative may enforce the instrument on behalf of the estate. If the personal representative loses possession of the note after he or she was entitled to enforce it, then the personal representative may enforce the note under § 3-309 if all of the elements of the claim are proved by clear and convincing evidence.

On the other hand, if a personal representative alleges that the decedent lost possession of an enforceable instrument before the decedent's death, then the personal representative must prove the elements under § 3-309(a), as they relate to the decedent, by clear and convincing evidence.

[6] Fales did not allege that the loss of possession occurred while the notes were in Virginia's possession. There was evidence, however, that Virginia did not destroy or transfer the notes before her death because Norine had possession of them after her death. Evidence was also adduced that after Norine was the personal representative and entitled to enforce the notes, neither he nor Fales, after she was appointed his successor, had been able to determine the whereabouts of the notes. Fales was not personally in possession of the notes when the loss occurred. But as the

successor personal representative, she has the same "powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated." See Neb. Rev. Stat. § 30-2456 (Reissue 1995). Thus, the right to enforce the notes under § 3-309 transferred to her by operation of law upon her appointment if she proved by clear and convincing evidence that (1) Norine was in possession of the notes and entitled to enforce them when the loss of possession occurred; (2) the loss of possession was not the result of a voluntary transfer by Norine or lawful seizure; and (3) possession of the notes cannot be obtained because they were either destroyed, their whereabouts cannot be determined, or they are in the wrongful possession of an unknown person or a person who cannot be found or is not amenable to service of process.

Norine claims there was insufficient evidence to submit this case to the jury and that the district court erred in failing to direct a verdict in his favor. We disagree.

At trial, Norine admitted that he had testified in an October 1999 deposition that he had possession of the original notes at that time. He also stated that he was mistaken in that belief. But the evidence also showed that he had listed the notes as assets on both the inventory of the estate and the proposed distribution. Both documents were signed by Norine and filed with the county court. In the estate inventory, he certified the notes were part of the "true and complete inventory of the property owned by decedent at the time of her death." This evidence conflicted with Norine's statements that the notes were sham instruments, intended to shield his assets during his divorce. Norine's son testified that Virginia had told him that she intended to destroy the notes because she did not want Norine to have to repay them. Norine's son also stated, however, that he had never seen the notes or heard anything else about them apart from this one comment. Norine also admitted that Virginia had never told him she had destroyed the notes.

[7] Conflicting evidence does not mean that the evidence is insufficient to submit to a jury. This court has previously considered the denial of a defendant's motion for a directed verdict in an action to enforce a lost, stolen, or destroyed instrument. We concluded that the denial must be affirmed unless, as a matter of

law, the claimant has failed to prove his or her case by clear and convincing evidence. See *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). As a general rule, this is a matter best left to the jury's determination based on all the facts, including the credibility of the witnesses. *Id*. See, also, *In re Estate of Brionez*, 8 Neb. App. 913, 603 N.W.2d 688 (2000).

Under these facts, this court cannot conclude as a matter of law that Fales has failed to prove by clear and convincing evidence that Norine was in possession of the notes after Virginia's death. Norine's own admissions, through earlier deposition testimony and submission of the estate's assets and distribution proposal, strongly indicate that he was in possession of the notes after Virginia's death. Although Norine's son testified that Virginia stated she did not intend to enforce the notes, this testimony is contrary to evidence that she secured the notes with a mortgage and financing statement.

The evidence also showed that Norine was Virginia's personal representative and, thus, entitled to enforce the notes after her death despite the fact that he was the maker. He admitted that he had executed and delivered the notes, along with the mortgage and security agreement, and verified that the copies were accurate representations of the notes and that the signatures were his. He stated that he was unable to locate the notes after Virginia's death. But given the evidence showing that he was in possession of the notes, the jury could have reasonably concluded that this testimony indicated that he had either lost the notes after her death or intentionally destroyed them.

[8] The jury was properly instructed that clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. See *Castellano, supra*. Under these facts, this court cannot conclude the jury's verdict was clearly wrong.

Determination of Adequate Protection

[9] Section 3-309(b) provides that a "court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." The comment to

§ 3-309 provides: "The court is given discretion in determining how adequate protection is to be assured. . . . Under section 3-309 adequate protection is a flexible concept. . . . [T]he type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts in the case."

[10] In this case, by the time the court entered a judgment on the verdict, 5 years had passed since the notes were executed. The court concluded that it was highly unlikely a stranger in possession of the notes would have waited that long to attempt to enforce them. Nonetheless, the court recognized that the notes were negotiable and took the additional precaution of withholding the judgment from Fales until the statute of limitations for enforcing the notes had expired, or January 16, 2003. Given the status of the estate, the court's purported use of the statute of limitations for adequate protection was a reasonable exercise of its discretion. However, contrary to Fales' contention, the applicable statute of limitations for negotiable instruments is not governed by Neb. Rev. Stat. § 25-205 (Reissue 1995). That section imposes a time limitation for actions on a written contract. Under Neb. U.C.C. § 3-118 (Reissue 2001), an action to enforce the obligation of a party to pay a negotiable instrument must be commenced within 6 years of the due date or the accelerated due date stated in the note. We conclude that the judgment should be withheld from Fales until January 16, 2004, or 6 years from the date the notes were due. The court's judgment is corrected to that extent. See *First Const. Co. v. Tri-South Mortg. Investors*, 308 N.W.2d 298 (Minn. 1981) (concluding that trial court erred in failing to extend surety's liability for indemnification bond until statute of limitations for enforcing note had expired).

Motion to Calculate Interest

[11] Although Norine assigns that the court erred in entertaining Fales' motion to correct the calculation of interest in the jury verdict, he did not discuss this assignment in his brief. 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. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

CONCLUSION

The district court did not err in submitting this case to the jury when the evidence was sufficient to create a firm belief or conviction that (1) the loss of possession occurred after Norine had possession of the notes and while he was entitled to enforce them, (2) the loss of possession did not occur because of a transfer or lawful seizure, and (3) neither Norine nor Fales was able to account for the whereabouts of the notes. For the same reason, the court did not err in denying Norine's motion for new trial or judgment notwithstanding the verdict. However, the court erred in its determination of adequate protection for Norine before entering the judgment by failing to use the correct statute of limitations in determining the time that the judgment would be withheld from Fales.

AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

KAREN L. MANKER, APPELLEE, V.
JAMES I. MANKER, APPELLANT.

644 N.W.2d 522

Filed May 24, 2002. No. S-01-736.

1. **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. **Statutes.** Statutory interpretation presents a question of law.
3. **Limitations of Actions.** The determination of which statute of limitations applies is a question of law.
4. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
5. **Pleadings: Limitations of Actions: Demurrer: Waiver.** The statute of limitations is an affirmative defense which is waived if not asserted by demurrer or answer.
6. **Pleadings.** Where both general and specific allegations are made in a pleading with respect to the same matter, the latter controls.
7. **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.

8. **Words and Phrases.** A nullity is something that is legally void.
9. **Marriage: Presumptions: Words and Phrases.** Nullity of marriage refers to the invalidity of a presumed or supposed marriage because it is void on its face or has been voided by court order.
10. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
11. **Trusts: Real Estate.** Real property may be the subject of a constructive trust.
12. **Trusts: Property: Stock.** Intangible property and liquid assets such as stocks and bank and investment accounts may also be held subject to a constructive trust.
13. **Trusts: Property: Title: Equity.** Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
14. **Limitations of Actions: Trusts: Property.** Neb. Rev. Stat. § 25-207 (Reissue 1995) is the applicable statute of limitations with regard to the establishment of a constructive trust on personal property.
15. **Limitations of Actions.** A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
16. **Limitations of Actions: Trusts.** The statute of limitations does not begin to run against the rights of the beneficiary of a constructive trust until he or she is apprised of the fact that the trustee does not intend to carry out the provisions of the trust.
17. **Pleadings: Limitations of Actions: Demurrer.** A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.
18. **Fraud: Estoppel: Limitations of Actions: Malpractice.** The doctrine of fraudulent concealment may estop a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering professional negligence.
19. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
20. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or

inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

21. **Equity: Estoppel: Limitations of Actions.** The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.
22. ____: ____: ____. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
23. **Trusts: Equity.** A constructive trust is an equitable remedy intended to prevent unjust enrichment.
24. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court.
25. **Equity: Fraud.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed in part, and in part reversed and vacated.

Thomas Blount, of Bertolini, Schroeder & Blount, for appellant.

Daylene A. Bennett, of Burger & Bennett, P.C., for appellee.

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

PER CURIAM.

I. NATURE OF CASE

Karen L. Manker and James I. Manker were married in 1979 and lived together until 1998. On August 13, 1999, Karen filed this action alleging she had learned for the first time in 1994 that James had dissolved the marriage in 1980. In her petition, Karen claimed she was a putative spouse within the meaning of Neb. Rev. Stat. § 42-378 (Reissue 1998) and sought relief in the form of an equitable division of assets, alimony, and child support. In the alternative, Karen requested that she be granted the same relief through the imposition of a constructive trust. James asserted various defenses, including an allegation that Karen's

claims were barred by the statute of limitations. The district court entered an order rejecting James' defenses and awarding Karen her requested relief. James perfected this timely appeal, and we granted his petition to bypass.

II. BACKGROUND

The parties were married in Kearney, Nebraska, on September 4, 1979. On February 21, 1980, James filed a petition in the district court for Buffalo County seeking to dissolve the marriage. Karen signed a voluntary appearance at the office of James' attorney on March 5. On April 18, Karen again accompanied James to his attorney's office to sign a property settlement agreement.

Notice of the final hearing on James' petition for dissolution was mailed to Karen at her address in Kearney on or about April 24, 1980. On May 8, James and his counsel appeared at the final hearing, but Karen did not appear personally or through counsel. The district court ordered the marriage dissolved after finding it to be irretrievably broken and then accepted the parties' property settlement agreement and incorporated it in the decree. On May 9, the clerk of the district court for Buffalo County mailed notice of the judgment to Karen at the address in Kearney where she and James resided.

Notwithstanding the legal dissolution of their marriage, James and Karen continued to reside together and hold themselves out as husband and wife. In late June or early July 1980, the couple moved to Loup City, Nebraska, so James could take a job as an industrial arts teacher. When James began his employment, he listed Karen as his "spouse" on his health insurance forms. James purchased a house in Loup City, and the warranty deed to the home referred to James and Karen as "husband and wife." In 1980, the parties filed their state and federal income tax returns under the status "Married, filing joint return" and continued to do so until 1997.

In 1988, the couple sold the house in Loup City and moved to Wauneta, Nebraska, so James could take a position as a school principal. When James began this employment, he again listed Karen as his "spouse" on his health insurance forms. In 1992, the parties visited an attorney for the purpose of executing wills. James executed a will that referred to Karen as his "wife" and left

Karen the entirety of his property in the event of his death. Karen executed a will that referred to James as her "husband" and left the entirety of her property to James in the event of her death.

In 1998, the parties' relationship ended, and James moved out of the rented home in which the family had resided. On August 13, 1999, Karen filed this action in the district court for Chase County. In her petition, Karen alleged that she was "completely and innocently ignorant of the actual status of her marriage until the fall of 1994." Karen prayed that the district court declare her to be James' putative spouse under § 42-378 and equitably distribute the assets accumulated by the parties during the alleged putative marriage or, in the alternative, for the imposition of a constructive trust. She further prayed for a determination that James is the father of a child born October 10, 1983, during their cohabitation, an award of legal custody of the child, and an award of child support.

After his general demurrer was overruled, James filed an answer in which he affirmatively stated that he has "always acknowledged [the child] to be his son and has supported him since the date of his birth." He further alleged that Karen "was well aware that the parties were divorced in 1980," that her petition failed to state facts sufficient to state a cause of action, and that her purported cause of action was barred by the statute of limitations and laches.

At trial, Karen admitted executing the voluntary appearance and property settlement agreement in 1980 but claimed that James subsequently told her that "he was just thinking about" a divorce and that "[h]e had time to stop it." Karen further testified that sometime between April and June 1980, James informed her that he had, in fact, dismissed the divorce proceedings on the day after the parties signed the property settlement agreement.

Karen denied ever receiving a copy of the notice of the final hearing on James' petition for dissolution or the notice of final judgment. She testified that James always retrieved the mail and surmised that he must have concealed these documents from her. Karen testified that at the time, she did not check with the court or James' attorney to verify that the dissolution proceeding had been dismissed. Karen stated that she simply "believed [James]" in this regard.

Karen testified that she had no reason to suspect her marriage to James had been dissolved until James made a suspicious comment during an argument in 1994. Based on this comment, Karen consulted an attorney who made inquiries and confirmed that the decree had, in fact, been entered in 1980. Karen testified that she was "shocked" to learn of this fact.

On direct examination, Karen was questioned about why she had continued living with James after discovering in 1994 that the marriage had been dissolved. She stated that she attempted to move out on one occasion in 1994 but that James said he would move out instead. According to Karen, James did not move out until 1998, despite her repeated requests that he do so. Asked why she did not disclose the dissolution to others after learning of it in 1994, Karen testified that James told her they "couldn't do that . . . because . . . it would alert the IRS and we'd be into a lot of trouble. And he'd lose his job."

Additional testimony from both parties established that James handled all of the couple's finances and that nearly all of the property accumulated during their relationship was titled in James' name. As of 1997, the only property held by Karen was $800 deposited in a checking account, an IRA worth $16,501.55 that Karen cashed for living expenses following the separation, a savings bond valued at $5,542 which was given to Karen by James' father and subsequently cashed by Karen, and a 1997 Buick LeSabre automobile purchased by James but titled in Karen's name. The remainder of the property, including James' substantial retirement account, numerous stocks and bonds, a pickup, a boat, and a camper, was all titled in James' name. James testified that he purchased all of these assets with his own funds.

In an order entered June 12, 2001, the district court stated:

> The Court finds that the very difficult issue in this case is the credibility of the parties. The question comes down to who does the Court believe. The Court finds that based upon the testimony, the demeanor of the witnesses, particularly Karen and James and the facts surrounding the dissolution of marriage in 1980 and the actions of the parties since 1980, [that] the plaintiff herein presented the more credible evidence. The Court finds specifically that the plaintiff herein believed, in good faith, that the defendant

> had stopped the dissolution of marriage in 1980 and that she was married to the defendant in 1980 and remained married to the defendant up until 1994. The Court further finds that in the fall of 1994, Karen found out the truth and [sic] that she had, in fact, been divorced from James since May 8, 1980.

Based upon these findings, the district court concluded that Karen should be considered James' putative spouse pursuant to § 42-378.

In reaching its conclusion, the district court relied on the decision of the California Court of Appeals in *In re Marriage of Monti*, 135 Cal. App. 3d 50, 185 Cal. Rptr. 72 (1982), which held that a person who continues to live with a former spouse in ignorance of a final dissolution decree and with a good faith belief in the continued validity of the marriage is a putative spouse under California law. The district court reasoned that because the California putative spouse statute construed in *In re Marriage of Monti* was similar to § 42-378, the same result was warranted in this case.

The district court acknowledged that more than 4 years had elapsed between the date in 1994 when Karen discovered that the marriage had been dissolved and the filing of her petition on August 13, 1999. Nevertheless, the district court reasoned that because the parties had lived together until the fall of 1998 and because of certain statements James had made to Karen after 1994, her claim was not time barred. Based upon its determination that Karen was a putative spouse and its alternative determination that Karen was entitled to relief through the imposition of a constructive trust, the district court divided the parties' assets and ordered James to "transfer to Karen . . . accounts, money, or monies worth [or] valued at one hundred thirty-eight thousand five hundred twenty-seven dollars ($138,527.00)," as part of a "property settlement." The district court then entered a judgment in that amount, with interest from and after June 1, 2001, until paid in full.

The district court also ordered Karen and James to execute a qualified domestic relations order and any other documents necessary to accomplish a division of James' interest in a teacher retirement program. In addition, the court found that James had

acknowledged paternity of the parties' minor child and ordered that custody of the child be awarded to Karen, subject to James' right of reasonable visitation, and that James pay $958 per month in child support to Karen commencing June 1, 2001, and continuing until the child reaches the age of majority, dies, or becomes emancipated. Finally, the court ordered James to pay alimony in the amount of $700 per month for 60 months commencing July 1, 2001, and terminating on the death or remarriage of Karen.

III. ASSIGNMENTS OF ERROR

James assigns, restated and consolidated, that the district court erred (1) in concluding that Karen was a putative spouse within the meaning of § 42-378; (2) in finding that Karen held a good faith belief in the existence of her marriage until 1994; (3) in concluding that Karen could, in the alternative, be compensated through the imposition of a constructive trust; (4) in concluding that Karen's cause of action under § 42-378, her action for the imposition of a constructive trust, and her actions for paternity and child support were all not barred by their applicable statutes of limitations; (5) in dividing James' property and awarding it to Karen; and (6) in awarding Karen alimony.

IV. 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. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

[2] Statutory interpretation presents a question of law. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002); *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

[3,4] The determination of which statute of limitations applies is a question of law. *Blankenau v. Landess*, 261 Neb. 906, 626 N.W.2d 588 (2001); *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000). The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.

Blankenau v. Landess, supra; *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999).

V. ANALYSIS

The relief awarded by the district court falls into two distinct categories. The first involves the court's finding that James was the father of the parties' minor child. Based upon this determination of paternity, the district court awarded custody to Karen subject to James' reasonable rights of visitation and ordered James to pay child support. The second category of relief relates to the court's finding that Karen was entitled to an equitable division of property and alimony under either of her alternative theories of relief. Because these two categories of relief are not interdependent, we analyze them separately.

1. Paternity, Custody, Visitation, and Child Support

The only assignment of error directed toward the determination of paternity and the award of custody and child support is James' assertion that these claims are barred by the statute of limitations. The procedure for obtaining a judicial determination of paternity is set forth in Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 1998 & Cum. Supp. 2000). Section 43-1411 provides that a paternity action may be instituted "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." James argues that the paternity action was initiated by the mother more than 4 years after the child's birth and is now time barred.

[5,6] The statute of limitations is an affirmative defense which is waived if not asserted by demurrer or answer. *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998). In his answer, James alleged generally that "the Plaintiff's Petition fails to state facts upon which a cause of action may be maintained by her and, further, that any action otherwise maintainable by her is barred by the Statute of Limitations." However, this assertion was preceded in the answer by a specific affirmative allegation that James "has always acknowledged [the minor child] to be his son and has supported him since the date of his birth." James' general statute of limitations allegation is inconsistent with his specific allegation

that he has always acknowledged paternity and his obligation to support the minor child. Where both general and specific allegations are made in a pleading with respect to the same matter, the latter controls. *Sickler v. City of Broken Bow*, 143 Neb. 542, 10 N.W.2d 462 (1943). Moreover, James' affirmative allegation that he had acknowledged paternity and the corresponding obligation of parental support prior to the filing of this action is a judicial admission which constitutes a waiver of all controversy with respect to those issues. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). Accordingly, there is no merit to James' contention that the district court erred in not determining these claims to be time barred.

2. Division of Property and Alimony

Karen also sought an equitable division of the property acquired during the period of cohabitation and an award of alimony on the theory that she was a putative spouse under § 42-378 or the alternative theory that James had committed fraud warranting the imposition of a constructive trust on the assets. James denied the material allegations pertaining to these claims and asserted a statute of limitations defense. The district court determined that Karen was entitled to relief under either of her theories of recovery and held that the claims were not time barred.

(a) Putative Spouse Doctrine—§ 42-378

[7] In his second assignment of error, James contends the district court erred in determining Karen was a putative spouse within the meaning of § 42-378. The specific issue presented is whether the statute applies in the circumstance of a party who continues to live with an ex-spouse in good faith ignorance of the fact that their once-valid marriage has been dissolved. We have not previously had an opportunity to address this issue, but we do so now guided by the familiar principle 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. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999).

[8,9] Section 42-378 provides:

> When the court finds that a party entered into the contract of marriage in good faith supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree and the court may order such innocent party compensated as in the case of dissolution of marriage, including an award for costs and attorney fees.

A "nullity" is "[s]omething that is legally void." Black's Law Dictionary 1095 (7th ed. 1999). "Nullity of marriage" refers to "[t]he invalidity of a presumed or supposed marriage because it is void on its face or has been voided by court order." *Id.* at 1096. The marriage in this case was never void; it was legally valid from its inception in 1979 until its dissolution in 1980.

In determining that § 42-378 applied in this case notwithstanding the fact that the marriage was never declared a nullity, the district court relied on *In re Marriage of Monti*, 135 Cal. App. 3d 50, 185 Cal. Rptr. 72 (1982). In *In re Marriage of Monti*, the California Court of Appeals applied California's putative spouse statute in a circumstance where the parties were both lawfully married and then lawfully divorced, but the woman continued living with the man based upon his representation that the divorce was never finalized. The relevant California statute provided: " 'Whenever a determination is made that a marriage is void or voidable and the Court finds that either party or both parties believed in good faith that the marriage was valid, the Court shall declare such party or parties to have the status of a putative spouse . . . .' " *In re Marriage of Monti*, 135 Cal. App. 3d at 52 n.1, 185 Cal. Rptr. at 73 n.1. The court noted that this statute codified but did not change the substantive common law which existed prior to its enactment. Although the court acknowledged that under California common law, the putative spouse principle "is usually applied in situations where a ceremonial marriage becomes void or voidable," it cited two cases decided prior to the enactment of the statute in which a person who continued to live with a former spouse in good faith ignorance of a divorce was deemed to be a putative spouse. *Id.* at 55, 185 Cal. Rptr. at 74, citing *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P.2d 49 (1948), and *Feig v. Bank of Italy etc. Assn.*, 218 Cal. 54, 21 P.2d 421 (1933). On the

basis of this preexisting common law, the *In re Marriage of Monti* court concluded that the statute "must be interpreted to include as a putative spouse a divorced spouse who continues to live with the ex-spouse in ignorance of the final divorce decree and with a good faith belief in the continuing validity of the marriage." 135 Cal. App. 3d at 56, 185 Cal. Rptr. at 75.

Section 42-378 was enacted in 1972. 1972 Neb. Laws, L.B. 820, § 32. Neither the briefs of the parties nor our own research has disclosed any opinion of this court applying the putative spouse doctrine prior to the enactment of the statute. Thus, the common-law predicate upon which the *In re Marriage of Monti* court relied in interpreting the California statute does not exist in this state. This court's discussion of § 42-378 since its enactment has always been in the context of void or voidable marriages. For example, in *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984), we concluded that a woman could not be considered a putative spouse under § 42-378 because the evidence established that she had always known that the parties' civil and religious marriage ceremonies performed in Mexico were invalid. Also, in *Hicklin v. Hicklin*, 244 Neb. 895, 509 N.W.2d 627 (1994), we noted that § 42-378 was properly applied to a woman whose marriage was void because she married a man whose divorce was not yet final.

A plausible argument can be made that putative spouse principles should be applied in the circumstance where one lives with a former spouse in the good faith belief that their valid marriage has not been dissolved and, indeed, some statutes do so provide. For example, the Uniform Marriage and Divorce Act provides:

> Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights.

Unif. Marriage and Divorce Act § 209, 9A U.L.A. 192 (1998). See, also, Colo. Rev. Stat. Ann. § 14-2-111 (West 1997); 750 Ill. Comp. Stat. Ann. 5/305 (Lexis 1999); Minn. Stat. Ann. § 518.055 (West 1990). The only prerequisite to a party's recovery under these statutes is cohabitation with another person in the good faith belief that they were married. However, that is not

how the putative spouse doctrine is statutorily defined in this state by § 42-378. If expansion of the statutory doctrine is deemed warranted, it is the province of the Legislature and not this court to do so. We conclude that because the parties' marriage was valid during its duration and never void or voidable, § 42-378 is not applicable to the facts presented and thus does not provide a legal basis for the alimony and property division awarded to Karen by the district court.

(b) Constructive Trust

[10-13] As noted, the district court held that Karen was also entitled to relief, in the alternative, through the imposition of a constructive trust. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999); *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997). Real property may be the subject of a constructive trust. *Id.* See, also, *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978). Intangible property and liquid assets such as stocks and bank and investment accounts may also be held subject to a constructive trust. See, *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *ProData Computer Servs. v. Ponec, supra*; *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

[14] On appeal, James contends the district court erred in determining that Karen's constructive trust claim was not time barred. We must first determine, as a matter of law, which statute of limitations applies. See, *Blankenau v. Landess*, 261 Neb. 906,

626 N.W.2d 588 (2001); *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000). In its division of property, the district court relied upon three exhibits listing the assets of each party. All of the listed assets were personal property, with the exception of a tract of land in Missouri which James had purchased prior to the marriage and which was therefore determined by the district court to be his sole property. Thus, we treat Karen's claim as seeking to impose a constructive trust on personal property including vehicles, household items, stocks, bonds, mutual fund shares, and bank accounts. Neb. Rev. Stat. § 25-207 (Reissue 1995) is the applicable statute of limitations with regard to the establishment of a constructive trust on personal property. *Nemaha Nat. Resources Dist. v. Neeman*, 210 Neb. 442, 315 N.W.2d 619 (1982). Section 25-207 provides in pertinent part: "The following actions can only be brought within four years: . . . (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property . . . ."

[15,16] We must next determine when the 4-year limitation period prescribed by § 25-207 began to run. Generally, a period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Blankenau v. Landess, supra*; *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). The statute of limitations does not begin to run against the rights of the beneficiary of a constructive trust until he or she is apprised of the fact that the trustee does not intend to carry out the provisions of the trust. *Nemaha Nat. Resources Dist. v. Neeman, supra.* Karen alleged in her petition that in the belief they were married, she held James "in a trusting fiduciary capacity as her husband [and] did not inquire into or object to [his] financial decisions as to how the investments and assets were titled or held." She further alleged that after learning of the divorce in the fall of 1994, she repeatedly demanded that James agree to an accounting and equitable distribution of the assets, but James refused. Therefore, it is clear from these allegations that Karen was aware by the fall of 1994 that James did not intend to fulfill any fiduciary duty owed to Karen. Thus, unless tolled, the 4-year limitation period began in the fall of 1994.

[17] A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). Here, it is apparent from the face of the petition that it was filed more than 4 years after the alleged cause of action accrued, and there are no allegations that would toll the operation and bar of the applicable statutes of limitation. Nevertheless, the district court overruled James' demurrer, determining that "pursuant to the case of Schendt v. Dewey, 246 Neb. 573, [520 N.W.2d 541 (1994)], the plaintiff has started [sic] a cause of action and has pled facts that may create an equitable estoppel against the defendant, which would prevent the running of the statute of limitations." Following trial, the district court made a specific finding that "in the fall of 1994, Karen found out the truth and [sic] that she had, in fact, been divorced from James since May 8, 1980. Karen continued to reside with James until the fall of 1998 and filed this action on August 13, 1999." While it acknowledged that the filing occurred more than 4 years after Karen's discovery of the divorce, the district court concluded that the action would not be barred by the statute of limitations because of the fact that the parties resided together until the fall of 1998 and "because of the statements made to her by James."

[18-21] By its references to *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994), and the theory of "equitable estoppel," we understand the district court to have applied either the doctrine of fraudulent concealment or the doctrine of equitable estoppel in pais, or both, to prevent a time bar. In *Schendt* and other professional negligence cases, we have recognized that the doctrine of fraudulent concealment may estop a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering professional negligence. See, also, *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000); *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). We have also recognized that the equitable doctrine of estoppel in pais may, in

a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996); *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989). The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Hullinger v. Board of Regents, supra*; *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Reifschneider v. Nebraska Methodist Hosp., supra*. The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

Karen did not specifically plead any statements by James as grounds for tolling the limitations period on the basis of fraudulent concealment or equitable estoppel in pais. On appeal, she relies on the following testimony she gave at trial:

> [Plaintiff's counsel:] Do you recall having any conversations with Mr. Manker about telling people that you were not married?
>
> [Karen:] Yeah, he said we couldn't do that. And we kept filing taxes the same, because he said if we changed our

> filing of our income tax then it would alert the IRS and we'd be into a lot of trouble. And he'd lose his job.

The district court made a specific finding regarding this testimony and noted that it was not disputed or denied by James. It is clear from the record that these statements were made by James *after* his disclosure of the dissolution in the fall of 1994, and therefore, they cannot be characterized as an effort to fraudulently conceal that fact.

[22] But equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996); *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989).

[23] In this regard, it is important to remember that a constructive trust is an equitable remedy intended to prevent unjust enrichment. The general principles of law governing constructive trusts are collected in the Restatement of Restitution § 163 (1937). Section 148 of the Restatement deals with laches and statutes of limitations as they relate to equitable actions for restitution. The comments provide that "in the absence of evidence of other circumstances the complainant normally is barred if the period of the statute of limitations applicable to actions at law in analogous situations would have run . . . ." *Id.*, § 148, comment *b*. at 590. But the comments list several circumstances that will excuse the complainant's delay including

> the fact that the respondent stood in a fiduciary or confidential relationship to the complainant who, because of that, hesitated to begin proceedings; the fact that the respondent was in a superior economic position to the complainant as where he was the complainant's creditor or employer; the fact that the complainant could not secure proper advice or that he was ignorant and did not understand his rights; the fact that the respondent fraudulently concealed the facts; the fact that the conduct of the respondent delayed proceedings, as where he could not be located, or where he sought to prevent action or caused

> delay by promises of satisfaction; or the fact that evidence was not available.

Id. at 590-91. We do not imply that every reason listed in the comments will toll the statute of limitations in an action for restitution. However, under the unique circumstances of this case, the issue is whether James' conduct prevents him from asserting the statute of limitations as a defense. The district court concluded that the action was not time barred because of the statements James made to Karen.

Equity is not a rigid concept, and its principles are not applied in a vacuum. Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so.

[24,25] The doctrine of equitable estoppel may be applied to prevent an injustice or a harsh and unfair result. A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

James' conduct is summarized as follows: From 1980 to 1994, Karen believed the parties were married because James did not tell her they were divorced. For 14 years, James accumulated valuable assets in his name alone. After Karen discovered the fraud, James said to her that if she told anyone that they were not married, they would both be in trouble with the Internal Revenue Service and he would lose his job. Karen testified about having conversations with James about telling people that they were not married. James told Karen she could not tell anyone and that they kept filing taxes the same "because he said if we changed our filing of our income tax then it would alert the IRS and we'd be into a lot of trouble. And he'd lose his job."

James did not dispute making these statements, and the district court specifically found that it was clear from the record that these statements were made after Karen discovered that the parties were not married. It is not when Karen discovered they were not married that is important, but what James told her after she knew. These representations were made by James with the intent to induce Karen not to take any action because of the threat of trouble, including the loss of his job, and these inducements continued because the parties kept filing their taxes the same way or "we'd be into a lot of trouble." Karen commenced her action in 1999 after James moved out of the house.

As a result of James' statements, the district court imposed a constructive trust and denied application of the statute of limitations as a defense. James occupied the superior position in the relationship. He controlled all the assets. Although the parties considered separating at times, this does not mean that when the parties had an argument, Karen was no longer influenced by James' statements about the trouble they both would incur. The fact that they did not separate indicates some intent to remain together. In addition, James handled all of the business transactions, and Karen was dependent upon him for her support and income. This dependency put James in a position to exert influence over Karen to his own benefit.

Statements made concerning trouble with the Internal Revenue Service and the loss of a means of support were made as strong inducements to Karen to take no action. It is highly significant that after Karen discovered that the parties were not married, James induced Karen not to take any action to protect her interests with the threat of legal and financial trouble. The strong inference is that he intended to deter her from seeking outside advice. Under these circumstances, we conclude that the district court did not err in applying equitable principles to prevent James from asserting a statute of limitations defense. See *Baker v. Pattee*, 684 P.2d 632, 636 (Utah 1984) ("in cases of undue influence and duress the limitation period begins with the termination of the influence").

The application of equitable estoppel in this case is consistent with the requirements of a constructive trust. A person seeking a constructive trust must prove by clear and convincing evidence

that the individual holding the property obtained it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under such circumstances, such individual should not, according to the rules of equity and good conscience hold and enjoy the property so obtained.

The facts of this case support the district court's finding of a constructive trust and that James was estopped from asserting the statute of limitations as an affirmative defense. The court did not err in finding that the evidence supported an equitable duty and a constructive trust regarding the property acquired by James.

VI. CONCLUSION

For the reasons discussed herein, we affirm that portion of the district court's order which determined that James was the father of the minor child, awarded custody of the child to Karen subject to James' reasonable rights of visitation, and required James to pay child support in the amount of $958 per month. We also affirm that portion of the order which requires James to furnish health insurance for the minor child and pay three-fourths of all noncovered medical, dental, eyeglass, optometric, and prescription medicine expenses incurred by or for such child which are not paid by insurance. We reverse and vacate the award requiring James to pay alimony. We affirm the award of personal property to Karen, including the judgment in the amount of $138,527 in favor of Karen, the qualified domestic relations order, and the constructive trust on James' assets ordered by the district court in order to effectuate such transfer. That portion of the order determining the sole and separate property held by each party is affirmed.

AFFIRMED IN PART, AND IN PART
REVERSED AND VACATED.

STEPHAN, J., concurring in part, and in part dissenting.

I agree with the majority that the paternity, custody, visitation, and child support claims in this action are not time barred, and I concur in the affirmance as to those issues. I also agree with the majority that Karen cannot be considered a "putative spouse" under Neb. Rev. Stat. § 42-378 (Reissue 1998) because her marriage to James was never void. If I could reach the merits of the constructive trust claim, I would agree with the majority and the

district court that it is supported by the evidence. I cannot reach the merits, however, because in my opinion, the constructive trust claim is barred by the 4-year limitations period prescribed by Neb. Rev. Stat. § 25-207 (Reissue 1995).

While this case involves highly unusual facts, it must nevertheless be considered and adjudged by applying the basic rules of pleading and proof which we apply in all civil actions. The issues in a case are framed by the pleadings. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). Nebraska law defines pleadings as the written statements by the parties of the facts constituting their respective claims and defenses. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002); *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993). 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. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001); *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000).

In her petition, Karen alleged that James concealed the fact of their 1980 divorce and that because of the trust she placed in him, she did not discover the truth concerning the divorce until the fall of 1994. Her right to maintain an action for recovery based upon a constructive trust theory accrued at the time of this discovery, but her petition was not filed until August 13, 1999, well outside the 4-year limitations period. A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995). Karen's petition alleged no specific reason why she was prevented or legally excused from filing her petition within 4 years after discovering that she and James were divorced. Therefore, in my opinion, James' demurrer to the petition should have been sustained.

When the demurrer was overruled, James filed an answer alleging that all of Karen's claims were barred by the statute of

limitations. The record does not reflect that Karen filed a reply denying this allegation or alleging any factual basis or theory upon which the running of the limitations period would be tolled. At trial, Karen admitted that she became aware of the divorce in the fall of 1994 when she consulted a lawyer who determined from court records that the decree had been entered in 1980. Karen was not asked, and she did not testify, why she waited until August 1999 to initiate this action.

In concluding that James was equitably estopped from asserting a statute of limitations defense, the district court and the majority focus on the fact that after Karen learned of the divorce, James told her that public disclosure of that fact would cause problems with the Internal Revenue Service and his employer. While the record reflects that these statements were made, there is no evidence to suggest that they influenced Karen's decision to forgo filing this lawsuit in a timely manner. Karen testified unequivocally that upon learning of the divorce in 1994, she distrusted and disliked her former spouse, and that beginning in the fall of 1994, she asked him on several occasions to move out of the family home, which he eventually did in 1998. After learning of the divorce, Karen declined James' offers of remarriage because, in her words, "I didn't trust him, I didn't—I mean after that, you just don't believe anything he's ever going to say." She admitted that she was at all times free to speak with a lawyer and in fact did obtain legal advice concerning the status of her marriage after James first mentioned the divorce in 1994. She also discussed the divorce with her sister and a personal friend in 1994. At trial, Karen was not asked why she waited more than 4 years after learning of the divorce to initiate this action, and she offered no testimony which could fairly be interpreted as an explanation or justification for the delay. On appeal, Karen did not argue equitable estoppel as a basis for tolling the limitations period, but, rather, contended that "a putative spouse is not subject to any statute of limitations." Brief for appellee at 20.

Based upon my reading of the record, the issue of whether James was equitably estopped from asserting a statute of limitations defense to the claim for distribution of property under a constructive trust theory was neither framed by the pleadings

nor resolved in Karen's favor by the evidence adduced at trial. Because it is undisputed that the claim was filed outside the limitations period and no grounds for tolling were alleged or proved, I respectfully dissent from that portion of the majority opinion affirming the award of personal property to Karen. I recognize that this result runs contrary to how many might view the equities of this case, but for the reasons stated, I believe it is nevertheless required by the law.

NOEL HEATHMAN, APPELLANT, V.
MICHAEL KENNEY, APPELLEE.

644 N.W.2d 558

Filed May 24, 2002. No. S-01-1260.

1. **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.
2. **Judgments.** An order on "summary application in an action after judgment" under Neb. Rev. Stat. § 25-1902 (Reissue 1995) is an order ruling on a postjudgment motion in an action.
3. **Affidavits: Final Orders.** An order denying a request for reimbursement pursuant to the in forma pauperis statutes entered after the judgment is an order affecting a substantial right made upon a summary application in an action after judgment and is therefore a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 1995).
4. **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.
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. **Actions: Costs: Affidavits.** The expense of photocopying is included in the expense of "printing," which is required under Neb. Rev. Stat. § 25-2307 (Cum. Supp. 2000) to be paid by the county when a party has been permitted to proceed in forma pauperis.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded.

Noel Heathman, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Noel Heathman appeals the order of the district court for Lancaster County denying his request for reimbursement of photocopying expenses he incurred in reproducing appellate briefs required to be filed and served in connection with an in forma pauperis appeal to this court. We reverse, and remand.

STATEMENT OF FACTS

Heathman filed a petition for a writ of habeas corpus in the district court for Lancaster County against Michael Kenney, warden of the Nebraska State Penitentiary where Heathman is incarcerated. The district court dismissed Heathman's petition, and Heathman appealed the dismissal in case No. S-01-718 currently pending before this court. On June 20, 2001, the district court granted Heathman in forma pauperis status to proceed with his appeal in case No. S-01-718.

Heathman prepared his brief on appeal in case No. S-01-718 and filed it with this court on September 4, 2001. As required by the rules of this court, Heathman filed an original and 16 copies of the brief. See Neb. Ct. R. of Prac. 9B(7) (rev. 2000). As further required by the rules of this court, Heathman served two copies of his appellate brief on the appellee. See rule 9B(6). On October 30, Heathman filed a "Voucher and Request for Reimbursement" with the district court, in which he asserted that he had incurred $108 in photocopying expenses for duplication of his appellate brief and requested that the district court authorize payment from Lancaster County to reimburse him the $108. On October 31, the district court entered an order denying Heathman's request for reimbursement after concluding that Neb. Rev. Stat. § 25-2307 (Cum. Supp. 2000) required the county to pay the costs of only "printed briefs, not the cost of photocopies." (Emphasis in original.) Heathman appeals.

ASSIGNMENT OF ERROR

Heathman claims that the district court erred in concluding that § 25-2307 does not provide for reimbursing appellants

proceeding in forma pauperis for the expenses of photocopied appellate briefs.

STANDARD OF REVIEW

[1] 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. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm., ante* p. 544, 641 N.W.2d 55 (2002).

ANALYSIS

Jurisdiction.

As an initial matter, Kenney questions whether Heathman's request for reimbursement was filed at the appropriate juncture of these proceedings. Kenney concedes that the in forma pauperis statutes, Neb. Rev. Stat. § 25-2301 et seq. (Cum. Supp. 2000), do not indicate the appropriate time to request expenses pursuant to § 25-2307. Kenney suggests that the conclusion of litigation would be a more appropriate time for Heathman to seek reimbursement of expenses. The inference from Kenney's argument is that this court lacks jurisdiction of this appeal.

We have long held that "[a]lthough jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court." *Flora v. Escudero*, 247 Neb. 260, 264, 526 N.W.2d 643, 647 (1995). The duty of ruling on a request for reimbursement of the expense of appellate briefs was required of the lower court notwithstanding the pendency of the appeal, and the time at which Heathman sought a ruling on reimbursement was not incorrect.

The order from which Heathman has taken appeal was an order of the district court denying his request for reimbursement which was entered subsequent to the final judgment in his habeas corpus action. Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

[2,3] As a general matter, an order on "summary application in an action after judgment" under § 25-1902 is an order ruling on a postjudgment motion in an action. We conclude that the order denying Heathman's request for reimbursement pursuant to the in forma pauperis statutes was "an order affecting a substantial right made . . . upon a summary application in an action after judgment" and was therefore a final, appealable order. We see nothing in the in forma pauperis statutes or § 25-1902 to the contrary. Accordingly, we determine we have jurisdiction of this appeal.

Expenses of Photocopied Appellate Briefs.

Heathman asserts that the district court erred in concluding that § 25-2307 does not require the county to pay the expenses of photocopied as opposed to printed appellate briefs in an appeal in which in forma pauperis status has been granted. Kenney asserts that this court's rules refer variously to "[p]rinted," "[c]omputer-generated," and "typewritten" briefs, see rule 9B(1) and (2), and that under § 25-2307, the county is only required to pay for "printed" briefs. We reject Kenney's argument.

Section 25-2307 provides:

> In any civil or criminal case in which a party is permitted to proceed in forma pauperis, on appeal the court shall direct that the expense of printing of the appellate briefs, if such printing is required by the court, be paid by the county in the same manner as other claims are paid.

The district court concluded, "It is clear that [§ 25-2307] refers only to <u>printed</u> briefs, not the cost of photocopies." On this basis, the district court denied Heathman's request for reimbursement. The district court erred in its interpretation of § 25-2307.

[4,5] 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. *City of Lincoln v. Central Platte NRD, ante* p. 141, 638 N.W.2d 839 (2002). 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. *Henery v. City of Omaha, ante* p. 700, 641 N.W.2d 644 (2002).

The language of § 25-2307 specifically provides that the county must pay "the expense of printing of the appellate briefs, if such printing is required by the court." Pursuant to rule 9B(7), an appellant is required to file an original and 16 copies of the appellant's brief. Pursuant to rule 9B(6), the appellant is required to serve two copies on the appellee. Thus, in order for an appellant to proceed in the Supreme Court or the Nebraska Court of Appeals, the appellant "is required by the court," § 25-2307, to file and serve the requisite number of briefs.

[6] The obvious intent of the in forma pauperis statutes is to allow parties access to the courts even though they are unable to pay the costs and associated expenses required to prosecute an action or an appeal. Section 25-2307 specifically provides for reimbursement for the expense associated with mechanically producing the copies of appellate briefs which are required by this court to be filed in the Supreme Court or Court of Appeals and served on the opposing party. A reasonable construction of § 25-2307 is that the expense for which reimbursement is provided covers the copies required by court rules, which copies at this time may be "[p]rinted," "[c]omputer-generated," or "typewritten." See rule 9B(1) and (2). We construe § 25-2307 to refer to the expense of mechanical production of the number of appellate briefs required by this court's rules to be filed and provided to opposing parties in an appeal. We therefore conclude that the expense of photocopying is included in the expense of "printing," which is required under § 25-2307 to be paid by the county when a party has been permitted to proceed in forma pauperis.

Because the district court concluded that the expenses of photocopied briefs were not covered by § 25-2307, it denied Heathman's request for reimbursement without determining what expenses were supported by Heathman's evidence. We therefore reverse, and remand to the district court to determine, consistent with this opinion, the appropriate expense that must be paid by the county to Heathman pursuant to § 25-2307.

CONCLUSION

We conclude that Heathman's request for reimbursement was not premature and that the order denying such reimbursement was a final, appealable order. We further conclude that the expenses of

photocopying the number of appellate briefs required by this court's rules are included in the expenses of "printing" which are required under § 25-2307 to be paid by the county when a party has been permitted to proceed in forma pauperis. We therefore reverse the order of the district court denying the reimbursement requested by Heathman and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

THE KANSAS BANKERS SURETY COMPANY, APPELLANT, V. LINDA HALFORD, APPELLEE.

644 N.W.2d 865

Filed May 31, 2002. No. S-00-1214.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
3. **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.
4. **Dismissal and Nonsuit.** A plaintiff may enter a dismissal as a matter of right at any time before final submission of the case.
5. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Vacated and dismissed.

Edmond E. Talbot, III, of Talbot Law Office, and Stephen D. Lanterman and Alan V. Johnson, of Sloan, Listrom, Eisenbarth, Solan & Glassman, L.L.C., for appellant.

David S. Houghton and William G. Garbina, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Kansas Bankers Surety Company (KBS), which is the surety company for Fort Calhoun State Bank (the Bank), brought an action against Linda Halford (Halford) claiming fraud and conversion of funds. After KBS voluntarily dismissed its action against Halford, the district court awarded Halford attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995). KBS timely appealed.

SCOPE OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

FACTS

In December 1997, the Bank made demand upon KBS for repayment of a loss, pursuant to the terms and conditions of a financial institution bond issued by KBS to the Bank. The Bank asserted that Halford, its former employee, had committed fraudulent and dishonest acts which caused the Bank to sustain a loss in the amount of $35,085.41. After it paid the bond, KBS took an assignment of the Bank's claim against Halford and sued her for fraud and conversion.

The Bank's president, John Ramsey, and its vice president, Paul Oestmann, signed a sworn statement dated October 30, 1998, which alleged that on July 8, 1991, a 12-month renewable certificate of deposit, No. 711640, was opened by Dorothy Sievers with an initial deposit of $25,200. The authorizing signature for the Bank on the certificate of deposit was that of Halford, who was the head teller of the Bank until her resignation in April 1996. The Bank's trial balance dated July 11, 1991, listed the certificate of deposit under Sievers' name, and the trial balance indicated a " 'Last Dep Date' of '07/07/91.' "

The sworn statement alleged that in October 1997, when Sievers presented a request to change the title on the certificate of deposit, bank records indicated there was no certificate of deposit No. 711640 outstanding. An investigation revealed that on July 8, 1991, certificate of deposit No. 711640 was issued to

" 'RF Broadband,' " which was a doing-business-as name used by Darrell Halford, the brother-in-law of Halford. Ramsey and Oestmann claimed that the authorizing signature for the Bank on the certificate of deposit was Halford's.

The sworn statement further alleged that two of the Bank's " 'Proof of Deposit Listing[s]' " dated March 8, 1996, noted that a debit was made to "account #711640 for $29,701.60" and that a credit was made to "Firstier (First Bank) - Omaha account number 112151" for the same amount. The Bank's " 'General Ledger Transaction Register' " noted a credit to First Bank account No. 112151 on March 8 which allowed account No. 112151 to balance with the general ledger and reflect no reconciling items. First Bank's statements for March 4 through 15 do not note a transaction for the amount in question.

According to the Bank's " 'Certificate of Deposit Maintenance Journal' " dated April 8, 1996, the name on certificate of deposit No. 711640 was changed to Darrell Halford, and the change was made from Halford's computer terminal. On July 16, 1996, an " 'Indemnity Agreement for Missing Instrument' " was executed for certificate of deposit No. 711460 in the amount of $1,407.77, which closed the account.

The sworn statement of Ramsey and Oestmann further alleged that dishonest and fraudulent acts were committed by Halford with the intent to cause the Bank a loss. The Bank reimbursed Sievers in the amount of $35,085.41, which represented the original certificate of deposit amount plus interest earned from July 8, 1991, through December 31, 1997.

The Bank hired an accounting firm to conduct an examination and assist the Bank with filing an employee dishonesty claim under the terms of the Bank's financial institution bond with KBS. The report was intended for use by the Bank's board of directors, KBS, and other authorities in the investigation of the claim. The report stated in part:

> In summary, bank management feels that the $29,701.60 noted above has been taken from the bank. In addition, bank management feels the $1,409.03 redeemed to Darrell Halford was in error. Bank management believes that there were two Certificate of Deposits [sic], the original issued to Ms. Dorothy Sievers in July 1991 and a second, fraudulent

> certificate of deposit issued in the name of RF Broadband. Management believes only Linda Halford is involved in the fraudulent activities as supported by: (1) Ms. Halford's signature on each of the Certificates of Deposits [sic] issued, (2) the change in the Certificate of Deposit name initiated by Ms. Halford as indicated on the "Certificate of Deposit Maintenance Journal", and (3) the discrepancies noted in reconciling the First Bank of Omaha and First National Bank accounts.
>
> Bank management wrote-off $35,085.41 at December 31, 1997, which represents the original Certificate of Deposit amount plus interest earned through December 31.

In October 1998, KBS paid the Bank $30,085.41, which represented the Bank's payment to Sievers less a $5,000 deductible. On November 19, an attorney for KBS wrote to Halford informing her that the Bank believed she was responsible for an unauthorized transfer of funds from Sievers' certificate of deposit. KBS formally demanded that Halford repay the $30,085.41 and informed her that it was preparing to file a lawsuit against her. KBS also requested any information that "would indicate any matters contrary to those set forth in this correspondence."

Through her attorney, Halford denied any wrongdoing and noted the lack of detail contained in the claim. Her lawyer stated: "We assume that such serious allegations have not been made without some independent investigation on behalf of the Bank and by your client." Halford requested access to information from any investigations conducted and the names of any persons to whom the allegations had been communicated.

Upon review of the documents in KBS' possession, Halford denied the allegations and specifically denied that her signature was on the certificate of deposit issued to RF Broadband. Both Halford and her brother-in-law, Darrell Halford, agreed to submit handwriting exemplars. Halford maintained that after a full and complete investigation, both the Bank and KBS would conclude that she was not involved in any loss or defalcation.

In a memo to KBS and the Bank, Darrell Halford stated that he and his wife had questioned an interest statement they received on June 11, 1996. He stated that Oestmann "assured [them] that [the $1,409.03 payment] was a past interest error on

the bank's fault from a previously redeemed CD and that it needed to be closed out ASAP." Darrell Halford returned the money prior to the filing of this lawsuit on August 24, 1999.

In his deposition, Ramsey stated that he initially reported the loss via a suspicious activity report to federal regulators without mentioning any names. After the Federal Deposit Insurance Corporation informed him that he had to provide a name, the report was amended to include Halford's name. Ramsey stated he believed Halford had taken the money because her signature appeared on both the original and the duplicate certificates of deposit and because she was in charge of reconciling the accounts that were out of balance. He had no knowledge of any money that was wrongfully taken from the Bank and admitted that the Bank did not lose funds in connection with the RF Broadband certificate of deposit.

Oestmann stated in his first deposition that the Bank lost money "from the standpoint that cash went out of teller drawers that [the Bank] didn't receive credit back from either correspondent banks, or from customers, or whatever the transactions involved." Oestmann was responsible for checking the reconcilements of the general ledger accounts, but he had no evidence that Halford was responsible for any of the "cash-outs" posted against the general ledger accounts that did not have offsetting entries.

In Oestmann's second deposition, he admitted that he had previously reported false information to make a reconciliation appear to be accurate when in January 1996, he told the accountants that $27,800 had been withdrawn from a certificate of deposit on October 30, 1995, when no withdrawal had actually been made. He reiterated his belief that Halford caused the Bank to lose $35,085.41 because it was her responsibility to reconcile the general ledger accounts and that the Bank suffered a loss because the accounts were out of balance.

On May 25, 2000, Halford proposed a settlement in which KBS would dismiss the lawsuit with prejudice and KBS and the Bank would issue a letter of apology and pay Halford $25,000. After Oestmann admitted on June 12 to "fudg[ing] a reconciliation" to "get the auditors out of the bank," Halford offered to dismiss her claims against KBS and seal the records in exchange for $100,000.

In a letter dated July 20, 2000, KBS rejected Halford's offer. Because the Bank could directly trace only $21,527.65 of the $29,701.60 KBS believed was taken, it proposed that Halford pay $21,527.65 and that she would not have to admit to any wrongdoing. Halford refused the offer.

KBS then offered to settle for $1,600.85, which offer was also rejected. Halford's subsequent counteroffer included a $250,000 payment to her and a written apology.

In mid-July 2000, KBS' certified document examiner provided a preliminary opinion that the duplicate certificate of deposit contained Halford's signature. However, on August 2, the document examiner concluded that Halford had not signed the duplicate certificate. The examiner was unable to rule out the possibility that Oestmann's handwriting was on the duplicate certificate.

On August 2, 2000, KBS mailed its motion to dismiss this action with prejudice, and the district court filed the order on August 4. On August 10, Halford filed a motion for attorney fees and costs pursuant to § 25-824. At the hearing on Halford's motion, KBS claimed the court lacked jurisdiction because the motion had not been filed until after the action had been dismissed.

The district court found that the lawsuit against Halford was frivolous as a matter of law and awarded fees and costs in the amount of $59,211.74. This award included attorney fees for the services of Frank Starr III, an attorney who, at the time of this lawsuit, was not licensed to practice law in Nebraska. KBS appeals.

ASSIGNMENTS OF ERROR

KBS assigns as error that the district court erred (1) in failing to find that it lacked jurisdiction to consider the motion requesting attorney fees and costs, (2) in making any award of attorney fees and costs, and (3) in awarding attorney fees for the services of Starr.

ANALYSIS

[2] Halford sought attorney fees and related costs pursuant to § 25-824, which provides in part:

> [I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its

> judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Salkin v. Jacobsen, ante* p. 521, 641 N.W.2d 356 (2002).

Halford claims that KBS is responsible for her costs, including attorney fees, and that the dismissal was ineffective because KBS did not pay any costs, as required by Neb. Rev. Stat. § 25-602 (Reissue 1995). Alternatively, Halford argues that the district court had the power to vacate and modify the judgment. She asserts her motion was an attempt to modify the judgment of dismissal to include attorney fees and costs.

[3] KBS argues that the district court lacked jurisdiction to consider the motion for attorney fees and costs because the motion was not filed until after the action had been dismissed and Halford failed to move to vacate the dismissal. 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. *Trainum v. Sutherland Assocs., ante* p. 778, 642 N.W.2d 816 (2002). The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

At the time the action was dismissed, Halford had not filed a motion for attorney fees based on her claim that the action was frivolous. Halford's motion for summary judgment was pending, and KBS had requested an extension to August 4, 2000, to file its brief. On August 4, KBS' motion to dismiss was filed, and the district court (without assigning costs) entered an order dismissing the action with prejudice. Halford did not attempt to set aside the dismissal.

[4] In deciding whether the district court had jurisdiction to enter an award for attorney fees after KBS' action had been dismissed, we must first address whether KBS had the right to

dismiss its action. We have previously held that a plaintiff may enter a dismissal as a matter of right at any time before final submission of the case. See, *Collection Specialists v. Vesely*, 238 Neb. 181, 469 N.W.2d 549 (1991); *Miller v. Harris*, 195 Neb. 75, 236 N.W.2d 828 (1975); *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951). In *Horton v. State*, 63 Neb. 34, 40, 88 N.W. 146, 148 (1901), the court, in seeking to clarify when the court may exercise its discretion in refusing to dismiss an action, stated: "This discretion has been exercised to require payment of costs." In *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604 (1928), the court held that the injury occasioned by the dismissal must be such as to deprive a defendant of some substantial right not available in a second suit, or that may be endangered by the dismissal.

This court has recognized exceptions to the right of a plaintiff to dismiss an action where it is necessary for the protection of any rights which have accrued to the defendant as a result of the bringing of the action. See *Feight v. Mathers, supra*. In *Mathers*, we stated:

> "We are of the opinion that the only discretion which may be exercised in the matter is the protection of any rights which have accrued to defendant as a result of the bringing of the action, such as the preservation of a counterclaim, the restitution of property of which he has been deprived, the recovery of his costs, and the like; that in the absence of such considerations the right to dismiss is absolute; that the expense of employing attorneys in defending the action, or the liability to further litigation over the same matter, are not subjects calling for the exercise of discretion by the court as constituting legal prejudice to defendant."

153 Neb. at 845, 46 N.W.2d at 495. See, also, *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Miller v. Harris, supra*; *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967), *overruled on other grounds, Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972); *Giesler v. City of Omaha*, 175 Neb. 706, 123 N.W.2d 650 (1963).

In *Giesler*, an action was commenced for a declaratory judgment to have an Omaha city ordinance declared unconstitutional. Two parties intervened. The City of Omaha was the only defendant. After the issues were determined and the case was set for trial, the plaintiff and the intervenors dismissed their respective petitions, and the city objected. The court dismissed the petitions but directed the trial to proceed on the issues raised by the amended answers of the city. This court reversed with directions to dismiss the entire action. We stated that the nature of the city's pleading was controlling in determining the correctness of the court's order retaining the case for trial. The answer prayed for an order dismissing the plaintiff's petition and a denial of the plaintiff's requested relief. In an amended answer, no prayer for relief was included.

We noted that by the terms of Neb. Rev. Stat. § 25-603 (Reissue 1995), a defendant who has presented a setoff or counterclaim may proceed with the trial of his claim irrespective of the plaintiff's dismissal, but the setoff or counterclaim must state a cause of action against the plaintiff. In *Giesler*, the defendant's answer stated no cause of action against the plaintiff and asserted only a defense. We concluded that the dismissal by the plaintiff and the intervenors had the effect of withdrawing the entire case from the trial court's consideration and that the court erred in proceeding with the case after the filing of the dismissals.

Accordingly, we conclude that KBS had a right to dismiss the lawsuit because Halford had not filed a setoff or counterclaim. There was no relief requested by Halford that was pending at the time of KBS' dismissal other than her motion for summary judgment requesting that KBS' action be dismissed.

Next, we address whether the district court could properly order payment of attorney fees after dismissal. In *Salkin v. Jacobsen, ante* p. 521, 641 N.W.2d 356 (2002), we specifically addressed the time in which a party may move for attorney fees pursuant to § 25-824. We deemed it significant that § 25-824(2) authorizes a court to award attorney fees as part of a judgment in addition to other costs when it determines that an action or defense is frivolous or made in bad faith.

[5] An award of costs in a judgment is considered a part of the judgment. See *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999). "It logically follows that a party seeking an award of attorney fees pursuant to § 25-824 for services rendered in a trial court must make such request prior to the judgment in order for the award of fees, if deemed appropriate, to be made a part thereof." *Salkin, ante* at 526, 641 N.W.2d at 360. *Salkin* therefore requires that a party seeking attorney fees in the trial court must make the request prior to the judgment in order for any award of fees to be a part of the judgment.

Halford asserts that the dismissal was ineffective because KBS did not pay any costs. Section 25-602 provides:

> The plaintiff, in any case pending in the district or Supreme Court of the state, shall, when no counterclaim or setoff has been filed by the opposite party, have the right in the vacation of any of said courts to dismiss his said action without prejudice, upon payment of costs, which dismissal shall be, by the clerk of any of said courts, entered upon the journal and take effect from and after the date thereof.

We have recognized the discretion of the trial courts to refuse such a dismissal or to require the payment of costs. See, *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951); *Blue River Power Co. v. Hronik*, 116 Neb. 405, 217 N.W. 604 (1928). However, no Nebraska case addressing the right of a party to dismiss pursuant to Neb. Rev. Stat. § 25-601 (Reissue 1995) has required the party to pay costs pursuant to § 25-602.

We conclude that § 25-602 is not applicable in this case because the district court entered the order dismissing the action without assessing costs to KBS. Furthermore, without a motion for attorney fees pending, such fees would not have been part of the costs to be paid under either § 25-601 or § 25-602.

The district court did not require the payment of costs or refuse to grant the dismissal. Halford's answer prayed for dismissal at KBS' costs and such other relief as may be just and equitable. Halford had no pending motion for attorney fees, nor did she allege that KBS' cause of action was frivolous. Once the court dismissed KBS' action with prejudice, nothing remained

for the court to decide. Thus, the court lacked jurisdiction to award Halford attorney fees and costs.

CONCLUSION

For the reasons set forth herein, the district court's award of attorney fees and costs is vacated, and the appeal is dismissed.

VACATED AND DISMISSED.

GERRARD, J., participating on briefs.

IN RE GRAND JURY OF DOUGLAS COUNTY.
JAMES S. JANSEN, APPELLANT, V. HONORABLE MARY G. LIKES, JUDGE, DISTRICT COURT FOR DOUGLAS COUNTY, NEBRASKA, APPELLEE.

644 N.W.2d 858

Filed May 31, 2002. No. S-00-1272.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Juries.** It has long been the policy of courts which employ grand juries to maintain the secrecy of their proceedings.
3. **Appeal and Error: Words and Phrases.** Plain error exists where there is 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.
4. **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.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

James S. Jansen, Douglas County Attorney, pro se.

Sean J. Brennan, of Brennan & Nielsen Law Office, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Douglas County Attorney James S. Jansen (County Attorney) filed a motion in district court requesting the release of the minutes, transcript, and exhibits of a Douglas County grand jury that had been convened to review the circumstances surrounding the death of a person who died while being apprehended by law enforcement personnel. The district court denied the request, and the County Attorney appeals.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002).

FACTS

On July 19, 2000, George D. Bibins died while being apprehended by Omaha police. The County Attorney certified to the district court that the cause of death was a single penetrating gunshot wound. Pursuant to Neb. Rev. Stat. § 29-1401 (Cum. Supp. 2000), the court directed that a grand jury be convened to review the circumstances surrounding the death. The court appointed a special prosecutor and an assistant special prosecutor, in accordance with § 29-1401(4)(b).

On July 26, 2000, the County Attorney filed charges of manslaughter and use of a firearm to commit a felony against Omaha police officer Jerad Kruse in connection with Bibins' death. A preliminary hearing was scheduled for August 18. However, on August 16, the special prosecutors filed a petition for a writ of mandamus directing the County Attorney to dismiss the charges against Kruse. The special prosecutors claimed that under § 29-1401(4)(b), they had exclusive authority to investigate and pursue criminal charges in cases arising out of the death of a person in police custody or while being apprehended by police. They alleged that the specific nature of § 29-1401(4)(b) overrides the general authority granted to the County Attorney

under Neb. Rev. Stat. § 23-1201 (Reissue 1997). The County Attorney demurred to the mandamus action, alleging that the mandamus petition sought to prevent him from performing a discretionary duty.

The special prosecutors also sought injunctive relief to prevent the County Attorney from presenting and publishing evidence at a preliminary hearing. They alleged the preliminary hearing could prevent the impaneling of a fair and impartial grand jury and impair the integrity of the grand jury process. The district court granted the special prosecutors' request for a temporary injunction on August 17, 2000. On August 18, the Douglas County Court dismissed the manslaughter and firearm charges against Kruse over the County Attorney's objection.

The grand jury commenced hearing evidence on August 24, 2000, and on September 1, it returned a "no true bill," which indicated that at least 12 of the 16 grand jurors found no probable cause to believe that a crime had been committed. The special prosecutors then filed a motion to dismiss the petition for writ of mandamus, and the district court dissolved the temporary injunction.

On September 14, 2000, the County Attorney requested that the district court release the grand jury minutes, transcript, and exhibits. He claimed that he was legally and ethically constrained from refiling charges against Kruse unless he could demonstrate the existence of relevant additional evidence not considered by the grand jury. He asserted that he needed to review the grand jury documents in order to determine if there was additional evidence not disclosed in his investigative reports. He requested a protective order which would prevent anyone other than the County Attorney from seeing or revealing the contents of the grand jury records.

At a hearing on the motion, the County Attorney argued that in order to make an informed decision about the facts of the case, he could not assume that the witnesses who appeared before the grand jury and the evidence presented to the grand jury were the same as that which he had previously reviewed. He expressed that he found himself "in a very precarious situation in terms of coming to one conclusion based on my review of the reports, and then a fact finding body who is charged with the

responsibilities of determining probable cause comes to a different conclusion." He claimed that in order to refile the charges, he must be able to show additional relevant evidence that was not previously submitted to the grand jury and that to do so, he needed to review the grand jury's records.

Since state law does not expressly provide for the review of grand jury testimony, the County Attorney referred the district court to Fed. R. Crim. P. 6(e), which provides three exceptions to the general rule of secrecy regarding grand jury proceedings. One exception allows for the disclosure of materials presented to the grand jury to attorneys for the government for use in the performance of their duties. The County Attorney has suggested that his authority to file criminal charges is a performance of his duties.

The special prosecutors objected to release of the grand jury's records, asserting that state law governing grand juries, Neb. Rev. Stat. § 29-1401 et seq. (Reissue 1995 & Cum. Supp. 2000), does not permit the release of such information. They claimed that the County Attorney had access to all of the information made available to the special prosecutors from the same sources and that the County Attorney had not demonstrated a legal and compelling reason for the district court to release the information. The County Attorney denied he had access to all the information made available to the special prosecutors because they had their own team of investigators who conducted an independent investigation.

The district court refused to release the grand jury records. It found that the State had failed to show the court a particularized need for the documents. The court noted that the U.S. Supreme Court has delineated a long-established policy of secrecy regarding disclosure of grand jury proceedings. Under rule 6(e), parties seeking grand jury transcripts must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. The showing is required even when the grand jury has concluded its operations, because disclosure may impact future grand jury proceedings. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979).

The district court stated that the County Attorney had resources at his disposal too numerous to list, including deputy county attorneys; hundreds of investigators in the Omaha Police Department; technical assistance, locally and nationally; and various criminal investigation agencies. It concluded that with his vast resources, the County Attorney should be able to conduct an investigation as thorough as that conducted by the special prosecutors, who had time constraints and limited resources. The court rejected the County Attorney's argument that the requested material was needed to avoid a possible injustice in another proceeding.

The district court found that after the grand jury returned a no true bill, the County Attorney was free to continue the initial investigation because the constraints of the laws governing grand juries were moot at that point. It concluded that the County Attorney's articulated need was insubstantial and did not meet the burden dictated in case law. The County Attorney appeals from the court's refusal to release the grand jury records. There was no request to advance this appeal.

ASSIGNMENTS OF ERROR

The County Attorney assigns three errors, which we have summarized as follows: (1) The district court erred in finding that disclosure of the grand jury materials was not appropriate, even though the County Attorney showed that release of such materials will not damage the integrity of the grand jury or its interests in secrecy; (2) the court erred in finding that disclosure of the grand jury materials was unnecessary because the County Attorney had not shown a particularized need that would outweigh the inherent secrecy required in grand jury proceedings; and (3) the court erred in finding that the County Attorney had not shown a particularized need for the requested grand jury materials.

ANALYSIS

The County Attorney's request for release of the minutes, transcript, and exhibits of the grand jury convened pursuant to § 29-1401 appears to be an issue of first impression in Nebraska. Section 29-1401 provides in relevant part:

> (4) District courts shall call a grand jury in each case upon certification by the county coroner or coroner's physician that a person has died while being apprehended by or

> while in the custody of a law enforcement officer or detention personnel. In each case subject to this subsection:
>
> . . . .
>
> (b) Except as provided in subdivision (d) of this subsection, as soon as practicable, the court shall appoint a special prosecutor who has had at least five years experience in criminal litigation, including felony litigation. The special prosecutor shall select a team of three peace officers, trained to investigate homicides, from jurisdictions outside the jurisdiction where the death occurred. The team shall examine all evidence concerning the cause of death and present the findings of its investigation to the special prosecutor;
>
> (c) A grand jury shall be impaneled within thirty days after the certification by the county coroner or coroner's physician, unless the court extends such time period upon the showing of a compelling reason . . . .

Thus, when a person dies while being apprehended by or while in the custody of a law enforcement officer or detention personnel, the district court is required to call a grand jury and appoint a special prosecutor. This statutory scheme removes the county attorney from the process. The case is investigated by law enforcement officers from outside the jurisdiction who are chosen by the special prosecutor, and the investigation must be completed within 30 days after the death.

Generally, a county attorney conducts grand jury investigations and therefore is fully informed concerning the evidence and testimony presented to the grand jury. If an indictment is returned, an information may be filed. However, because § 29-1401(4) requires a special prosecutor in specific cases, the county attorney has no access to the grand jury information.

This legislation requires us to determine whether following the return of a no true bill by the grand jury, a county attorney may be given access to the records, evidence, and testimony adduced at the grand jury hearing.

Section 29-1420 provides:

> (1) The report of the grand jury shall not be made public except when the report is filed, including indictments, or when required by statute or except that all of the report or a portion thereof may be released if the judge of the district

court finds that such a release will exonerate a person or persons who have requested such a release.

(2) A district judge under whose direction a grand jury has been impaneled may, upon good cause shown, transfer to a court of competent jurisdiction in another county or jurisdiction any evidence gathered by the grand jury that offenses have been committed in such other county or jurisdiction.

Our review of the statutes governing grand juries reveals only limited access to grand jury records. Section 29-1407.01 provides in part: "No release or destruction of the notes or transcripts shall occur without prior court approval." However, this section does not describe the circumstances under which the release may occur. Section 29-1407.01(2) allows a witness to be furnished with a transcript of his or her own grand jury testimony, or minutes, reports, or exhibits relating thereto "for good cause." Under § 29-1420(2), a district judge, upon good cause shown, may transfer to a court of another county or jurisdiction evidence gathered by a grand jury regarding offenses that may have been committed in another county or jurisdiction. Good cause appears to be the criteria for the release of certain grand jury records, but the case at bar does not present any of the situations described above.

Although the Nebraska Legislature has enacted statutes regarding grand juries, it has not provided for disclosure of grand jury materials except as previously described. Section 29-1420 allows for the release of a grand jury report, but as the special prosecutors note, this grand jury did not prepare a report, but, rather, returned a no true bill and nothing more.

The district court applied the standard used by federal courts to determine that the County Attorney had not demonstrated " 'a particularized need' " for the grand jury documents. See *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959). The County Attorney urges this court to rely on rule 6(e) in order to determine that the grand jury records should be released to him. Rule 6(e) provides that no proceedings of a grand jury may be disclosed except in certain instances, such as for a government attorney to use in the performance of the attorney's duty. The County

Attorney suggests that the grand jury records may be disclosed to him based on this rule.

In the federal system, the sole method of bringing felony criminal charges against an individual is by a grand jury indictment. In Nebraska, a county attorney may bring charges by filing a complaint or information. A county attorney may proceed by or independently of a grand jury proceeding. See § 29-1402. In the instant case, the County Attorney had proceeded independently of the grand jury until the district court issued the temporary injunction.

[2] One of the general principles of grand juries is that their hearings are not open to the public. It has long been the policy of courts which employ grand juries to maintain the secrecy of their proceedings. See *United States v. Procter & Gamble*, 356 U.S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958). Secrecy has been held to be vital "to encourage all witnesses to step forward and testify freely without fear of retaliation." *Procter & Gamble*, 356 U.S. at 682. "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Id.*

In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979), the U.S. Supreme Court reiterated that the proper functioning of the grand jury system depended upon the secrecy of grand jury proceedings and that for such reasons, courts have been reluctant to unnecessarily lift the veil of secrecy from the grand jury. The Court set forth standards for determining when the traditional secrecy of the grand jury may be broken: The material sought is needed to avoid a possible injustice in another judicial proceeding, the need for disclosure is greater than the need for continued secrecy, and the request is structured to cover only material so needed.

We conclude that the arguments advanced by the County Attorney for obtaining the grand jury records are not persuasive. The failure of the grand jury to return an indictment does not prevent the County Attorney from proceeding independently. It is not necessary to convene a second grand jury, but, rather, the County Attorney may proceed by filing a complaint or information in the district court.

Courts must consider not only any immediate effects upon a grand jury if its proceedings are disclosed, but they must consider the possible effect upon future grand juries.

> Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.

Douglas Oil Co., 441 U.S. at 222.

The County Attorney's request for release of the grand jury documents presents a question of law, which we resolve independently of the conclusion reached by the trial court. See *Sydow v. City of Grand Island, ante* p. 389, 639 N.W.2d 913 (2002). We conclude that the district court did not err in denying the County Attorney's request.

We also address whether the district court, at the request of a special prosecutor, may enjoin a county attorney from proceeding with a separate preliminary hearing during the time that the grand jury is proceeding on the same matter. In the case at bar, the district court enjoined the County Attorney from presenting and publishing evidence at a preliminary hearing because the special prosecutors alleged such action would prevent the impaneling of a fair and impartial grand jury and impair the integrity of the grand jury process. As a result of the injunction, the county court dismissed the criminal charges against Kruse over the County Attorney's objection because the State was not able to present evidence at the preliminary hearing.

[3] Because of the importance of this issue, we note plain error in the entry of the temporary injunction. Plain error exists where there is 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. *State v. Davlin, ante* p. 283, 639 N.W.2d 631 (2002).

[4] Section 29-1402 provides: "The convening of a grand jury shall in no way limit the right of prosecution on information or complaint during the time the grand jury is in session." 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. *Henery v. City of Omaha, ante* p. 700, 641 N.W.2d 644 (2002).

The purpose of § 29-1401(4) is to provide for an independent investigation when an individual dies while in custody or being apprehended. We find nothing in the law that permits a special prosecutor to ask a court to enjoin the activity of a county attorney who has elected to proceed with a complaint or an information simultaneously with the grand jury investigation. We note that § 29-1416 prohibits a subsequent grand jury inquiry "into the same transaction or events . . . unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry." That situation is not before us. Therefore, we conclude that it was plain error for the district court to issue a temporary injunction limiting the right of the prosecution to proceed on information or complaint against a criminal defendant during the time the grand jury was in session.

CONCLUSION

The district court did not err in denying the County Attorney's motion for release of the grand jury documents. However, we note plain error in the district court's entry of the temporary injunction which prevented the County Attorney from presenting evidence at the preliminary hearing and from proceeding on information or complaint against a criminal defendant during the time the grand jury was in session. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRAKA, RELATOR, V. OMAHA EXPOSITION AND RACING, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., RESPONDENTS.

644 N.W.2d 563

Filed May 31, 2002. No. S-01-973.

1. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
2. **Constitutional Law: Statutes: Presumptions: Proof.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
3. **Constitutional Law: Gaming.** Wagering which takes place outside a licensed racetrack enclosure or a detached facility cannot logically occur within a licensed racetrack enclosure as required by the Nebraska Constitution.
4. **Constitutional Law: Statutes: Legislature: Intent.** Several factors must be considered in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.
5. **Constitutional Law: Intent.** Constitutional provisions, like statutes, are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.
6. **Constitutional Law: Legislature.** The Legislature may not circumvent or nullify the constitution by defining terms in statutes.
7. ____: ____. The Legislature's power to define terms is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded.
8. ____: ____. Nebraska's Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the constitution.
9. **Constitutional Law: Statutes.** An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations.

Original action. Judgment for relator.

Don Stenberg, Attorney General, and L. Jay Bartel for relator.

Michael J. Lehan and Michael A. Kelley, of Kelley & Lehan, P.C., for respondents.

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

WRIGHT, J.

NATURE OF CASE

In this original action, the Attorney General (relator) asks the court to declare (1) that the conduct of "telephonic wagering" pursuant to Neb. Rev. Stat. §§ 2-1230 to 2-1242 (Reissue 1997) violates Neb. Const. art. III, § 24, and (2) that licenses to conduct telephonic wagering are void due to the unconstitutionality of the statutes under which they were issued. The relator also seeks to permanently enjoin the respondents from acting pursuant to licenses granted by the Nebraska State Racing Commission (Commission).

SCOPE OF REVIEW

[1] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[2] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Id.*

FACTS

The respondents are entities licensed by the Commission to conduct parimutuel wagering on live horseracing and on horseracing events conducted both within and outside the state, including simulcast wagering. Named as respondents are Omaha Exposition and Racing, Inc., which operates Horsemen's Park Racetrack in Omaha; the Nebraska State Board of Agriculture, which operates State Fair Park Racetrack in Lincoln; the Hall County Livestock Improvement Association, which operates Fonner Park Racetrack in Grand Island; the Platte County Agricultural Society, which operates Columbus Agricultural Park Racetrack in Columbus; and South Sioux City Exposition and Racing, Inc., which operates Atokad Downs Racetrack in South Sioux City. In May 2001, the Commission, acting pursuant to §§ 2-1232 and 2-1241, approved licenses for the respondents which allow them to conduct telephonic wagering at the respective racetracks. Omaha Exposition and Racing,

Inc., began operating telephonic wagering pursuant to its license on October 24.

The relator asserts that a portion of 1992 Neb. Laws, L.B. 718, now codified at §§ 2-1230 to 2-1242, violates article III, § 24, which states in pertinent part:

> Nothing in this section shall be construed to prohibit (a) the enactment of laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure . . . .

Sections 2-1230 to 2-1242 purport to authorize telephonic wagering which does not occur within the confines of a licensed racetrack enclosure in the state.

In Nebraska, betting on the outcome of horseraces is authorized when conducted by the parimutuel method. Bettors attempt to predict the outcome of one or more races. All wagers on any of the horses to win in a specific race constitute a pool. After deductions for taxes, for promotion of agriculture and breeder's awards, and for payment to the entity conducting the races, the amount remaining in the pool is paid out to the bettors in proportion to their bets, e.g., the winner who has wagered $20 receives 10 times as much as the winner who wagered $2. A combination of the total amount bet by all bettors and the total amount bet upon the same successful horse or combination of horses determines the amount won. A separate pool is used to collect more complicated bets, such as predicting the exact order of finish of horses in a race or of the winners in two or more races. That pool is divided among the successful bettors.

A computer known as a totalizator is used to manage the wagers. The computer continuously computes and recomputes the amount of each pool, the amount bet upon each prediction for each horse, and the amount that would theoretically be paid out for each $2 bet on each horse if the race is finished and that horse wins, places, or shows.

According to the parties, when telephonic wagering is not available, an individual who wishes to place a bet on a horserace is required to go to a licensed racetrack; select the race, the horse, and the order of finish; and then place the bet at a terminal station,

which is either operated by the bettor or a parimutuel clerk at a parimutuel window. When the bet is entered into the totalizator, a ticket showing the transaction is issued and given to the bettor. If the bettor is successful, the ticket is presented to the racetrack for payment.

As a result of the Commission's issuance of licenses for telephonic wagering, a person outside the confines of a licensed racetrack enclosure may place a telephone call to a racetrack and give instructions to an employee of the racetrack concerning the wager of money that the individual has on deposit at a telephone deposit center in his or her own deposit account. After the racetrack employee at the telephone deposit center has received a call and determined that the individual has sufficient funds in the deposit account, the employee places the wager on behalf of the caller. The wager is entered into the totalizator, which records the transaction and places the money in the applicable parimutuel pool. Any winnings are credited to the individual's deposit account, and any losses are deducted from the account. The employee is allowed to enter a wager only if the individual has sufficient funds available in the deposit account at the time the wager is placed by the employee.

ISSUES BEFORE COURT

The court is asked to determine (1) whether the authorization of telephonic wagering on horseraces pursuant to §§ 2-1230 to 2-1242 violates article III, § 24, which authorizes parimutuel wagering on the results of horseraces within or outside the state only "when such wagering is conducted by licensees within a licensed racetrack enclosure"; (2) whether licenses issued by the Commission authorizing the respondents to conduct telephonic wagering are void due to the unconstitutionality of the statutes under which they were issued; and (3) whether the respondents should be permanently enjoined from acting pursuant to the telephonic wagering licenses issued by the Commission.

ANALYSIS

L.B. 718

The statutes in question were passed by the Legislature as 1992 Neb. Laws, L.B. 718. The Legislature stated that "horseracing, horse breeding, and parimutuel wagering industries are important

sectors of the agricultural economy of the state, provide substantial revenue for state and local governments, and employ many residents of the state." § 2-1230(1)(a). Teleracing facilities provide a potential for strengthening the horseracing industry and its economic contributions to the state. § 2-1230(1)(b). The Legislature found that "it is in the best interests of the state to encourage experimentation with parimutuel wagering through licensed teleracing facilities" and telephonic wagering. § 2-1230(1)(b) and (c). The experimentation would determine whether teleracing and telephonic wagering would promote growth of the horseracing industry and provide additional revenue to the state. § 2-1230(1)(d). The Legislature also found that teleracing and telephonic wagering should be authorized and regulated so that it would not jeopardize horseracing or employment opportunities. § 2-1230(1)(e).

Telephonic wagering is defined as "the placing of parimutuel wagers by telephone to a telephone deposit center at a licensed racetrack as authorized by the commission." § 2-1231(5). A teleracing facility is "a detached, licensed area occupied solely by a licensee for the purpose of conducting telewagering and containing one or more betting terminals, which facility is either owned or under the exclusive control of the licensee during the period for which it is licensed." § 2-1231(6). Telewagering is "the placing of a wager through betting terminals electronically linked to a licensed racetrack, which . . . instantaneously transmits the wagering information to the parimutuel pool for acceptance and issues tickets as evidence of such wager." § 2-1231(7).

At the present time, the Commission issues licenses to racetracks for the operation of telephonic wagering facilities. § 2-1232. A licensee may deduct up to 5 percent from the winnings of any winning ticket purchased through telephonic wagering. § 2-1236. A licensed racetrack that conducts live races may establish a telephonic wagering system if the racetrack establishes and maintains a telephone deposit center. All wagers must be entered into the parimutuel pool and are subject to all laws and conditions applicable to any other wagers. § 2-1239.

Under the law, only the holder of the deposit account may place a telephonic wager. § 2-1240. Any violation of that rule constitutes a Class II misdemeanor. *Id*. Telephonic wagering is allowed at licensed racetracks which conduct either intrastate

simulcasting or interstate simulcasting as approved by the Commission. § 2-1241. The racetracks must pay one-half of 1 percent of the amount wagered through telephonic wagering to the Department of Revenue for credit to the Commission's cash fund. § 2-1242.

CONSTITUTIONALITY OF L.B. 718

This court has previously been asked to consider the constitutionality of portions of L.B. 718. In 1994, upon an original action filed by the relator, we held that the provisions of L.B. 718 which authorized teleracing facilities to conduct telewagering were unconstitutional in violation of article III, § 24. See *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994).

Douglas Racing Corp. was licensed to operate a teleracing facility in Bennington, Nebraska, at which terminals were electronically linked to its totalizator located in Omaha. The bets were entered by either the bettor or the parimutuel clerk and then sent to the totalizator at the racetrack. The bettors received tickets as evidence of their wagers. We held that the relator had met the burden to establish that certain statutes were unconstitutional to the extent they authorized telewagering.

In *Douglas Racing Corp.*, the relator argued that telewagering at a teleracing facility was unconstitutional because parimutuel wagering on horseraces must be conducted within a licensed racetrack enclosure and that telewagering was equivalent to off-track betting, which was not constitutionally authorized. The respondent unsuccessfully asserted that because the licensee conducted his end of the wagering within the confines of the licensed racetrack, telewagering was constitutional.

[3] We concluded that article III, § 24, was unambiguous and required no construction. *State ex rel. Stenberg v. Douglas Racing Corp., supra*, citing *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). The Constitution's provision that parimutuel wagering is authorized only when conducted within a licensed racetrack enclosure "plainly requires that (1) the wagering must be conducted by an entity licensed to do so and (2) the wagering must be conducted by licensees at a racetrack enclosure which is licensed to operate horseraces." *Douglas Racing Corp.*,

246 Neb. at 906, 524 N.W.2d at 64. Wagering which takes place outside a licensed racetrack enclosure or a detached facility "cannot logically occur within a licensed racetrack enclosure as required by our Constitution." *Id*. We determined that telewagering at teleracing facilities was the functional equivalent of off-track betting, which was not conducted within a licensed racetrack enclosure and which violated the state Constitution. *Id*.

We held that Douglas Racing Corp.'s license for the operation of the Bennington facility was void because it was licensed pursuant to an unconstitutional statute. We enjoined the respondent from acting pursuant to the license issued by the Commission. While we held that Neb. Rev. Stat. §§ 2-1203, 2-1203.01, 2-1207, 2-1208, 2-1216, 2-1221, 2-1222, and 2-1230 through 2-1242 (Cum. Supp. 1994) were all unconstitutional to the extent they authorized telewagering at teleracing facilities, we did not address any other portions of L.B. 718.

[4] Here, we are asked to consider the remainder of L.B. 718 as it purports to authorize telephonic wagering. We first address whether the remainder of L.B. 718 is severable from the provisions previously held to be unconstitutional. Several factors must be considered in determining whether an unconstitutional provision is severable from the remainder of a statute:

> "(1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act."

Duggan v. Beermann, 249 Neb. 411, 427-28, 544 N.W.2d 68, 78 (1996), quoting *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992).

There is no dispute between the parties concerning the severability of L.B. 718. The relator suggests that although L.B. 718 did not include a severability clause, the provisions relating to telephonic wagering are severable because a workable plan remains even if telewagering is prohibited. The provisions related to

telephonic wagering are independently enforceable, and it does not appear that passage of telewagering was contingent upon or an inducement to enact the telephonic wagering portions. Experimentation with parimutuel wagering through both teleracing facilities and telephonic wagering was authorized in § 2-1230(2). The relator asserts that the holding in *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994), does not preclude severing the invalid provisions concerning telewagering from the provisions concerning telephonic wagering. Thus, we conclude that it is possible to sever the telewagering provisions from the telephonic wagering provisions.

[5] We next examine whether telephonic wagering is unconstitutional. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Id.* Constitutional provisions, like statutes, are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary. *State ex rel. Stenberg v. Douglas Racing Corp., supra.*

As noted earlier, article III, § 24, does not prohibit wagering on horseracing by the parimutuel method "when such wagering is conducted by licensees *within a licensed racetrack enclosure*." (Emphasis supplied.) The key issue here is whether telephonic wagering occurs within a licensed racetrack enclosure.

Section 2-1231(5) defines telephonic wagering as "the placing of parimutuel wagers by telephone to a telephone deposit center at a licensed racetrack" as authorized by the Commission. For purposes of this opinion, the person placing the wager is not at the racetrack, but is calling from a telephone away from the facility. The parties stipulated that "a person located outside the confines of a racetrack will be allowed to place a call to a licensed racetrack enclosure to give instructions to an employee of the racetrack concerning the wager of money that the individual has on deposit at a telephone deposit center."

[6,7] In attempting to allow different forms of parimutuel wagering, the Legislature stated that "[w]agers placed . . . by approved telephonic wagering as authorized by sections 2-1230 to 2-1242 shall be deemed to be wagers placed and accepted within the enclosure of any racetrack." See § 2-1207 (Reissue 1997). However, as the relator notes, the Legislature may not circumvent or nullify the constitution by defining terms in statutes. In *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 571, 471 N.W.2d 734, 739 (1991), *cert. denied* 508 U.S. 960, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (1993), we held that the Legislature's "power to define [terms] is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded."

Pursuant to stipulation, under telephonic wagering, the person making the wager calls the licensed racetrack directly to instruct an employee on the placing of a wager. Thus, it is undisputed that the person placing the call is outside the licensed racetrack enclosure.

[8] Nebraska's Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the constitution. *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994). The question is whether the wager is placed within the licensed racetrack enclosure when the telephone call is initiated outside the racetrack enclosure. Simply stated, does the constitution require that the person making the call to the licensee also be located within the licensed racetrack enclosure?

The respondents argue that the constitution requires only that the licensee's activity in conducting wagering on horseraces occur within a licensed racetrack enclosure. This is distinguished from wagers made at a teleracing facility, where at least a part of the licensee's activity occurs outside the racetrack enclosure. They assert that the wager occurs within the confines of the racetrack enclosure because the wager is placed by a racetrack employee pursuant to instructions from a person outside the enclosure. They conclude that it is only the actions of the licensee's employee that constitute the placing of the wager.

The respondents argue that telephonic wagering is substantially different from telewagering. They assert that the only action taken by a person who is outside the racetrack enclosure is to give instructions to an employee of the licensed racetrack, who then places the wager from within the enclosure. In their brief, they claim that telephonic wagering is conducted every day by persons who go to the racetrack with a cellular telephone and place wagers for friends who are located outside the racetrack enclosure. They argue that the wager occurs only when the person inside the racetrack enclosure places the wager with the licensee.

The relator argues that both telephonic wagering and telewagering involve the same conduct—placing wagers on horseraces from an offtrack location. The relator claims that it is the caller who directs the racetrack employee to follow his instructions and that, therefore, it is the offtrack caller who is engaged in wagering on the horserace.

Minnesota has faced a similar challenge to its constitution, which was amended in 1982 to provide that " '[t]he legislature may authorize on-track parimutuel betting on horseracing in a manner prescribed by law.' " *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992). In 1985, the Minnesota Racing Commission adopted rules implementing a telephone account wagering system, in which account holders maintained a minimum balance against which wagers were debited and winnings were credited. The account holder telephoned a licensed employee at a racetrack to place and record wagers on behalf of the account holder. "[T]he wagerer need not be present at the racetrack or a teleracing facility—all that is required is access to a telephone." *Id*. at 246.

When asked whether the constitution "contemplate[d] other than on-track, *i.e.*, on the racetrack premises, parimutuel betting," the Minnesota Supreme Court found that it did not. See *id*. The court found that "[i]n its literal sense, the word 'on' as a part of the phrase 'on-track' is more precisely defined as 'at' to denote a location for the placement of a parimutuel bet." *Id*. at 247. The state's voters had specifically approved " 'on-track parimutuel betting on horseracing,' " and the court found, as a practical matter, that "bets not physically placed at the racetrack cannot be, by definition, 'on-track,' no matter how they are

transmitted to the track, electronically recorded or accepted into the pool of funds." *Id.*

The Minnesota court noted, as the respondents had pointed out, that advances in technology facilitated remote wagering. However, the court found that its own mandate required it to "refrain from expansive interpretation by looking beyond the clear, unambiguous and ordinary meaning of the language of the constitutional provision." *Id.* at 248. It held: "Wagering at facilities remote from the racetrack or by telephonic means are beyond the scope of the activities authorized by the voters and are therefore impermissible." *Id.*

Following the rationale of the Minnesota Supreme Court, resolution of the case at bar is relatively simple. In the context of telephonic wagering, wagers are not placed by a licensee until the licensee has been instructed to do so by a caller, and the instructions do not originate from within a licensed racetrack enclosure. We conclude the constitution requires that the instructions to place the wager must originate from within the licensed racetrack enclosure.

Nebraska voters have previously rejected an attempt by the Legislature to change the constitutional provisions concerning parimutuel betting. In 1995, the Legislature adopted L.R. 24CA, which placed before the voters a constitutional amendment proposing the elimination of the location requirement in article III, § 24. The amendment provided that parimutuel wagering on racehorses could be conducted by licensees "at such locations and by such means as are authorized by the Legislature." The introducer's statement of intent noted this court's decision in *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994), and stated that L.R. 24CA would delete the location provision and provide the Legislature with the authority to determine the location and means of wagering on horseraces. See Statement of Intent, L.R. 24CA, General Affairs Committee, 93d Leg., 2d Sess. (Jan. 23, 1995). At the general election in November 1996, the constitutional amendment was defeated by a vote of 388,462 against and 236,600 in favor.

Nebraska's Constitution permits wagers on horseracing when the "wagering is conducted by licensees within a licensed racetrack enclosure." See Neb. Const. art. III, § 24. As this court held

in *Douglas Racing Corp.*, the constitutional language allows wagering only by those who are within a racetrack enclosure. Telephonic wagering differs from telewagering only as to the form used to transmit the wager. It is a distinction without a difference. Telephonic wagering violates the constitution because it does not occur within a licensed racetrack enclosure. The relator has met the burden of establishing that the telephonic wagering statutes are unconstitutional.

CONCLUSION

[9] We have held that "[a]n unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations." *Douglas Racing Corp.*, 246 Neb. at 906, 524 N.W.2d at 65. The statutes purporting to authorize telephonic wagering, §§ 2-1230 to 2-1242, are unconstitutional. The licenses issued to the respondents to conduct telephonic wagering are void because they were issued pursuant to these statutes. The respondents are permanently enjoined from acting pursuant to the licenses issued by the Commission, and judgment is entered for the relator.

JUDGMENT FOR RELATOR.

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